Court File No. CV-16-11567-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

THE SUPERINTENDENT OF FINANCIAL SERVICES

Applicant

- and -

TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (555 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE CORPORATION, 2223947 ONTARIO LIMITED, MC TRUSTEE (KITCHENER) LTD., SCOLLARD TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, 7743718 CANADA INC., KEELE MEDICAL TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (445 PRINCESS STREET) TRUSTEE CORPORATION and HAZELTON 4070 DIXIE ROAD TRUSTEE CORPORATION

Respondents

APPLICATION UNDER SECTION 37 OF THE *MORTGAGE BROKERAGES, LENDERS AND ADMINISTRATORS ACT*, 2006, S.O. 2006, c. 29 and SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C.43

Court File No. CV-17-11689-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE RECEIVERSHIP OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

AND IN THE MATTER OF A MOTION PURSUANT TO SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No. CV-17-589078-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

TEXTBOOK (445 PRINCESS STREET) INC.

Respondent

IN THE MATTER OF THE RECEIVERSHIP OF TEXTBOOK (445 PRINCESS STREET) INC.

AND IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No. CV-17-11822-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

KSV KOFMAN INC. IN ITS CAPACITY AS RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

Plaintiff

- and -

AEOLIAN INVESTMENTS LTD., JOHN DAVIES IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF BOTH THE DAVIES ARIZONA TRUST AND THE DAVIES FAMILY TRUST, JUDITH DAVIES IN HER PERSONAL CAPACITY AND IN HER CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, AND GREGORY HARRIS SOLELY IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST

Defendants

Court File No. CV-18-606314-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

GRANT THORNTON LIMITED, IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (555 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE CORPORATION, 2223947 ONTARIO LIMITED, MC TRUSTEE (KITCHENER) LTD., SCOLLARD TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, 7743718 CANADA INC., KEELE MEDICAL TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (445 PRINCESS STREET) TRUSTEE CORPORATION AND HAZELTON 4070 DIXIE ROAD TRUSTEE CORPORATION, AND KSV KOFMAN INC., IN ITS CAPACITY AS THE COURT-APPOINTED RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO LTD., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC., TEXTBOOK (555 PRINCESS STREET) INC., TEXTBOOK (445 PRINCESS STREET) INC., MCMURRAY STREET INVESTMENTS INC., TEXTBOOK (774 BRONSON AVENUE) INC. AND TEXTBOOK ROSS PARK INC.

Plaintiffs

- and -

AEOLIAN INVESTMENTS LTD., JOHN DAVIES IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF BOTH THE DAVIES ARIZONA TRUST AND THE DAVIES FAMILY TRUST, JUDITH DAVIES IN HER PERSONAL CAPACITY AND IN HER CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, GREGORY HARRIS IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, HARRIS + HARRIS LLP, NANCY ELLIOT, ELLIOT LAW PROFESSIONAL CORPORATION, WALTER THOMPSON, 1321805 ONTARIO INC., BRUCE STEWART, THE TRADITIONS DEVELOPMENT COMPANY LTD., DAVID ARSENAULT, JAMES GRACE, BHAKTRAJ SINGH A.K.A. RAJ SINGH, RS CONSULTING GROUP INC., TIER 1 TRANSACTION ADVISORY SERVICES INC., JUDE CASSIMY, FIRST COMMONWEALTH MORTGAGE CORPORATION, MEMORY CARE INVESTMENTS LTD., TEXTBOOK SUITES INC., TEXTBOOK STUDENT SUITES INC. AND MICHAEL CANE

Defendants

BOOK OF AUTHORITIES
(Motion Returnable May 29, 2019)

May 23, 2019

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(Updated as of April 11, 2019)

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Receiver and manager in the Expanded Receivership Proceedings

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Index

INDEX

LIST OF AUTHORITIES

TAB 1

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Canadian Standards Association v. P.S. Knight Co. Ltd. | 2018 FC 1081, 2018 CarswellNat 6012, 297 A.C.W.S. (3d) 625 | (F.C., Oct 26, 2018)

2012 ONSC 3307
Ontario Superior Court of Justice

Whitehall Homes & Construction Ltd. v. Hanson

2012 CarswellOnt 8062, 2012 ONSC 3307, 217 A.C.W.S. (3d) 823, 23 C.L.R. (4th) 272

Whitehall Homes & Construction Ltd., Plaintiff and Brian Hanson and Elaine Hanson, Defendants

J.A. Milanetti J.

Heard: January 12-13, 2012
Judgment: June 5, 2012 * **
Docket: 06-28661

Proceedings: additional reasons at *Whitehall Homes & Construction Ltd., v. Hanson* (2012), 2012 ONSC 4741, 2012 CarswellOnt 10356, J.A. Milanetti J. (Ont. S.C.J.)

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Subject: Civil Practice and Procedure; Contracts
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.b Formation and validity
XVI.7.b.i Offer and acceptance
XVI.7.b.i.B Miscellaneous
Construction law
II Contracts
II.6 Breach of terms of contract
II.6.l Practice and procedure

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Headnote

Civil practice and procedure --- Disposition without trial — Settlement — Formation and validity — Offer and acceptance — Miscellaneous

Defendant homeowners engaged plaintiff contractors to build high-end luxury home — Homeowners claimed significant deficiencies in construction and held back $200,000 — Contractor commenced action for payment of held-back money — Parties entered into negotiations and signed Minutes of Settlement --- Release was never signed by homeowners — Cross-motion by contractor to enforce settlement --- Cross-motion granted --- Judgment was issued in accordance with Minutes of Settlement entered into by parties — Minutes of Settlement signed by parties constituted enforceable contract --- Agreement was complete when settlement minutes were signed --- Releases were merely reflections of written settlement --- Home owners were not under duress at time of signing.

Construction law --- Contracts — Breach of terms of contract — Practice and procedure

Defendant homeowners engaged plaintiff contractors to build high-end luxury home — Homeowners claimed significant deficiencies in construction and held back $200,000 — Contractor commenced action for payment of held-back money — Parties entered into negotiations and signed Minutes of Settlement — Release was never signed by homeowners — Cross-motion by contractor to enforce settlement — Cross-motion granted — Judgment was issued in accordance with Minutes of Settlement entered into by parties — Minutes of Settlement signed by parties constituted enforceable contract — Agreement was complete when settlement minutes were signed — Releases were merely reflections of written settlement --- Home owners were not under duress at time of signing.

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Fieguth v. Acklands Ltd. (1989), 59 D.L.R. (4th) 114, 37 B.C.L.R. (2d) 62, 1989 CarswellBC 88 (B.C. C.A.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

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R. 20 — considered

R. 49.09 — referred to

CROSS-MOTION by contractor to enforce settlement.

J.A. Milanetti J.:

Background

1 The defendants Hanson bring this motion to amend their statement of defence and cross-claim.

2 The plaintiffs Whitehall bring a cross-motion to enforce a settlement entered into by the parties on June 13th, 2008. Whitehall seeks Judgment in accordance with the Minutes of Settlement pursuant to Rule 20, saying that there is no genuine issue requiring a trial. If Whitehall is unsuccessful on this cross-motion, they consent to the amendments being sought by the defendant Hanson's.

3 Voluminous materials were filed before me including the motions, transcripts of cross-examinations, and very lengthy factums/books of authorities.

4 I had virtually a full day's argument from the plaintiff moving party on the cross-motion. They spent considerable time going over the contract between the parties - a contract deriving from the Minutes of Settlement signed by each of the parties to the action and the Tarion Warranty Corporation on June 13th, 2008.

Facts

5 The background to this action is quite straightforward. Whitehall was engaged to build a high end luxury home for the Hanson's for $1.425 million dollars. The Hanson's claimed significant deficiencies in the construction and thus held back $200,000; making complaint to the builder and to Tarion.

6 Whitehall launched this action seeking payment of the $200,000 hold back money. The Hansons, who moved into the house on April 26th, 2006, defended and advanced a cross-claim.

7 A settlement meeting/mediation was arranged by Tarion between the parties and was held May 12th, 2008. The meeting/mediation was unsuccessful. Neither of the parties had lawyers with them at the mediation.

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8 Discussions between the parties continued after the failed mediation; ultimately minutes of settlement were signed by all on June 13th, 2008.

9 The final paragraph of the minutes (at paragraph 15) states that:

> The parties acknowledge having had the opportunity to seek legal advice and acknowledge that these are a binding agreement on them freely entered into.

10 The agreement is broken down by heading. These are: Preamble; Homeowners Agreement to Settle; Builders Agreement to Settle; Releases and Discontinuance of Litigation; and Tarion's Agreement to Settle.

11 While the agreement references the exchange of mutual releases (in respect of the discontinuance of the civil action), and obtaining of orders reflective of that discontinuance (on a without costs basis), such steps were never completed.

12 I learned that Whitehall's solicitor had drafted a release and forwarded it to the Hanson's solicitor. Hanson's solicitor said he was seeking instructions but had some concerns about the wording. He provided no alternate version. The release was never signed by the defendants Hanson.

Positions of the Parties

13 The plaintiffs argue that the signed minutes represent a contract between the parties; a contract this court should enforce.

14 While the documentation presented on these motions is extensive, and the argument long, the plaintiff suggests that the case is quite simple - should the three page Minutes of Settlement signed by the parties be seen as an enforceable agreement/contract between them thereby terminating this litigation. They further suggest that the defendants Hanson changed their mind after the fact and now raise a number of issues, all irrelevant and mainly red herrings to make the matter seem more complicated than it is.

15 The Hansons say there was no enforceable settlement as:

> 1. No release was provided;
>
> 2. The agreement was signed when the defendants were under duress/being pressured to do so;
>
> 3. The plaintiff and Tarion had held back the key Thermal Imaging Report outlining numerous significant flaws in construction (the report was dated June 11th, 2008 and

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the agreement was signed June 13th, 2008). Both Tarion and the plaintiff denied that they had the report before signing the settlement document;

4. The plaintiff did not fulfill his end of the agreement thereby vitiating it, i.e. they did not provide the defendant the manufacturers warranties referenced in paragraph 11 of the agreement;

5. Tarion was in a conflict of interest.

6. The agreement was ambiguous, incomplete, and unenforceable.

16 It is important to note that each of the parties was represented by counsel throughout - and certainly at the time the minutes were signed. As such, I accept that while counsel were not invited to the Mediation itself (May 12, 2008), counsel were available to the parties before and after it (although I did understand the defence counsel for the Hansons was away on vacation for some of the period between the settlement meeting and the actual signing of the minutes on June 13,2008). A notice of change of solicitor was filed by the defendants in May 2009.

17 It is the position of Whitehall that between the June 2008 agreement and the May 2009 change of solicitors, the parties were acting on the agreement. The Hanson's were handling the subtrades themselves - contractors were coming into the house, and correcting deficiencies, often without remuneration. Whitehall did nothing to recover the $200,000 it claimed to be owed in the statement of claim.

18 As such, they argue that if the settlement is not enforced, the defendant Hansons have had a windfall. They kept the $200,000 Whitehall sought in their claim, had deficiencies corrected at no charge, and have lived in the home since 2006.

19 Further, the plaintiff alleges prejudice. They have not had the benefit of the $200,000 they say they were owed under the contract, and are unable to effectively defend the allegations of the Hanson's as remedial work has been undertaken over the past six years. They are thus unable to establish the state of their own work product alleged to be deficient.

20 Whitehall also claims it destroyed some documentation as a result of the settlement arrived at in 2006.

The Law

21 The recent Court of Appeal decision of *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.) sets out the current test for summary judgment. A motions judge must ask if:

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> Can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

22 While the record before me is most voluminous, and the arguments extensive, I find that the issue for my consideration is quite narrow. *Should the settlement arrived at between the parties on June 13th, 2008 be enforced?*

23 I read with interest and could quote extensively from the decision of Chapnik, J. in *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Ont. Gen. Div.) affirmed [1995] O.J. No. 3773 (Ont. C.A.), Justice Chapnik was faced with a motion under Rule 49.09 for a judgment based on an accepted offer to settle. She quotes *Canada Square Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (Ont. C.A.) and the *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) which state:

> An agreement to settle a claim is a contract. To establish the existence of a contract, the parties' expression of agreement must demonstrate a mutual intention to create a legally binding relationship and contain agreement on all its essential terms. (para. 17)

24 I was taken carefully through the minutes by counsel. I found them to be clear and comprehensive.

25 I have significant context from reading the materials filed, most particularly the minutes and the pleadings in the action.

26 The statement of defence is extensive and cites numerous deficiencies and inadequacies. It states it is not limited to deficiencies then known. Paragraph 24, for instance, says the deficiencies listed "...are not intended to constitute a complete enunciation of unacceptable work or to prejudice Hanson from calling evidence as to further deficiencies". Despite this language, both parties agreed to end the litigation between them.

27 The context of the pleadings before me suggest that the parties contemplated litigation of all deficiencies in construction. These pleadings were in place at the time of the settlement entered into by the parties, in consultation with their respective lawyers.

28 I am not to look beyond the plain meaning of the words used in the settlement document, understood in context, unless to do so would lead to some absurd or illegal result. I see no need to look behind the wording set out.

29 Moreover, the parties are presumed to have intended the legal consequences of their actions. This is particularly so when both are represented by counsel throughout. The

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intentions of the parties seem fair to me - they are each agreeing to resolve the dispute they have with one another as a result of construction of this home.

Releases

30 As is common, the minutes call for mutual exchange of releases and an order dismissing both the action and counterclaim. The defendants Hanson argue that these are essential terms of the contract; non-compliance effectively repudiates the contract. I must determine if they are essential terms.

31 It is clear that the onus of proving repudiation is on the party claiming it. I note that it would be rare for conduct subsequent to a settlement agreement to amount to repudiation (*Fieguth v. Acklands Ltd.* [1989 CarswellBC 88 (B.C. C.A.)], 1989 CanLII 2744).

32 In the case before me Whitehall provided a release, the Hansons neither signed nor provided an alternate version. The obligation to exchange releases was a mutual one. It did not rest with Whitehall alone.

33 Over and above, rather than treating the contract as at an end, I find that both parties continued to act upon the agreement struck on that day in June 2008.

34 I find that in the context of the case before me, the agreement was complete when the settlement minutes were signed. The releases/order are merely reflections of that written settlement. The defendants should not be allowed to set aside the contract when they did not hold up their end of the mutual obligation relating to the provision of releases and the dismissal order.

35 This is particularly so given that I have an executed document, (signed by sophisticated individuals with the benefit of legal counsel), and significant steps taken in furtherance of it. The plaintiff no longer pursued the $200,000 they say they were owed. The defendants Hanson began to deal directly with the subtrades to remedy the deficiencies (presumably utilizing these funds).

36 While the defendants argue that the plaintiffs failed to provide the warranties agreed to in the settlement document, I was presented no evidence that the defendants were ever thwarted in their effort to have work done by this non-production. It seems clear that Whitehall did not provide these warranties nor did the homeowner ask for them. I was presented no evidence that demonstrated that the Hanson's had any trouble pursing these warranties.

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37 The defendants Hanson argue that the plaintiffs told the subtrades not to cooperate with them but provided no independent evidence from those subtrades to substantiate this allegation.

38 I would have expected such evidence given the power nature of a Rule 20 motion and the requirement that a responding party "put their best foot forward/lead trump". They did not. Moreover, the homeowner admits that he received benefits from the subtrades.

39 At the end of the day I find that there was a contract; a valid agreement between the parties. The defendants Hanson then ask whether such a contract should be enforced.

Duress

40 The defendants plead duress. There is no doubt that duress can serve to make an agreement unenforceable against a party who is compelled by the duress to enter into it. The defendants Hanson argue that they were forced to settle; pressured by Tarion and Whitehall to sign by June 13 th, 2008.

41 I heard that Whitehall threatened to "walk away" from negotiations and Tarion threatened to write a "decision letter" wherein it would deny claims and compel the Hansons to appeal all items Tarion had rejected. Such positions would require the Hansons to fight both the Whitehall litigation and an appeal before Licence Appeal Tribunal if settlement was not arrived at.

42 As such, both Tarion (who the Hansons say were in a conflict of interest) and Whitehall exercised undue pressure on them.

43 I must say I was unimpressed with this argument. The defendants Hanson were not unsophisticated, vulnerable (emotionally or financially) or inexperienced individuals. Rather, they were both intelligent, well to do and experienced business people. Mr. Hanson is the Vice Chairman of CIBC World Markets with an MBA from Stanford University. Ms. Hanson was President of the Canadian Institute for Sustainability and Resilience at the time of the signing of the minutes.

44 I find it disingenuous to say that either of these individuals were under duress at the time of the signing.

45 Moreover, I find that the Hansons availed themselves of legal advice throughout the process and before and after signing the settlement document. The "duress" was not mentioned until the defendants responded to this motion to enforce the settlement.

Thermal Imaging Report

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46 The Hansons contend that Whitehall and Tarion held back the Thermal Imaging Report dated June 11th, 2008 until after the minutes were signed on June 13th, 2008.

47 They contend that this document revealed significant additional damages and deficiencies that were unknown to them at the time of signing.

48 Whitehall denies having the report prior to the signing. Regardless, it is clear from the evidence presented that Mr. Hanson himself knew the substance of the report before he signed the minutes.

49 His email of June 11th, 2008 and the letter from his lawyer dated June 13th, 2008 (before the minutes were signed) reveal that they in fact had in-depth knowledge of the content of the report before it was ever released.

50 As such, I have not been persuaded that the allegations relating to the thermal imaging report have been proven on the evidence before me. It does indeed appear to be a 'red herring'. Moreover, I do not accept this as a basis for failing to enforce the settlement given the defendant's obvious familiarity with its contents before entering into the settlement.

Conclusion

51 At the end of the day, I find that the Minutes of Settlement signed by the parties to this litigation constitute an enforceable contract. I was not persuaded that they should be ignored or the contract set aside.

52 Settlement between parties should be encouraged and supported. It is contrary to public policy to merely set agreements aside because someone changes their mind; significantly after the fact. In this regard I accept the language of my colleague Justice Sproat that ...

> ...parties should be encouraged to take settlement discussions seriously and carefully and that their motivation to settle should not be eroded by a concern that settlements will be easily avoided by litigants having second thoughts.
>
> (*Vanderkop v. Manufacturers Life Insurance Company*, 2005 CanLII 39686ON S.C.)

53 Judgment shall go in accordance with the Minutes of Settlement entered into by the parties on June 13, 2008.

54 If the parties are unable to resolve costs they may provide 3 page written submissions within 20 days of this decision.

Cross-motion granted.

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Footnotes

* Additional reasons at *Whitehall Homes & Construction Ltd. v. Hanson* (2012), 2012 ONSC 4741, 23 C.L.R. (4th) 281, 2012 CarswellOnt 10356 (Ont. S.C.J.).

** Further additional reasons at *Whitehall Homes & Construction Ltd. v. Hanson* (2012), 2012 ONSC 6691, 2012 CarswellOnt 15418 (Ont. S.C.J.).

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TAB 2

1993 CarswellNat 364
Federal Court of Canada — Trial Division

Dimatt Investments Inc. v. Presidio Clothing Inc. / Vêtements Presidio Inc.

1993 CarswellNat 364, [1993] F.C.J. No. 281, 39 A.C.W.S. (3d) 682, 48 C.P.R. (3d) 46, 4 W.D.C.P. (2d) 252, 62 F.T.R. 142

Dimatt Investment Inc., Plaintiff v. Presidio Clothing Inc./Vêtements Presidio Inc. (formerly Genesis Fashions Inc./ Modes Genesis Inc.), Defendant

MacKay J.

Judgment: March 23, 1993
Docket: Doc. T-1883-88

Counsel: *D. Allsebrook* , for the Plaintiff.
R. Uditsky , for the Defendant.

Subject: Intellectual Property; Property; Civil Practice and Procedure
Related Abridgment Classifications
Judges and courts
XX Contempt of court
XX.4 Forms of contempt
XX.4.c Disobedience of court
XX.4.c.i Injunctions
XX.4.c.i.A Copyright, patents, and trademarks
Headnote
Judges and Courts — Contempt of court — Forms of contempt — Disobedience of court — Injunctions
Defendants attempting to comply with order requiring change of corporate name and change of use of trade name — Defendants being in contempt for failure to ensure change in telephone listing and on premises.
Defendants were prohibited by order from using a trade name and were required to change the corporate name so as not to use the trade name. Defendants took steps to comply with the order, including effecting the corporate name change, but although they requested changes in the telephone directory listing and in signage at the office premises from which little business was conducted, these changes were not made. Plaintiff sought order in contempt. Held, the application was granted. Defendants did not deliberately breach the order but were negligent in failing to ensure for more than 2 years that the directory listing and signage was changed.

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Immediate action and an apology by defendants following the contempt citation justified reducing the penalty to a fine of $2,000 for corporation and $1,000 for each of two officers.

***MacKay J.* reasons for judgment:**

1 This was a show cause hearing at which, pursuant to the Order of Madame Justice Reed issued August 5, 1992, the defendant Presidio Clothing Inc./Vêtements Presidio Inc. (formerly Genesis Fashions Inc./Modes Genesis Inc.) (herein after "Presidio"), and Howard Vineberg and David Talbot were directed to appear and show cause why they should not be condemned for contempt of this Court for breach of an injunction order granted, on consent, by Giles, A.S.P. on December 19, 1989.

2 The matter was heard on October 19, 1992, in Toronto when counsel appeared for the plaintiff, and counsel also appeared for the defendant Presidio and for Messrs. Vineberg and Talbot. The latter two defendants, who are officers of Presidio, were present as well. Affidavits were filed on behalf of the plaintiff, and on behalf of the defendant Presidio by Howard Vineberg of Montreal, President of Presidio and by David Talbot of Mississauga, Ontario, Vice-president of Presidio. Affidavits were also filed on behalf of the defendant from officers of companies that are customers or suppliers of Presidio, and from the manager of the bank where Presidio maintains its accounts. No witnesses were called at the hearing and counsel for the parties advised that, as there was no dispute on essential facts, the matter should be disposed of on the basis of affidavits filed and argument presented.

3 Following the hearing, after deliberation, I rendered oral judgment by which I found the defendant Presidio in breach of the Order of December 19, 1989, and that the defendants Howard Vineberg and David Talbot, with knowledge of that Order, as officers of Presidio aided and abetted Presidio in breaches of the Order. In my view, those breaches interfered with the orderly administration of justice and impaired the authority or dignity of the Court. I imposed fines, upon Presidio in the amount of $2,000., and upon each of Messrs. Vineberg and Talbot in the amount of $1,000., all to be paid within 30 days, with reasonable solicitor and client costs payable to the plaintiff.

4 Written Judgment was filed on October 26, 1992. I now confirm and expand upon oral reasons given, in explanation of the Judgment and for compliance with section 51 of the *Federal Court Act* , R.S.C. 1985, c. F-7 as amended.

5 The Order of December 19, 1989, granted on consent, upon application by the plaintiff, was directed against the defendant Presidio, then named Genesis Fashions Inc./ Modes Genesis Inc. It provided, so far as it is relevant here, as follows:

> 1. The Defendant shall forthwith change its corporate names to a name or names not including the word GENESIS or any word or phrase confusingly similar thereto;

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2. The Defendant and its directors, officers, servants, agents, employees and persons under their control having notice of this order are restrained from using the trade names Genesis and/or Genesis Fashions and/or Modes Genesis Inc. and/or Genesis Fashions Inc. or any trade name or trade mark confusingly similar thereto from and after February 3, 1990.

6 The Order of Madame Justice Reed, granted on August 5, 1992, upon application of the plaintiff filed July 30 directed Presidio and Messrs. Vineberg and Talbot to appear and show cause why they should not be condemned for

(1) breach of the Court's Order of December 19, 1989, on the grounds that since February 3, 1990,

(i) Presidio continued to carry on business in the trade names Genesis Fashions Inc., Genesis Fashion Inc., and Modes Genesis.

(ii) Presidio is causing signs to be displayed at 462 Wellington Street West, Toronto, Ontario which display the trade names "Genesis Fashion Inc.", "Genesis Fashions Inc." and "Modes Genesis";

(iii) Presidio is using the trade name Genesis Fashion Ltd. in the Metropolitan Toronto Telephone Directories, April 1991-1992 and April 1992-1993;

(iv) David Talbot has used the trade name Genesis to carry on the business of Presidio with knowledge that this breaches the injunction contained in the Judgment and has thereby aided and abetted Presidio in its breach of the said injunction;

(v) Howard Vineberg, as a principal and guiding mind of Presidio and with knowledge of the injunction contained in the Judgment, has been negligent in his attempts to change the listing for Genesis Fashion Ltd. in the Metropolitan Toronto Telephone Directory and has neglected to cause Presidio and Talbot to comply with the terms of the Judgment and in particular to cease and refrain from the activities described in subparagraphs (i) to (iv) inclusive, above, and has thereby aided and abetted Presidio in its breach of the said injunction;

(2) acting in such a way as to interfere with the orderly administration of justice, and to impair the authority or dignity of this Court and rendering nugatory an order of this Court by reason of the acts set forth above.

7 With regard to the particular allegations of breach of the Court's Order set out in the Order of Madame Justice Reed, I found that there was no evidence that Presidio continued to carry on business in the trade names Genesis Fashions Inc., Genesis Fashion Inc. and Mode

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Genesis, as alleged. Nor did I find any evidence that David Talbot has used the trade name Genesis to carry on the business of Presidio in any significant way.

8 I did find that the corporate defendant Presidio did, after February 3, 1990, continue to display signs at 462 Wellington Street West, Toronto, Ontario, including as trade names "Genesis Fashions Inc.", "Genesis Fashion Inc." and "Mode Genesis", and that the defendant Presidio had continued to use the trade name Genesis Fashion Ltd. in the Metropolitan Toronto Telephone directories, April, 1991-1992 and April 1992-1993. By so doing the defendant Presidio breached and was in contempt of the Order of the Court dated December 19, 1989. I further found that the defendants Howard Vineberg and David Talbot, with knowledge of the Order of the Court, as responsible officers of the defendant Presidio, aided and abetted Presidio in its breach of the Order and were thus in contempt of the Order made December 19, 1989.

9 I am satisfied that as a result of settlement between the parties in November 1989, which led to the Order of December 19, 1989, rendered on consent, Howard Vineberg as President of Presidio took substantial steps to ensure that the corporation would not be in violation of the Court's Order. These steps included the following.

(1.) The name of the corporate defendant was formally changed. Originally incorporated under the Quebec Companies Act on November 3, 1987, with the corporate name Genesis Fashions Inc./Mode Genesis Inc., that name was changed to Presidio Clothing Inc./Vêtements Presidio Inc. and a certificate of notification of the change, dated November 14, 1989, was issued by the appropriate Quebec Government office.

(2.) All business forms and documents of the defendant corporation were changed after November 1989 so that the only name used thereafter on any documents of the company was that of Presidio Clothing Inc./Vêtements Presidio Inc.

(3.) All customers and suppliers, and the corporate defendant's bank, were advised of the change of name at the time the change was made and thereafter all corporate documents of the defendant corporation used in its business transactions bore only the new name of the company. This is confirmed by affidavits of officers of companies that were suppliers or were purchasers of goods from Presidio, and by affidavit of the manager of the defendant corporations's bank. All of them affirm that from and after November or December 1989 all transactions with the corporate defendant were carried on with the new name of the company, Presidio Clothing Inc./Vêtements Presidio Inc. being the only corporate name used.

(4.) In April 1990, Howard Vineberg wrote to Bell Canada in Toronto to direct a change in the corporate telephone listing for the corporate defendant asking that it thereafter be listed in the new name of the company. He assumed that this change had been made,

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never having been made aware by any customer, supplier, consumer, or the plaintiff until the service of the plaintiff's notice of motion of July 31, 1992, for a show cause order, that Bell Canada had failed to correct the telephone listing in Toronto. Upon receipt of the notice of motion Mr. Vineberg again communicated with Bell Canada in Toronto, again explicitly instructing them to effect the change of listing in all future Toronto telephone directories. He has been assured this has been undertaken by the telephone company and has confirmed by calling the information number 411 in Toronto, that no listing for Genesis Fashions Inc. is now carried by Bell Canada in Toronto but that a listing for Presidio Clothing Inc. is carried by the telephone company.

(5.) By his affidavit David Talbot affirms that following settlement of the matter with the plaintiff in the fall of 1989 he was instructed by Howard Vineberg not to use the former name of the corporate defendant, or the name Genesis, and to use his own personal name when answering the telephone at the company's office at 462 Wellington Street in Toronto. He further avers that he followed these instructions and that he could recall that after the change of the company's name he had received only one telephone call at those premises, nearly two years ago, where the caller asked for Genesis Fashions Inc. and he advised the caller that this name was no longer in use and that the company now had the new name, Presidio.

(6.) Howard Vineberg had also advised the landlord of the premises at 462 Wellington Street West in Toronto of the change in corporate name in the late fall of 1989. He had done so orally in anticipation that the owner of the premises would see to changes in the name used for reference to the company at those premises. The name Genesis Fashions Inc. was originally included on the "buzzer" panel at the exterior door used to acquire access to the building, on the directory board in the lobby of the building, on the door of the premises leased by the corporate defendant, and on the parking lot sign adjacent to the building. By July 1992 no changes had been made in the original signs, which were only changed by the landlord of the premises after written instructions from Mr. Vineberg following service of the plaintiff's notice of motion of July 30 for the show cause order. All such signs at the premises were changed to display only the new name Presidio at the premises in Toronto.

10 The defendants Vineberg and Talbot acknowledge by affidavit that they were careless in ensuring that the changes requested by Vineberg for the telephone listing and for signs at the Toronto premises were not made following the original requests by Vineberg to Bell Canada and to the landlord.

11 I was less concerned with the listing in the Toronto telephone directory for 1991-92 than I was for the succeeding year's directory and for the continuing use of the name at the company's premises in Toronto. There was no evidence before me of the appropriate timing for information to Bell Canada for a change in directory listing of the first directory,

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apparently issued to be effective April 1991. At least for the second year's directory listing I assume that the defendant company at its Toronto office would have been in receipt on a regular basis of a statement of service charges for telephone service, including listing the name of Genesis Fashions Inc., though again there was no evidence of this. In my view, there can be no excuse for the continuing use of the original name of the company at its premises in Toronto, where Mr. Talbot was based and he was responsible for the company's operations there. He knew of the instructions of Mr. Vineberg to the landlord of the Toronto premises and simply assumed, without checking for more than two years, that the corporate name of the defendant corporation would be changed on signs at the Toronto premises. It is hard to believe that he would not have noticed that the original corporate name continued to be displayed, particularly at the parking space and at the door to the office of the company, without the new name Presidio, even if he did not examine the outside buzzer access panel or the directory board in the lobby of the building.

12 I note that the nature of the defendant's business is such that only very occasionally would persons visit its premises at 462 Wellington Street West in Toronto. The defendant company is a manufacturer of apparel, primarily for women, which it sells in the low to mid-price range. As a manufacturer it does not sell on any retail basis but sells to buyers for retail chains or stores. It has never had more than 30 customers purchasing its goods and only ten of those have been in the Toronto area. In that area Mr. Talbot, who is responsible for sales, does most of his work by visiting purchasers at their premises and only very occasionally would anyone visit Presidio's premises in Toronto. That general practice is reflected in their experience by one or two of the affiants who are purchasing officers of customer companies.

13 In terms of the general allegation set out in the second main clause of the show cause order of August 5, 1992, I did not find that Presidio, or Howard Vineberg or David Talbot, willingly acted "in such a way as to interfere with the orderly administration of justice, and to impair the authority or dignity of this Court in rendering nugatory an Order of this Court". However, on the basis of the facts averred by affidavit and by the acknowledgements of Messrs. Vineberg and Talbot, I did find that all three of the defendants named in the show cause order, that is, the corporate defendant and Messrs. Vineberg and Talbot, were negligent in failing to ensure that the terms of the Court's Order were adhered to, in particular in regard to the continued listing of Genesis Fashion Ltd., on behalf of the defendant Presidio, in Toronto telephone directories, and more especially by the continued use of the name Genesis Fashions Ltd. on signage related to the company's premises at 462 Wellington Street West in Toronto. That negligence, in my view, does interfere with the orderly administration of justice, impairing the authority of an Order of this Court and thus impairing the dignity of the Court.

14 The terms of a court order as expressed are to be followed strictly and failure to do so interferes with the orderly administration of justice and impairs the authority or dignity of

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the Court. Here the defendant corporation, its directors, officers, servants, agents, employees and others under their control having notice of the Order were expressly restrained from using certain trade names after February 3, 1990, yet prohibited names continued to be listed in the Toronto telephone directory and at the company's leased premises in Toronto until after July 30, 1992.

15 In light of these findings, it was, in my view, appropriate that in this case fines be imposed, in the amount of $2,000. in the case of the corporate defendant, and in the amount of $1,000. for each of the defendants Howard Vineberg and David Talbot.

16 Those fines seemed to me appropriate in light of the following factors. There were substantial steps taken by Mr. Vineberg, President of Presidio, to comply with the Court's Order, including a written request to Bell Canada to change the telephone listing in Toronto and an oral notification to the company's Toronto landlord that the name of the corporate defendant had been changed. The only incidents of breaching the Court's Order were the continuing listing until after July 1992 of the original name in the Toronto telephone directory and in the display of the original name of the company at its Toronto premises. There was no evidence that the original name was used in dealing with telephone messages at the Toronto premises; indeed the only evidence is that that name was not used in accepting telephone calls, or in any other way, except for the signs at the Toronto premises, after the formal change in the corporate name of Presidio. The head office and principal place of business of Presidio, is Montreal, where it does not maintain any telephone listing and there is no evidence of any continuing use of its former name in its business operations there.

17 In my view, the actions of Messrs. Vineberg and Talbot cannot be characterized as contumacious, or demonstrating any intended disdain of the Court's Order. Both acknowledge they were negligent in ensuring instructions of Vineberg to Bell Canada and to the landlord were followed. By their negligence, which resulted in carrying on, for some two and a half years, the use in relation to the company's Toronto operations of a trade name which the Court's Order had prohibited, the Order was breached. That constitutes contempt, and it impairs the authority and dignity of the Court, and impairs the orderly administration of justice.

18 I consider that the following factors warrant consideration in mitigation and in fixing the appropriate sanctions. Howard Vineberg, when he learned by the plaintiff's notice of motion for a show cause order issued July 30, 1992, acted quickly to remedy the failures to ensure the telephone listing in Toronto and the signs at the Toronto premises were changed to include only the new corporate name of Presidio. Messrs. Vineberg and Talbot formally, and I accept sincerely, apologized for their failure to observe strictly the Order of December 19, 1989, and Mr. Vineberg, as President of Presidio, averred his determination to ensure

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that there be no further breach of the Court's Order. As I understand counsel, Mr. Vineberg had also apologized to the plaintiff in this matter.

19 In addition to imposing fines, I ordered that reasonable costs, on a solicitor and client basis be awarded to the plaintiff. This accords with normal practice in a successful application for an Order finding contempt, ensuring that the role of the party acting to support compliance with an Order of the Court does not result in undue costs for the applicant. In a number of recent cases in this Court costs awarded on that basis have been set at a fixed amount, but since there was no evidence of the costs actually incurred by the plaintiff and thus of what might be considered reasonable in this case, I declined to fix the amount in the expectation that reasonable costs on a solicitor and client basis would be agreed upon, or failing agreement could be taxed.

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TAB 3

2011 ONSC 4837
Ontario Superior Court of Justice

Canadian National Railway v. Holmes

2011 CarswellOnt 7935, 2011 ONSC 4837, [2011] O.J. No. 3672, 205 A.C.W.S. (3d) 910

Canadian National Railway Company, Plaintiff and Scott Paul Homes, Jennifer Lynn Parisien, also known as Jennifer Lynn Flynn in her personal capacity and as the sole proprietor and operating as Efficient Construction, Janice Shirley Maureen Holmes, Murray Fussie, Scott Albert Pole, Rick Sousa, also known as Ricky Sousa, in his personal capacity and operating as Trax Unlimited, Michael Sousa, also known as Mike Sousa, in his personal capacity and operating as Trax Unlimited, Julie Sousa, 2035113 Ontario Ltd., Complete Excavating Ltd., Monterey Consulting & Construction Ltd., 2071438 Ontario Ltd., operating as Complete Trax, 2071442 Ontario Ltd., The Scott Holmes Living Trust, The Jennifer Lynn Flynn Living Trust, Greystone Ltd. and Belview Management Ltd., Defendants

D.M. Brown J.

Heard: June 14, 2011
Judgment: August 15, 2011
Docket: CV-08-7670-00CL

Counsel: M. Jilesen, for Plaintiff in the Toronto Action, Defendants, E. Hunter Harrison, Claude Mongeau, Olivier Chouc, Keith Creel, Michael Cory, Nizam-U-Din Hasham, Michael Farkouh, Dave Roy, Nick Nielsen in the Hamilton Action
M. Munro, M. Lacy, for Defendants, Scott Paul Homes, 2035113 Ontario Ltd., Complete Excavating Ltd., Monterey Consulting & Construction Ltd., The Scott Holmes Living Trust
M. Moloci, for Defendant, Jennifer Lynn Flynn
M-A. Vermette, for Defendant, Murray Fussie
D. Porter, E. Block, B. Shaw, for John Dalzell, Serge Meloche, Ben Fusco, Bruce Power, Robert Zawerbny, Scott McCallum, Marc Pontenier, some of the Defendants in the Hamilton Action

Subject: Civil Practice and Procedure; Corporate and Commercial; Public; Torts

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Related Abridgment Classifications

Civil practice and procedure
XIX Pre-trial procedures
XIX.6 Consolidation or hearing together
XIX.6.b Hearing together or sequentially

Headnote

Civil practice and procedure --- Pre-trial procedures --- Consolidation or hearing together — Hearing together or sequentially

Employer was railway company --- Employee had worked for employer as track supervisor — Employer alleged employee breached his duties to employer by, inter alia, arranging for work to be done by companies in which employee had personal interest — Employer commenced action against employee and others in Toronto for relief for deceit, conversion, and conspiracy — Employer successfully brought motion for Mareva injunction — Employer's allegations led to criminal charges against employee and his wife — Crown stayed charges during preliminary inquiry --- Employee, his wife, and others commenced separate action against employer in Hamilton for damages for false arrest, malicious prosecution, and abuse of process — Employer brought motion for consolidation of actions in Toronto — Motion granted in part — Hamilton action was to be transferred to Toronto and parties were required to prepare joint timetable and discovery plan but actions were to be heard one after other rather than together — Both actions clearly had substantial facts in common — Relief claimed in both actions arose in large part out of same transactions or occurrences — Evidence would largely be same in both actions Some joinder of actions was in order to keep pre-trial discovery costs within some manageable range — Fact that employee and others had filed jury notice in Hamilton action did not preclude some form of joinder.

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1014864 Ontario Ltd. v. 1721789 Ontario Inc. (2010), 2010 CarswellOnt 4183, 2010 ONSC 3306 (Ont. Master) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

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

Generally — referred to

s. 138 — considered

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Generally — referred to

Rules considered:

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R. 1.04(1) — referred to

R. 6.01 — considered

R. 6.01(1)(a) — considered

R. 6.01(1)(b) — considered

R. 6.02 — considered

R. 13.1.02(2) [en. O. Reg. 14/04] — considered

R. 29.1 — considered

MOTION by employer for consolidation of actions.

D.M. Brown J.:

I. To consolidate or not to consolidate?

1 "As far as possible, multiplicity of legal proceedings shall be avoided", so says section 138 of the *Courts of Justice Act*. [1] Yet, in some circumstances multiple proceedings might be

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required to secure the just, most expeditious and least expensive determination of disputes.[2] Whether there should be one proceeding or two turns on the particular facts of any case and the various litigation-related considerations attaching to any case.

2 Two separate actions frame the motions brought before me. In August, 2008 the Canadian National Railway Company ("CN") commenced this Toronto action - Court File No. CV-08-7670-00CL - against Scott Holmes, his wife, Jennifer Parisien (also known as Jennifer Flynn), and others, alleging deceit, conversion and conspiracy in respect of a fraudulent invoice scheme (the "Toronto Action"). In November, 2009 Scott Holmes and Jennifer Flynn were charged with several fraud-related offences in respect of the same transactions which are the subject matter of the Toronto Action. During the preliminary inquiry in November, 2010, the Crown stayed the charges. In February, 2011, Scott Holmes, Jennifer Flynn and others commenced an action in Hamilton - Court File No. 11-25681 - against CN, its officers and employees, seeking $35 million in damages for false arrest, malicious prosecution and abuse of process in respect of the failed criminal prosecution (the "Hamilton Action"). The plaintiffs have served a jury notice in the Hamilton Action.

3 Argued before me were three motions:

(i) CN moved for (i) the transfer of the Hamilton Action to the Toronto Region Commercial List, (ii) the consolidation of the Toronto and Hamilton Actions or, alternatively, an order directing their trial one after the other; (iii) a timetable for the consolidated proceeding; (iv) an order striking the jury notice in the Hamilton Action; and, (v) an order setting aside a protocol order made on December 4, 2008 in the Toronto Action. The CN Police defendants in the Hamilton Action brought a motion seeking much of the same relief;

(ii) Scott Holmes and the other plaintiffs in the Hamilton Action opposed the transfer of the Hamilton Action and moved for orders (i) establishing a timetable in the Toronto Action and (ii) removing the Toronto Action from the Commercial List and transferring it to the general Civil List in the Toronto Region.

Greyslone Ltd. and Belview Management Ltd., defendants in the Toronto Action, opposed the consolidation of the proceedings, as did Murray Fussie and Jennifer Flynn.

4 The Holmes parties had also brought a motion requiring the case management judge in the Toronto Action, C. Campbell J., to recuse himself from hearing these motions. In the result that motion did not proceed because C. Campbell J. requested that I hear the motions. At the commencement of the hearing I advised the parties that when I practiced law I had acted for CN on some tax litigation and served as a witness for CN in some U.S. regulatory proceedings. I told counsel that I would retire for a short time to enable them to consult with

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their clients and, on my return, one counsel was to inform me whether any (unnamed) party objected to my hearing the motions. No party raised any objection.

5 I shall first review the issues raised by the pleadings in the Toronto Action, then describe the procedural history of the Toronto Action, after which I will state the issues raised by the pleadings in the Hamilton Action. I will then examine the relief requested in light of the applicable principles of law and the specific circumstances of these two proceedings.

II. Issues raised by the Toronto Action

6 CN issued its Statement of Claim in the Toronto Action on August 6, 2008, and then amended it on December 4, 2008. No Statements of Defence for the Toronto Action were contained in the motion materials filed before me, although one affidavit stated that in 2009 Scott Holmes served a Statement of Defence, and later an Amended Statement of Defence, and Jennifer Flynn delivered her defence in March, 2009. Evidently there are no cross-claims. Neither the Sousa/Trax Unlimited/Complete Trax nor the Greyslone/Belview defendants have delivered their pleadings; they have not been noted in default. In any event, the only pleading before me is the Amended Statement of Claim and it is from that document that I have gained an understanding of the issues in the Toronto Action.

7 The Amended Statement of Claim identifies three groups of defendants:

> (i) Scott Holmes, his wife, Jennifer Lynn Flynn, their respective living trusts and the Holmes Companies which they are alleged to control - 2035113 Ontario Ltd., 2071442 Ontario Ltd., Complete Excavating Ltd., Monterey Consulting & Construction Ltd. and Efficient Construction (collectively the "Holmes Defendants");
>
> (ii) Janice Holmes, Scott's former wife, Murray Fussie, Scott Albert Pole, Rick Sousa, Michael Sousa, Julie Sousa, Trax Unlimited and Complete Trax, persons whom CN alleges assisted Holmes to carry out his scheme and who benefited from the scheme to CN's detriment; and,
>
> (iii) Greyslone Ltd. and Belview Management Ltd., corporations through which CN alleges that Holmes channeled funds which he obtained wrongfully from CN and whose securities interests against the Holmes Companies are invalid.

8 CN alleges that Holmes, a full-time track supervisor with the company, was responsible for dealing with the maintenance and construction of certain CN trackage, for procuring construction services and equipment for CN, and possessed limited authority to approve invoices for such services and equipment up to $10,000.00. CN alleges that Holmes breached his duties to his employer by engaging in the following wrongful conduct:

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(i) He arranged for the Holmes Companies to provide services and equipment to CN without disclosing to his employer his personal interest in those companies (ASC, paras. 34 to 36);

(ii) He obtained the computer passwords of a more senior CN employee and used them to approve invoices submitted to CN by the Holmes Companies when he had no authority to make such approvals (ASC, paras. 53 to 61);

(iii) He wrongfully approved invoices submitted by the Holmes Companies for which services and equipment were never provided to CN (ASC, para. 82); and,

(iv) He utilized materials owned by CN without any colour of right to do so and without compensating CN for those materials (ASC, para. 68).

CN pleaded that when it discovered this scheme, it confronted Holmes, who denied any wrongdoing and then promptly resigned (ASC, paras. 74 to 79).

9 CN alleges that Jennifer Flynn, Janice Holmes, Fussie, Pole and the Holmes Companies all conspired with Holmes "together to perpetuate the scheme by which Holmes paid millions of dollars from CN to the Holmes Companies" (ASC, para. 64).

10 Complete Trax and Trax Unlimited provided maintenance and construction services to CN. The company alleges that the Sousas, Complete Trax and Trax Unlimited provided a car to Holmes for which they charged CN and supplied invoices to Holmes, which he approved, as a result of which they received monies to which they were not entitled (ASC, paras. 70 to 73).

11 It is alleged that Greyslone and Belview hold security interests over assets of Complete and Holmes which are invalid and that the transactions with those two defendants were "sham transactions designed to move the assets of Holmes and Holmes Defendants beyond the reach of CN" (ASC, paras. 94 to 102 and 107).

12 In its pleading CN seeks a wide range of relief including damages of up to $2 million against various defendants, except Greyslone and Belview, various forms of tracing and constructive remedies, the issuance of *Mareva*, Anton Pillar and receivership orders against Holmes, his wife, their trusts and the Holmes Companies and, to an extent, against other defendants, and the rescission of any transactions between Greyslone, Belview and the defendants and the return of any related monies.

III. Procedural history of the Toronto Action

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13 The motion materials placed before me did not describe all of the steps which have occurred in the Toronto Action, but identified the following main occurrences. Immediately after serving the Statement of Claim CN sought a *Mareva* injunction and an *Anton Pillar* order. On August 8, 2008 Lederman J. granted a *Mareva* injunction against the Holmes Defendants. On consent, Newbould J. continued the *Mareva* injunction by order made August 18, 2008.

14 Then, on August 26, 2008, Spence J., on the consent of the Holmes Defendants, appointed Schonfeld Inc. as Monitor over the assets of Holmes, Flynn, the Holmes Companies and their Trusts, as well as over the business and undertaking of the Holmes Companies. By order made December 4, 2008, C. Campbell J. transformed the monitorship of Schonfeld Inc. into a receivership over the property of the Holmes Defendants. The receiver remains in place and has not been discharged, although it has no on-going role; attendances before C. Campbell J. this past February included discussions about the future role of the Receiver.

15 In 2009 Holmes moved to set aside the *Mareva* injunction and the receivership order. His motions were dismissed and he was denied leave to appeal by the Divisional Court on May 21, 2010 [*Canadian National Railway v. Holmes*, 2010 CarswellOnt 4374 (Ont. Div. Ct.)]. In 2009 Holmes changed his solicitors of record; in early 2010 so did Ms. Flynn.

16 The Receiver has brought several contempt motions against the Holmes Defendants. An August, 2009 motion alleged that the Holmes Defendants had breached court orders by selling high-end cars, retaining the proceeds, and placing a mortgage on property in Florida. Evidently that motion was resolved on the basis that Holmes and Flynn would remit the sales proceeds from the cars to the Receiver and discharge the mortgage. The vehicle proceeds were remitted to the Receiver. The mortgage was not discharged, prompting a further contempt motion by the Receiver returnable in early 2010. According to the affidavit filed by CN, Holmes ultimately complied with the court order and the contempt motion did not proceed.

17 No substantive steps apparently took place in the Toronto Action between August and November, 2010 when Mr. Holmes was subject to the preliminary inquiry in respect of the criminal charges.

18 Following the stay of the criminal proceedings, Mr. Holmes brought a motion in December, 2010 to strike CN's Amended Statement of Claim as an abuse of process. CN moved to seek disclosure of the Crown Brief in the criminal proceeding through a *Wagg* motion. Various scheduling attendances ensued in respect of those motions.

19 CN learned of the Hamilton Action in late February, 2011. On March 1, 2011 CN's counsel wrote to counsel for Mr. Holmes seeking a case conference before C. Campbell J. to

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schedule a motion to transfer the Hamilton Action to Toronto; CN viewed the issues in the Toronto and Hamilton actions as inextricably linked. A case conference was held on March 11, at which time C. Campbell J. set March 24 as the date for hearing the *Wagg* motion and the transfer motion.

20 Notwithstanding that scheduled motion, counsel for Mr. Holmes advised CN that his client intended to note CN in default in the Hamilton Action unless it filed a defence. C. Campbell J. ultimately dealt with that issue.

21 In late March, 2011, Mr. Holmes' counsel advised that his client was not pursuing his motion to strike out the claim. In his May 16, 2011 affidavit Mr. Holmes confirmed that he had decided not to proceed with that motion, primarily for the "pragmatic" reason that the Receiver intends to move for its discharge. The *Wagg* motion was resolved by a consent order of C. Campbell J. made March 24, 2011.

22 On March 21 Mr. Sheppard, counsel to Mr. Holmes, wrote CN's counsel to advise that his client objected to C. Campbell J. hearing the transfer motion. The only reason given was that C. Campbell J. had "been acting in the role of case-management judge for many months". Later, Mr. Holmes, in his affidavit, deposed that he had concerns about C. Campbell J. hearing the consolidation motion in light of the discussion which had taken place during a case management conference for that motion. The parties appeared on March 24 before C. Campbell J. As described in the affidavit of Ms. Lefebvre, an articled student with CN's counsel, the following transpired at the March 24 attendance before C. Campbell J.:

> 32. Mr. Munro [Holmes' counsel] made a request during the hearing for another judge to allow for "fresh eyes" for the litigation. Mr. Munro did not advise the court that the defendant was taking the position that Justice Campbell had pre-judged the consolidation motion or that there was any apprehension of bias. There was no basis to do so.
>
> 33. Justice Campbell said that he would consider what counsel had raised. His Honour directed Mr. Munro to the Commercial List Practice Direction policy of a single judge hearing all motions in case-managed proceedings.

23 In the result I heard the motions on June 14, 2011.

IV. Issues raised by the Hamilton Action

A. The claim

24 The plaintiffs in the Hamilton Action are the Holmes Defendants in the Toronto Action. The Amended Statement of Claim names three groups of defendants:

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(i) CN, certain of its officers — E. Hunter Harrison, Claude Mongeau, Keith Creel, John Dalzell, Michael Cory — some of its in-house counsel - Olivier Choue and Nizam-U-Din Hasham — and some employees — Michael Farkouh, Nick Nielsen and Dave Roy;

(ii) Members of the CN Police who were involved in the investigation into the conduct of Scott Holmes and Jennifer Flynn — Serge Meloche, Ben Fusco, Bruce Power, Robert Zawebny, Marc Pontenier and Scott McCallum; and,

(iii) Janice Holmes, the ex-wife of Scott Holmes.

25 In the Hamilton Action the plaintiffs allege that Janice Holmes provided false information to CN and the CN Police which led to the criminal charges against Scott Holmes and Jennifer Flynn. Central to the plaintiffs' claim is the allegation that the CN Police conducted an investigation not only for the purpose of a criminal prosecution, "but also to assist in the prosecution of a civil action against the plaintiff Holmes for the recovery of alleged losses". The plaintiffs allege that:

> [i]n causing the investigation of criminal proceedings against the plaintiffs Holmes and Flynn and the laying of such charges amounted to an unlawful conspiracy which constituted an abuse of process. (ASC, para. 31)

26 The plaintiffs contend that the informations sworn against them lacked reasonable and probable grounds and were done for the purpose of assisting in the prosecution of the proposed civil action and therefore constituted an abuse of public office and an abuse of process. Given the eventual stay of the criminal proceedings, the Amended Statement of Claim advances a claim of malicious prosecution against the defendants.

27 The Holmes Plaintiffs plead that CN made false statements before the court in order to obtain the *Mareva* injunction and the appointment of a receiver in the Toronto Action (ASC, paras. 38 to 40). Those false statements, according to the plaintiffs, amounted to an injurious falsehood for which they seek damages.

28 The Amended Statement of Claim identifies 24 instances of conduct by the CN Police and/or CN's in-house counsel during the investigation which the plaintiffs plead amounted to abuses of process and abuses of public office. One particular of misconduct alleged that a CN employee had failed to make full and frank disclosure on the motions for *Mareva* and *Anton Pillar* orders in the Toronto Action (ASC, para. 42(p)). The claim also asserts wrongdoing by the CN Police during the arrest and detention of Holmes and Flynn.

29 Finally, claims in defamation are made against two of the defendants, Zawerbny and Power. Although a claim for damages is asserted for the breach of *Charter* rights, the Amended Statement of Claim offers no particulars of that claim.

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B. Defence of CN and its officers, employees and in-house counsel

30 The CN defendants pleaded that upon receipt of an anonymous letter alleging that Scott Holmes was committing fraud, awarding contracts to his own companies, and selling scrap metal from the CN yards, separate investigations were commenced by CN management and the CN Police. The Amended Statement of Defence made the following pleading about the results of the CN Management Investigation:

> 8. The information yielded in the investigation demonstrated that there was a scheme by which:
>
> (i) Holmes caused companies or entities related to him to provide some services to CN without disclosing his conflict of interest;
>
> (ii) Holmes caused the companies to deliver invoices which were for amounts of less than $10,000.00 each, such that they were within Homes' approval limit;
>
> (iii) Holmes, posing as another employee, inputted the invoices into the CN accounting and SAP system;
>
> (iv) Holmes then approved the invoices for payment that had been addressed to his supervisor and without the supervisor's consent caused them to be sent to Montreal to Head Office accounting for such purpose; and,
>
> (v) The companies received the payments as a result.
>
> 9. CN's internal audit team determined that under this scheme, Holmes approved payments based on invoices from companies or entities related to him, resulting in millions of dollars being paid to these companies.
>
> 10. The CN Management Investigation demonstrated that invoices were approved for which equipment and services were not provided.
>
> 11. The CN Civil Defendants acted appropriately and in accordance with the law prior to and over the course of the CN Management Investigation. Any information shared with ... the CN Police Defendants was for a lawful, proper and appropriate purpose.

31 The CN Defendants pleaded that they made full and frank disclosure on the motion for a *Mareva* injunction, and that by reason of the dismissal of Holmes' motion to set aside the *Mareva* injunction he was estopped from re-litigating that issue. CN also pleaded:

> 30. CN was the victim of a fraud perpetrated on it by Holmes through his unlawful conduct. That CN, by virtue of the provision of the *Railway Safety Act*, has an investigative and enforcement arm does not prevent it from taking the steps which it

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did to pursue both an investigation and the Civil Action. There is no abuse of process inherent in the CN statutory and corporate structure giving rise to any duty to the plaintiffs or cause of action known at law.

. . .

38. The plaintiffs have suffered no special damages. Their conduct would have led, in any event, to investigation, charges and arrest.

39. The conduct of the plaintiffs bars any recovery of damages pursuant to the doctrine of *ex turpi causa non oritur actio* due to their illegal and wrongful conduct as pleaded above.

C. Defence of CN Police

32 In their Amended Statement of Defence the CN Police pleaded that all production orders obtained during their investigation were done so lawfully, honestly, in good faith, with reasonable and probable grounds, and:

20. The results of the investigation revealed that Mr. Holmes had participated in a scheme to procure the unauthorized approval of fraudulent invoices to companies that he owned or controlled...

33 The CN Police stated that all charges against Mr. Holmes and Ms. Flynn were laid with reasonable and probable grounds and that they conducted themselves "reasonably, lawfully, in good faith and for proper purposes". They denied making any defamatory statements.

34 The CN Police also pleaded that the "plaintiffs are barred from recovering damages pursuant to the doctrine of *ex turpi cause non oritur actio* by reason of their illegal or wrongful conduct".

D. Defence of Janice Holmes

35 Ms. Holmes denies that she conspired with any members of the CN Police to institute criminal proceedings against Holmes or Flynn. Ms. Holmes pleaded that she was not involved with any of the contracts between Complete Excavating and CN.

V. Analysis

A. Removing the Toronto action from the Commercial List (delay)

36 Let me first deal with the motion by the Holmes Defendants in the Toronto Action to remove it from the Commercial List and place it on the Civil List. They argue that CN has delayed in prosecuting the Toronto Action by not insisting that the other defendants file

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their defences or by failing to note them in default, and that the plaintiff has not set the action down for trial within two years.

37 I see no merit to these arguments. The record of the proceedings reveals that most of the delay in 2009 was caused by Mr. Holmes' decision to move to set aside the *Mareva* and Receivership orders, an effort which did not succeed, and by Mr. Holmes' failure to comply promptly with orders of this Court, resulting in contempt proceedings by the Receiver against him. Most of the delay in 2010 resulted from the on-going criminal preliminary hearing. Upon the stay of the criminal charges CN moved to obtain disclosure of the Crown Brief and, shortly thereafter, Mr. Holmes commenced the Hamilton Action, the effects of which have pre-occupied the parties since this past February. In sum, the record discloses no delay on the part of CN which would justify removing the Toronto Action from the Commercial List.

38 On the contrary, the litigation history of the Toronto Action points strongly to the need to keep the proceeding under the direction of the case management process which C. Campbell J. has been applying in accordance with paragraph 33 of the Commercial List Practice Direction. I therefore dismiss this part of the motion brought by the Holmes Defendants.

B. Request to transfer the Hamilton Action and to consolidate with the Toronto Action

39 CN seeks to transfer the Hamilton Action to Toronto and consolidate it with the Toronto Action; the Holmes Defendants, the Greyslone/Belview defendants and Mr. Fussie oppose that request. The issues of transfer and consolidation are inextricably linked together, so I will consider them at the same time.

B.1 The applicable Rules and their jurisprudence

40 Rule 13.1.02(2) of the *Rules of Civil Procedure* sets out the considerations which a court must take into account when determining a request to transfer a proceeding from one county to the other:

> 13.1.02(2) If subrule (1) does not apply, the court may, on any party's motion, make an order to transfer the proceeding to a county other than the one where it was commenced, if the court is satisfied,
>
> (a) that it is likely that a fair hearing cannot be held in the county where the proceeding was commenced; or
>
> (b) that a transfer is desirable in the interest of justice, having regard to,
>
> (i) where a substantial part of the events or omissions that gave rise to the claim occurred,

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(ii) where a substantial part of the damages were sustained,

(iii) where the subject-matter of the proceeding is or was located,

(iv) any local community's interest in the subject-matter of the proceeding,

(v) the convenience of the parties, the witnesses and the court,

(vi) whether there are counterclaims, crossclaims, or third or subsequent party claims,

(vii) any advantages or disadvantages of a particular place with respect to securing the just, most expeditious and least expensive determination of the proceeding on its merits,

(viii) whether judges and court facilities are available at the other county, and

(ix) any other relevant matter.

41 I expressed my understanding of the jurisprudence under this rule in *Hallman v. Pure Spousal Trust (Trustee of)* where I wrote:

> The rule does not state that the initiating party must justify the choice as a reasonable one. If one of the parties opposite thinks the choice an unreasonable one for whatever reason, it may bring a motion to change the venue. On that motion the court should engage in the "holistic" exercise described in *Eveready* of considering the enumerated factors, including "any other relevant matter", in order to determine whether the moving party has demonstrated that "a transfer is desirable in the interest of justice".
>
> Certainly when one looks back at the history of earlier change of venue rules one sees courts imposing a requirement on the initiating party to select only a venue that had a rational connection with the cause of action or the parties - the history of that requirement is set out in detail in *Eveready*: paras. 12 to 15. However, as noted in *Eveready*, the requirement did not find favour with all judges: see *Eveready*, para. 16. While the connection of the venue to the parties and the subject-matter of the dispute are factors to be taken into account in the overall analysis under Rule 13.1.02(2), I agree with the analysis in *Eveready* that a court should approach the venue issue by weighing and considering each of the enumerated factors in order to determine whether a transfer of venue is desirable in the interest of justice. As echoed by M. F. Brown J. in *Patry v. Sudbury Regional Hospital* [2009] O.J. No. 1060 (S.C.J.):
>
> > The law is well established that change of venue motions are fact specific. The current rule makes it clear that none of the enumerated factors are more important than the other and all of those factors and any other factors relevant to the location

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> of the action must be balanced to ensure that a proceeding is transferred from the county where it was commenced only if such transfer is "desirable in the interest of justice". (para. 13)

Such a holistic approach best reflects the policy choices underpinning the language of the rule. [3]

42 Rule 6 of the *Rules of Civil Procedure* describes the circumstances under which a court may order the consolidation of two proceedings:

> 6.01(1) Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) they have a question of law or fact in common;
>
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
>
> (c) for any other reason an order ought to be made under this rule,
>
> the court may order that,
>
> (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
>
> (e) any of the proceedings be,
>
> (i) stayed until after the determination of any other of them, or
>
> (ii) asserted by way of counterclaim in any other of them.
>
> (2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.
>
> 6.02 Where the court has made an order that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise.

43 Perell and Morden, in *The Law of Civil Procedure in Ontario, First Edition*, explained the key considerations underlying the consolidation rule:

> Before making a consolidation order or an order for a trial together, the court will consider whether the criteria defined by the rule have been satisfied and then consider whether the balance of convenience favours such an order. It is not appropriate to

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> consolidate actions arising from separate and distinct occurrences. In assessing whether there is a question of fact or law common to both proceedings, the focus is on whether the proposed common issue has sufficient importance in relation to the other facts or issues such that it would be desirable that the matters be consolidated, heard at the same time, or after each other.
>
> The underlying policy of the consolidation rule is to avoid a multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes, and to avoid inconsistent judicial findings. In exercising its discretion whether to order the consolidation of proceedings or that they be heard simultaneously or consecutively, the court will consider the general rule, mandated by the *Courts of Justice Act*, that, as far as possible, multiplicity of proceedings shall be avoided, and a variety of factors including: (1) the extent of the difference of commonality of the factual or issues in the proceedings; (2) the status of the progress of the several proceedings; and (3) the convenience or inconvenience, in terms of time, money, due process and administration, of bringing the proceedings together. [4]

To this I would add the comments made by Quinn J. in *Wood v. Farr Ford Ltd.*:

> The customarily expressed purpose of rule 6 is to avoid multiplicity of proceedings, thereby preventing inconsistent dispositions, protecting the scarce resources of the court and saving expense to the parties. However, it also safeguards against a tactical decision to subject a party or parties to more than one action and, therefore, it promotes fairness. [5]

44 One can find in the case law several expressions of the variety of factors which a court should take into account when considering a request to consolidate proceedings. A very comprehensive one was offered by Master Dash in *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*:

> A non-exhaustive list of some of the considerations on ordering trial together may, depending on the circumstances, include:
>
> (a) the extent to which the issues in each action are interwoven;
>
> (b) whether the same damages are sought in both actions, in whole or in part;
>
> (c) whether damages overlap and whether a global assessment of damages is required;
>
> (d) whether there is expected to be a significant overlap of evidence or of witnesses among the various actions;

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(e) whether the parties the same;

(f) whether the lawyers are the same;

(g) whether there is a risk of inconsistent findings or judgment if the actions are not joined;

(h) whether the issues in one action are relatively straight forward compared to the complexity of the other actions;

(i) whether a decision in one action, if kept separate and tried first would likely put an end to the other actions or significantly narrow the issues for the other actions or significantly increase the likelihood of settlement;

(j) the litigation status of each action;

(k) whether there is a jury notice in one or more but not all of the actions;

(l) whether, if the actions are combined, certain interlocutory steps not yet taken in some of the actions, such as examinations for discovery, may be avoided by relying on transcripts from the more advanced action;

(m) the timing of the motion and the possibility of delay;

(n) whether any of the parties will save costs or alternatively have their costs increased if the actions are tried together;

(o) any advantage or prejudice the parties are likely to experience if the actions are kept separate or if they are to be tried together;

(p) whether trial together of all of the actions would result in undue procedural complexities that cannot easily be dealt with by the trial judge;

(q) whether the motion is brought on consent or over the objection of one or more parties.

6

B.2 Considering the factors presented by these proceedings

45 I start by considering the issue of whether the Toronto and Hamilton Actions should be consolidated because a determination of that issue will play a large role in deciding whether the Hamilton Action should be transferred to Toronto.

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46 Based on my review of the pleadings in the Toronto and Hamilton Actions, it is clear that both actions have substantial facts in common and that the relief claimed in them arises, in large part, out of the same transaction or occurrence, or series of transactions or occurrences. The main issue in the Toronto Action is whether Mr. Holmes, and the other defendants, engaged in the wrongful conduct alleged by CN. That factual inquiry, and the evidence related to it, will play a large role in the Hamilton Action. Although Mr. Holmes and Ms. Flynn plead several causes of action in the Hamilton Action, a significant part of the factual inquiry in that proceeding will focus on two questions: (i) did the CN Police have reasonable cause to lay the charges against Mr. Holmes and Ms. Flynn, and (ii) did the CN Police act for an improper purpose in so doing? [7] A consideration of the question of reasonable cause, in turn, will require the review of (a) evidence concerning the officers' subjective beliefs that they had reasonable and probable grounds to charge the Hamilton plaintiffs and (b) evidence that a reasonable person, placed in the position of the officer, would have believed that reasonable and probable grounds existed to lay those charges. [8] Although the issue of the officers' subjective beliefs does not arise in the Toronto Action, certainly the evidence with respect to the existence of objective grounds for reasonable cause will track that in the Toronto Action.

47 Further, notwithstanding the limitations surrounding the defence of *ex turpi causa*, [9] the pleadings disclose that the evidence CN and the CN Police will rely upon in the Hamilton Action in support of that defence will draw largely upon the same evidence they adduce in support of their defence of the existence of reasonable cause which, in turn, will overlap significantly with the evidence the plaintiffs will adduce in the Toronto Action. Finally, in the Hamilton Action the plaintiffs have put in issue the conduct of CN in obtaining certain orders in the Toronto Action, adding to the evidentiary overlap.

48 Now, it is true that the issue of the appropriateness of the purpose of the criminal proceedings does not arise in the Toronto Action, but the issue of purpose will draw, in part, on evidence regarding the conduct of the Holmes Defendants. As well, although the Hamilton plaintiffs have also pleaded a claim in defamation, from an evidentiary perspective, that claim will play a minor role in the trial of the Hamilton Action.

49 In sum, while the issues pleaded in both actions are not identical, certainly the evidence which will be led in respect of the issues in the Toronto Action will play a very large role in the adjudication of the issues pleaded in the Hamilton Action. In other words, there will be a *very significant* overlap of evidence in the two proceedings. That factor points very strongly to some form of joinder of the two proceedings.

50 So, too, the substantial commonality of the factual matrix for the Toronto and Hamilton Actions necessitates some joinder of the actions in order to keep pre-trial discovery costs

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within some manageable range. Simply put, there is no need for the parties to have to tell the same story twice before trial in two different proceedings.

51 I do not regard the commencement of the two proceedings in different judicial regions as a major factor. CN commenced its action in Toronto, but Mr. Holmes did not move to change its venue. Moreover, the trip between Toronto and Hamilton is a mere daily commute for many people; it is not a road trip to some faraway land.

52 As a factor militating against joinder Ms. Flynn submitted that in the Hamilton Action she retained joint counsel with her husband, Scott Holmes, whereas in the Toronto Action she has separate counsel. I do not regard that as a reason against ordering some joinder of the two actions. The choice of retaining two different counsel was Ms. Flynn's to make, and it is open to her to instruct her different counsel to conduct themselves in a manner which will minimize the overall costs to her.

53 There is not an identity of parties in the two actions — the Sousa and Greyslone/Belview defendants are not named in the Hamilton Action and the CN Management defendants and CN Police are not named in the Toronto Action. I do not see this factor as militating against some form of joinder of the two actions. Certainly efforts should be made in the proceedings' Rule 29.1 discovery plan to schedule examinations for discovery in such a way as to ensure that only those parties who need to attend a particular examination do so, and a similar efficiency should be brought to dealing with any interlocutory motions. I have no doubt that continued case management of the proceedings and the preparation of a joint Rule 29.1 discovery plan can achieve those goals, both with respect to any pre-trial steps, as well as with developing a fair and cost-effective trial management plan.

54 One significant difference between the two actions does exist - the form of the trial. The plaintiffs served a jury notice in the Hamilton Action, whereas none has been served in the Toronto Action. The right to a jury in a civil action is a substantive right which should only be displaced in whole or in part upon it being established clearly that the issues to be tried are not appropriate for resolution by a jury. [10] CN requests that I strike out the jury notice. I am not prepared to do so at this early stage of the proceeding. Productions and discoveries have not yet occurred, nor is it clear whether expert evidence will be adduced at trial. The factual complexity of the trials has not yet come into focus, so it would be premature, in my view, to consider whether the jury notice should be struck. I fully recognize the difficulties associated with the prospect of a trial of the Toronto Action by judge alone and that of the Hamilton Action by judge and jury, including the risk of inconsistent findings of fact, but that important issue can be re-visited at a later date when more will be known about how the parties intend to present their cases at trial. Moreover, the existence of the jury notice does not prevent some of form of joinder of these two actions in order to bring cost benefits to the pre-trial preparation of the cases.

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55 CN has demonstrated the existence of factors specified in Rule 6.01(1)(a) and (b) and, as well, that the balance of convenience justifies some joinder of these actions. I am not prepared to consolidate them, but I do grant the alternative relief sought by CN that the two actions be heard one immediately after the other. I transfer the Hamilton Action to the Toronto Region Commercial List. The parties have litigated for some time on the Commercial List, without protest about the venue, so I tend to regard the commencement of the Hamilton Action in that venue as more in the nature of a tactical step. In order that efficiencies from joinder are achieved in the pre-trial steps of the proceedings, I order the parties in both actions to continue with the case management of the proceedings before C. Campbell J. and I also order the parties to both actions to develop a joint Rule 29.1 discovery plan.

C. Establishing a timetable for the actions

56 Both CN and the Holmes Defendants seek orders establishing a timetable for the Toronto Action. I completely agree that a joint timetable should be imposed for the Toronto and Hamilton Actions. No party filed a proposed timetable, so I can hardly impose one in the absence of any proposals. I direct the parties to secure a 9:30 a.m. appointment before C. Campbell J. within the next three weeks in order to establish a joint timetable for both proceedings. The parties must exchange and file proposed timetables at least three days before that appointment. Of course, I would encourage the parties to discuss and agree upon a joint timetable.

D. Setting aside the Protocol Order

57 CN seeks an order varying the Protocol Order of December 4, 2008. That order was not placed in the record before me. Without an opportunity to review that order, I cannot consider varying it. The parties are to place this matter on the agenda of the 9:30 a.m. appointment which I have directed them to book with C. Campbell J.

VI. Conclusion and directions

58 For the reasons set forth above, I make the following orders:

(i) I grant the motions of CN and the CN Police to transfer the Hamilton Action to the Toronto Region Commercial List;

(ii) I dismiss the Holmes Defendants' motion to remove the Toronto Action from the Commercial List;

(iii) I order that the Toronto Action and the Hamilton Action be heard one immediately after the other;

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(iv) I order the parties in both actions to continue with the case management of the proceedings before C. Campbell J.;

(v) I direct the parties to secure a 9:30 a.m. appointment before C. Campbell J. within the next three weeks in order to establish a joint timetable for both proceedings. The parties must exchange and file proposed timetables at least three days before that appointment. The issue of the variation of the Protocol Order shall be placed on the agenda of that 9:30 a.m. appointment; and,

(vi) I also order the parties to both actions to develop a joint Rule 29.1 discovery plan.

59 I wish to make one final comment concerning the reasonable and proper expectations of parties about the case management of these proceedings in light of section 33 of the Commercial List Practice Direction which enunciates the policy that one judge should hear the whole of a matter on the Commercial List. In *Abrams v. Abrams* I offered the following observations about how case management inevitably operates under such a system:

> It is apparent that Mr. Abrams has challenged my jurisdiction to make such directions because they do not accord with the way he wishes to litigate this proceeding. Judicial management of high-conflict cases, such as this one, involves, at times, a certain amount of "judicial squeezing" in order to advance the case to a hearing in a timely and proportionate manner. Not all parties take kindly to such squeezing. But, it is worth recalling the comments made by Master Haberman in her decision in *Mother of God Church v. Balolis* where one party sought the recusal of a case management master with whose directions it did not agree:
>
> > It is understood that, in a case managed environment, there will be times when the master forms an impression about how one party or the other has been conducting itself as a result of this repeated exposure. If the view is unfavourable, that, in and of itself, does not give rise to a basis for recusal. One must still meet the test that has been articulated by the Supreme Court of Canada. Similarly, if the master's repeated dealings with the parties and the issues gives rise to a sense that there is more merit to one side than the other, that, too, will not suffice to prevent further handling of the case. *That is precisely what case management was intended to do - create an expeditious and cost effective way to resolve all aspects of the disputes that come before the courts, by allowing judges/masters to become familiar with the case through repeated exposure.* [11]
>
> In other words, some amount of judicial squeezing accompanies litigation management. If some pinching occurs, that does not signal a lack of jurisdiction or bias, but simply a necessary degree of judicial hammering to bang a case back into proper procedural

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shape. The recent adoption of the principle of proportionality signals that the sound of the judicial hammer will only get louder. [12]

VII. Costs

60 I would encourage the parties to try to settle the costs of this motion. If they cannot, any party seeking costs may serve and file with my office written cost submissions, together with a Bill of Costs, by Monday, August 29, 2011. Any party opposing a request for costs may serve and file with my office responding written cost submissions by Friday, September 9, 2011. The costs submissions shall not exceed four pages in length, excluding the Bill of Costs.

Motion granted in part.

Footnotes

1 R.S.O. 1990, c. C.43.

2 Rule 1.04(1) of the *Rules of Civil Procedure*.

3 (2009), 80 C.P.C. (6th) 139 (Ont. S.C.J.), paras. 28 and 29.

4 Paul Perell and John Morden, *The Law of Civil Procedure in Ontario, First Edition* (LexisNexis: Toronto, 2010), p. 316.

5 (2008), 67 C.P.C. (6th) 23 (Ont. S.C.J.), para. 23.

6 2010 ONSC 3306 (Ont. Master), para. 18.

7 I recently canvassed the case law concerning the elements of false arrest, trespass, malicious prosecution, negligent investigation and breach of *Charter* rights in *Russell v. York Police Services Board*, 2011 ONSC 4619 (Ont. S.C.J.), (CanLII) at paras. 146 to 183

8 *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), para. 17.

9 *British Columbia v. Zastowny*, [2008] 1 S.C.R. 27 (S.C.C.), para. 20.

10 *Clark v. McLauchlan*, [2002] O.J. No. 1968 (Ont. S.C.J.), para. 26.

11 *Mother of God Church v. Balalis* [2005] O.J. No. 1638, at para. 30 (Master, S.C.J.). (Emphasis added.)

12 (2010), 102 O.R. (3d) 645 (Ont. S.C.J.), para. 65.

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TAB 4

2008 CarswellOnt 5100
Ontario Superior Court of Justice

Logtenberg v. ING Insurance Co.

2008 CarswellOnt 5100, [2008] O.J. No. 3394,
169 A.C.W.S. (3d) 32, 66 C.C.L.I. (4th) 145

Lynn Logtenberg (Plaintiff) and ING Insurance Company and Acclaim Ability Management Inc. (Defendants)

R.D. Gordon J.

Heard: June 18, 2008
Judgment: July 7, 2008
Docket: C-10670/08

Counsel: Patrick Wymes for Plaintiff
Kadey Schultz for Defendants

Subject: Civil Practice and Procedure; Insurance; Torts
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.d Joinder of claims
Insurance
X Actions on policies
X.2 Practice and procedure
X.2.f Joinder and consolidation
Headnote
Civil practice and procedure — Pleadings — Statement of claim — Joinder of claims — General principles
Plaintiff alleged she was injured in motor vehicle accident — On November 30, 2004, plaintiff and her immediate family commenced tort claim against driver and owner of other vehicle ("tort action") — Productions and discovery of defendants were complete and discovery of plaintiff was to continue in fall — Plaintiff alone commenced action herein on January 25, 2008 against insurer claiming inter alia accident benefits and damages for breach of contract and negligence ("bad faith action"), for which she was self-represented — Insurer moved for order that tort action be tried together with bad faith action — Motion dismissed — While both proceedings had common question of fact, order was not appropriate — Given evidence

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of plaintiff's inability to function effectively for more than short periods of time and given that she was self-represented in one action, it was likely that trial time would be increased having actions heard together — There were no expected savings in experts' time or witness fees — Tort action was more advanced than bad faith action and it was unlikely that it would be ready for trial within reasonable time frame — Plaintiff stood to suffer substantial prejudice if tort action was delayed in regard to her financial situation and her health, whereas there was no evidence that insurer would be prejudiced by having two actions tried independently.
Insurance — Actions on policies — Practice and procedure — Joinder and consolidation
Plaintiff alleged she was injured in motor vehicle accident — On November 30, 2004, plaintiff and her immediate family commenced tort claim against driver and owner of other vehicle ("tort action") — Productions and discovery of defendants were complete and discovery of plaintiff was to continue in fall — Plaintiff alone commenced action herein on January 25, 2008 against insurer claiming inter alia accident benefits and damages for breach of contract and negligence ("bad faith action"), for which she was self-represented — Insurer moved for order that tort action be tried together with bad faith action — Motion dismissed — While both proceedings had common question of fact, order was not appropriate — Given evidence of plaintiff's inability to function effectively for more than short periods of time and given that she was self-represented in one action, it was likely that trial time would be increased having actions heard together — There were no expected savings in experts' time or witness fees — Tort action was more advanced than bad faith action and it was unlikely that it would be ready for trial within reasonable time frame — Plaintiff stood to suffer substantial prejudice if tort action was delayed in regard to her financial situation and her health, whereas there was no evidence that insurer would be prejudiced by having two actions tried independently.

Table of Authorities

Cases considered by *R.D. Gordon J.*:

Shah v. Bakken (1996), 1996 CarswellBC 289, 46 C.P.C. (3d) 205, 20 B.C.L.R. (3d) 393 (B.C. Master) — followed

Webster v. Webster (1979), 12 B.C.L.R. 172, 1979 CarswellBC 129, 10 C.P.C. 248 (B.C. S.C.) — followed

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 6 — referred to

R. 6.01(1)(a) — considered

R. 6.01(1)(b) — considered

R. 6.01(1)(c) — considered

R. 57.01 — referred to

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MOTION by defendant insurer for order that plaintiff's tort action against owner and other driver be tried together with plaintiff's bad faith action against insurer.

R.D. Gordon J.:

1 This decision pertains to a motion brought by the defendant ING Insurance Company (hereinafter referred to as "ING") asking that this action and the proceedings in Court File No. C-8534/04 be tried together or one immediately after the other.

2 The Plaintiff was involved in a motor vehicle accident on December 3, 2002 and alleges that she sustained injuries in this accident. She and the members of her immediate family began an action (Court File No. C-8534/04) against the driver and owner of the other vehicle involved in the accident alleging his responsibility for the accident and claiming various heads of damages, including non-pecuniary damages for pain and suffering, pecuniary damages for out-of-pocket expenses incurred as a result of the accident, damages for past and future cost of care, damages for costs of household and home maintenance chores, and damages for loss of income, loss of competitive advantage and loss of earning capacity. Her immediate family has advanced what are commonly known as Family Law Act claims. Mr. Wymes is solicitor of record in this action. The claim was issued on November 30, 2004. Discovery of the Defendants is complete. Discovery of the Plaintiff is to continue this fall. Productions are complete. From the Plaintiff's perspective, the matter is ready to be set down for trial. I will refer to this action hereafter as the "tort claim".

3 The Plaintiff has also issued the action against ING and Acclaim Ability Management Inc. under which this motion is brought. Lynn Logtenberg is the sole Plaintiff in this action and she is self-represented. For the purposes of this motion, Mr. Wymes attended and made argument on her behalf. This claim was issued January 25, 2008 and claims accident benefits, damages for breach of contract, negligence, misrepresentation, breach of fiduciary duty, bad faith, mental anguish and distress and intentional infliction of mental anguish and distress. It also claims aggravated, exemplary and/or punitive damages and a declaration that the Defendants acted in bad faith. Discovery of the Plaintiff has yet to take place in this action. Discovery of a representative of ING has yet to be undertaken. There is little doubt that there will be motions brought by the Plaintiff to discover more than one representative of ING and to have certain production issues addressed. I rather suspect that ING will also have a motion relative to production. I will refer to this action hereafter as the "bad faith claim".

4 The grounds advanced by ING in support of its motion are that:

1. Both actions relate to damages arising from the same motor vehicle accident;

2. Both actions involve common questions of fact and law; and

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3. The issues of apportionment of damages between the defendants are contingent on findings of fact as against each of the defendants in both proceedings.

5 It is the contention of ING that the trial of these actions together or one following the other would result in the most expeditious and least expensive determination of the civil proceedings and would avoid duplicitous and possibly inconsistent rulings given by separate courts.

6 I am advised that the remaining defendants in each action consent to the relief sought by ING. The Plaintiff does not. The Plaintiff contests the motion on the following bases:

1. That ING gas not met the onus required for the order requested;

2. That the actions are at very different stages and considerable delay and prejudice would result to the Plaintiff if the order were granted;

3. The nature of the two claims are very different;

4. There are different parties in the two claims;

5. There is no prejudice to ING if its request is denied;

6. There are few, if any, witnesses who are common to each action;

7. The Plaintiff's disabilities would make it extremely difficult for her to prepare and attend at two trials within a short period of time.

7 I believe that it is now commonly accepted that the underlying policy of Rule 6 is to avoid a multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes and to avoid inconsistent judicial findings.

8 In order for a moving party to be successful in having the court consider its request to have two actions tried together or one immediately following the other, it has the onus of meeting one of the criteria set out in Rule 6, namely that:

(a) the separate proceedings have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule.

9 I am satisfied that the two proceedings have a question of fact in common. Indeed, the Plaintiff as much as admits the same in paragraph 14 of her factum. The nature of the Plaintiff's injuries, the extent of her disability, and whether or not such disability arose as a

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result of the motor vehicle accident in question are issues that will figure to one extent or another in both actions.

10 As ING has satisfied one of the criteria set out in Rule 6, it becomes necessary to consider other factors that might lead a court to consider whether or not the requested order ought to be granted. This involves a balancing of such factors as expediency, convenience and prejudice to the parties. A useful list of criteria has been developed in the cases of *Webster v. Webster* (1979), 12 B.C.L.R. 172 (B.C. S.C.) and *Shah v. Bakken*, [1996] B.C.J. No. 2836 (B.C. Master):

- Will the order sought create a savings in pretrial procedures?
- Will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?
- What is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may only have a marginal interest?
- Will there be real savings in experts' time and witness fees?
- Is one of the actions at a more advanced stage than the other?
- Will the order result in a delay on one of the actions?
- Are any of the actions proceedings in a different fashion?

11 When I consider these issues, it is my opinion that the order requested by ING is not appropriate in the circumstances of this case for the following reasons.

12 There is no evidence before me upon which I could find that there would be a savings in pre-trial procedures.

13 There is no evidence before me upon which I am able to find that there will be a real reduction in the number of trial days taken up by the trials being heard at the same time or one immediately following the other. On the contrary, given the evidence of the Plaintiff's inability to function effectively for anything more than short periods of time, and given that she is represented in only one of the actions, it is likely that trial time would be increased by having the actions heard together.

14 There is little evidence before me by which I can find that there would be any real savings in experts' time and witness fees. The Plaintiff has provided evidence that in fact the witnesses will largely be different at the two trials. ING has not provided a list of witnesses. Furthermore, in the event a combined trial lasts longer than the two trials heard individually, it is likely that there would be no such savings.

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15 On the evidence before me, it is hard to imagine that the tort action is not far more advanced than the bad faith action. In the tort action discoveries are nearly complete. In the bad faith action they have not yet begun. In the tort action, document production is complete. In the bad faith action, not only is document production not complete, but there are motions contemplated with regard to it. Given the history of the first six months of the bad faith action, and the number of motions already brought within it, it is very unlikely that it will be ready for trial within any reasonable time frame. I recognize that it is the position of ING that any delay in the bad faith action has been the fault of the Plaintiff. However, I do not have sufficient evidence before me to make that determination and in any event, that has little bearing on what amount of time it will take to get the action ready to proceed to trial in the future. In my view, the order sought by ING will almost certainly result in a delay in getting the tort action to trial.

16 I will add that although there are some common elements to the two actions, there are many elements that are completely different. For example, in the bad faith action, some damages are claimed which are not related to the injuries suffered in the motor vehicle accident, but are alleged to be the result of the poor treatment of the insured by the insurer. This issue exists completely independently of the tort action and is based upon an entirely different set of allegations.

17 Lastly, it is apparent from the evidence before me that the Plaintiff stands to suffer substantial prejudice if the tort action is delayed both in regards to her financial situation and her health. There is no evidence before me to support the notion that ING would be prejudiced by having the two actions tried independently.

18 When one balances all of these considerations, it is apparent that this is not a situation where it is appropriate to order that the actions be tried together or one immediately following the other notwithstanding that there are some common factual issues.

19 Given that the Plaintiff has been successful in defending ING's motion, it is appropriate that it have its costs on a partial indemnity basis. Considering the costs outline provided by Mr. Wymes and the various factors set out in Rule 57.01 the sum of $3,500.00, all inclusive, is a reasonable and appropriate costs award in all of the circumstances. Such amount is payable forthwith.

20 Counsel for the Defendant in the tort action appeared on this motion and made argument in support thereof. It does not seem appropriate that there be an award of costs in favour of or against this party.

Motion dismissed.

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TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2013 ONSC 2042
Ontario Superior Court of Justice

Marchant (Litigation Guardian of) v. RBC Dominion Securities Inc.

2013 CarswellOnt 4323, 2013 ONSC 2042, 228 A.C.W.S. (3d) 368, 88 E.T.R. (3d) 232

Edward Marchant as Litigation Guardian on Behalf of Andrew Marchant, a Minor, Respondent/Plaintiff and RBC Dominion Securities Inc., Jerry Crawford and Rosemary Marchant, Respondents/Defendants and Kenning Marchant, Colin Marchant, Rosemary Marchant and Ian Marchant, Appellants/Third Parties and Barry Paquette and Paquette, Travers and Hussein, Respondents

Goldstein J.

Heard: April 2, 2013
Judgment: April 10, 2013
Docket: CV-09-384665-00A1

Counsel: No one for Respondent / Plaintiff
Marc Kestenberg, for Respondents / Defendants, RBC Dominion Securities Inc., Jerry Crawford
Shael Eisen, Pia H. Hundal, for Respondent / Defendant, Rosemary Marchant
Kenning Marchant, for Appellants / Third Parties
Rebecca Studin, for Barry Paquette, Paquette, Travers & Hussein

Subject: Civil Practice and Procedure; Estates and Trusts; Public; Torts

Related Abridgment Classifications

Civil practice and procedure
XIX Pre-trial procedures
XIX.6 Consolidation or hearing together
XIX.6.b Hearing together or sequentially

Headnote

Civil practice and procedure --- Pre-trial procedures — Consolidation or hearing together — Hearing together or sequentially

Trust was set up for benefit of EM — Settlor was EM's grandmother — RM was trustee of trust and of grandmother's will — One faction of M family brought motion to have five proceedings arising from dispute heard together — These were: application by EM against

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RM for breach of fiduciary duty and removal of RM as trustee of trust; contested passing of accounts in relation to grandmother's estate; action by EM against RBC and C for negligence in relation to assets of trust; third party claim against RM by RBC and C for indemnity; and solicitor's negligence action by RM against P — Master dismissed motion — Appeal dismissed — Master determined that factors in R. 6 of Rules of Civil Procedure militated against trying actions and applications together, and doubted that she had jurisdiction to make some of orders requested — Master did not err by failing to properly apply R. 6 of Rules — She found there was common threshold issue as between proceedings, namely, whether RM breached her various fiduciary duties; and that balance of convenience did not favour compelling RBC and C to participate in M family estate matters — Master's conclusion was unassailable — She took into account relevant factors and did not apply irrelevant ones — Master did not err by finding that she did not have jurisdiction to make some aspects of order sought — She found that her order would have effect of converting application into action — Only judge can make such order — Master found she had no jurisdiction to transfer Kitchener matters to Toronto — Only judge can transfer matters on estate list — Master noted that RM had brought motion for case management, which she found was more suitable for these matters than R. 6 order — Master's decision was discretionary one — There being no error, her decision was entitled to deference.

Table of Authorities

Cases considered by *Goldstein J.*:

Coulls v. Pinto (2007), 2007 CarswellOnt 7050, 48 C.P.C. (6th) 183 (Ont. Master) — followed

Ivandaeva Total Image Salon Inc. v. Hlembizky (2003), 29 C.P.C. (5th) 66, 169 O.A.C. 354, 2003 CarswellOnt 868, 63 O.R. (3d) 769, 225 D.L.R. (4th) 322 (Ont. C.A.) — referred to

Logienberg v. ING Insurance Co. (2008), 2008 CarswellOnt 5100, 66 C.C.L.I. (4th) 145 (Ont. S.C.J.) — referred to

Paul v. Pizale (2011), 2011 ONSC 3490, 2011 CarswellOnt 4539 (Ont. S.C.J.) — followed

Shah v. Bakken (1996), 1996 CarswellBC 289, 46 C.P.C. (3d) 205, 20 B.C.L.R. (3d) 393 (B.C. Master) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 6 — considered

R. 6.01 — considered

R. 38.10 — considered

R. 75 — considered

APPEAL from decision dismissing motion to have five proceedings heard together.

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Goldstein J.:

1 The Marchant family appears determined to consume itself and others in a family dispute over a relatively small amount of money. To that end, there have been at least five different proceedings in the Superior Court. The family is split into factions. One faction brought a motion to have the five proceedings heard together. Master Abrams dismissed the motion. On April 2, 2013 I dismissed an appeal from that decision with costs. I made the following endorsement:

> I am not persuaded that Master Abrams erred. The appeal is dismissed. I will issue more extensive reasons.

These are my reasons.

Background

2 The background facts and the five proceedings are summarized in the decision of Master Abrams and there is no need for me to significantly expand on those points here. Briefly, a trust was set up for the benefit of Edward Marchant to provide for his education. The Settlor was Edward's grandmother, Edith Marchant. Rosemary Marchant was the trustee of the trust. Rosemary was also the trustee of Edith's will.

3 The five proceedings are:

- An application by Edward (by his litigation guardian, Andrew Marchant), against Rosemary for breach of fiduciary duty and removal of Rosemary as trustee of the trust. Andrew is Edward's first cousin. Rosemary is Edward's aunt.

- A contested passing of accounts in relation to the estate of Edith. As noted, Rosemary is also the trustee of the estate.

- An action by Edward (again, by his litigation guardian, Andrew) against RBC Dominion Securities and Jerry Crawford for negligence in relation to the assets of the trust. It is alleged that RBC and Crawford gave negligent investment advice.

- A third party claim against Rosemary by RBC and Crawford for indemnity in relation to the action brought by Andrew.

- A solicitor's negligence action by Rosemary against Barry Paquette for allegedly negligent advice given in relation to the trust. That action was stayed by order of Master Dash.

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4 The faction that brought the motion is made up of Colin, Kenning, and Ian Marchant. They are the brothers of Rosemary. Kenning, who is a lawyer, acts for himself on this appeal as well as for Colin and Ian. Two of the proceedings are in Kitchener; three are in Toronto.

5 Master Abrams exercised her discretion by determining that the factors in Rule 6 militated against trying the actions and applications together. The Master also doubted that she had jurisdiction to make some of the orders requested.

Analysis

6 The Appellants argue that Master Abrams erred as follows:

1. Failing to properly apply Rule 6.01;

2. By finding that she did not have jurisdiction to make some aspects of the order sought; and,

3. By failing to make the required ancillary orders, including the lifting of a stay of proceedings.

1. Did the Master err by Failing to Properly Apply the Rule 6?

7 The standard of review that this Court will exercise on appeal from a master was summarized by Strathy J. in *Paul v. Pizale*, 2011 ONSC 3490 (Ont. S.C.J.):

> 19 The standard of review on appeal from the Master was set out by the Divisional Court in *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Ont. Div. Ct.), aff'd, (2009), 96 O.R. (3d) 639 (Ont. C.A.): the decision should not be interfered with unless the Master made an error of law, exercised his or her discretion on the wrong principles or misapprehended the evidence such that there was a palpable or overriding error. Where there is an error of law, the standard of review is correctness, whether the order is final or interlocutory. Where there is an error in the exercise of discretion, it must be established that the discretion was based on a wrong principle or that there was a palpable or overriding error in the assessment. See also *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.).

8 The Appellant does not quarrel with the Master's statement of the principles by which she is bound as set out in the first paragraph of her reasons. The Appellant's position is that the Master improperly applied those principles and took into account irrelevant factors.

9 The motion before Master Abrams was governed by Rule 6, which states:

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6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule, the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

10 Ultimately, the use of the word "may" indicates that the decision made by the Master is a discretionary one. Thus, the Master's decision is accorded a substantial degree of deference unless her discretion was based on a wrong principle or there was a palpable or overriding error in the assessment.

11 In my respectful view the test for a motion under Rule 6 was properly set out by Master Glustein in *Coulls v. Pinto*, [2007] O.J. No. 4241, 48 C.P.C. (6th) 183, 2007 CarswellOnt 7050 (Ont. Master):

18 The parties agree that the underlying policy of Rule 6 is to avoid a multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes and to avoid inconsistent judicial findings (*Pilon v. Janveaux*, [2000] O.J. No. 4743 (S.C.J.) at para. 6).

19 The parties also agree that if I find that there is either (i) a question of law or fact in common (under Rule 6.01(1)(a)), or (ii) the relief arises out of the same transaction or occurrence or series of transactions or occurrences (under Rule 6.01(1)(b)), or (iii) another reason why an order under Rule 6 ought to be made (under Rule 6.01(1)(c)), the court must still consider whether the balance of convenience favours such an order (*Drabinsky v. KPMG*, [1999] O.J. No. 3630 (S.C.J.)).

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> **20** Consequently, I first must determine whether any of the criteria under Rule 6.01(1) have been met. If so, I would then consider whether the balance of convenience favours such an order, pursuant to the discretionary factors which include: (i) will the order sought create a saving in pre-trial procedures, and in particular, pre-trial conferences; (ii) will there be a real reduction in the number of trial days taken up by the trials being heard at the same time; (iii) what is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest; (iv) will there be a real saving in experts' time and witness fees; (v) is one of the actions at a more advanced stage than the other, and (vi) will the order result in a delay of the trial of one of the actions, and if so, does any prejudice which a party may suffer as a result of that delay outweigh the potential benefits a combined trial might otherwise have (*Shah v. Bakken*, [1996] B.C.J. No. 2836 (S.C.) at paras. 14-15 ("*Shah*"); adopted by O'Neill J. in *McKee v. Thistlethwaite*, [2003] O.J. No. 2850 (S.C.J.) ("*McKee*") at para. 11).

12 See also *Logtenberg v. ING Insurance Co.*, 2008 CarswellOnt 5100, 66 C.C.L.I. (4th) 145 (Ont. S.C.J.). I note that Master Abrams referenced the criteria in *Shah v. Bakken* [1996 CarswellBC 289 (B.C. Master)], *supra*, in her decision.

13 As a first step, the Master found that there was a common threshold issue as between the proceedings, namely whether Rosemary breached her various fiduciary duties. I accept that there may have been some common evidence and some common witnesses. That said, I see no error in the Master's finding that only the threshold issue is a common legal issue.

14 As to the balance of convenience, the critical point of Master Abram's reasons is found in the following statement:

> The proceedings are primarily Marchant family Estate matters. While the Marchant family drew RBC Dominion Securities, Jerry Crawford, Barry Paquette and Mr. Paquette's firm into part of their family dispute, RBC Dominion Securities and Messrs. Paquette and Crawford are not and ought not to be part of the whole of the Marchant family dispute. Looking at the motion from the perspective of RBC Dominion Securities and Jerry Crawford only (and this by way of example), I accept that these two defendants have no interest in who the Trustee of the Estate may be (to be determined in the fiduciary duty application); they have no interest in the passing of the Estate's accounts (to be determined in the accounts application); and they have no interest in whether or not Barry Paquette and his firm provided negligent legal advice to Ms. Marchant in dealing with the Estate (to be determined in the solicitor's negligence action). To bundle this and the third party action, by way of example, with the other three proceedings and to compel all of the non-Marchant family parties to participate in a global mediation is to increase their costs and increase inconvenience to them, with little or no attendant benefit.

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15 The Master's conclusion is unassailable. In my view Master Abrams took into account relevant factors and did not apply irrelevant factors. I see no error of principle. I, therefore, find that Master Abrams did not err in her application of the relevant factors under Rule 6.01.

16 The Appellants also argue that the Master misapprehended the evidence. For example, Master Abrams found that the evidence of economy and bundling set out by the Appellants was self-serving. I see no error in her appreciation of that evidence. By self-serving, I read her reasons to mean that the Appellants looked to the resources that they would save, as opposed to the other participants in the proceedings and the justice system as a hole. Although it is not for me to second-guess the Master's evidentiary finding (unless, as noted, she misapprehended the evidence) I have reviewed the Affidavit of Ian Marchant. Not only do I see no error in her approach, I agree with her conclusion.

2. Did the Master Err by Finding that She Did Not Have Jurisdiction to make Some Aspects of the Order Sought?

17 The Appellants argue that Master Abrams erred by finding that by ordering the matters heard together she would be usurping the function of the applications judge. Given that one of the proceedings is an application, she found that her order would have the effect of converting an application into an action. In my view, this aspect of her decision is correct. Rule 38.10 is quite clear that only a judge can make such an order. I accept that it would be open to a Master to order that an action and an application can be heard together, given that Rule 6.01 refers to "proceedings" and does not differentiate between to the two types. That said, the Master was required to evaluate the effect of the order sought. The Appellants effectively asked for the Master to elevate form over substance. She declined to do so. I agree with her and see no error.

18 The Appellants also pointed to the Master's statement that she had no jurisdiction to transfer the Kitchener matters to Toronto because only a judge may transfer matters on the Estate List. They merely asked for a transfer without regard to the Estate List.

19 In my view, this submission seeks to create a distinction without a difference. It is clear from Rule 75 and the corresponding Practice Direction that only a judge may make such a transfer. To say, as the Appellants do, that it is only a transfer from the Superior Court in Kitchener to the Superior Court in Toronto ignores the reality that these are estates matters and governed by specific rules and a Practice Direction.

20 The Appellants also argue that Master Abrams erred by noting the fact that Rosemary has brought a motion before Then R.S.J. for case management. The Master stated that, in her view, case management was more suitable for these matters than a Rule 6 order. She noted that it was for Then R.S.J. to make that decision. In my view, there was no error by the

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Master. She was asked to make a discretionary decision. A Case Management Master like Master Abrams is an expert in civil procedure and practice. She is entitled to express her view as to the appropriate manner in which to manage a case and is entitled to take the fact that other management tools exist in making her decision. Since she made no error of principle in doing so, she is entitled to deference from a reviewing court.

3. Did the Master Err by Failing to Make the required Ancillary Orders, Including the Lifting of a Stay or Proceedings?

21 Given my findings on the first two issues, it is obvious that I do not need to find that the Master erred on this third issue. I will, for completeness, deal with the issue of the Master Dash order staying proceedings in the solicitor's negligence proceeding. The parties in the solicitor's negligence proceedings agreed as between themselves to hold the claim in abeyance pending the outcome of the estate litigation. Mr. Marchant argues that the stay should be set aside in the face of the agreement of the actual parties to that litigation, as well as in the face of their joint opposition where a proprietary interest can be shown. Although a person other than a party may move to set aside an order, standing must still be established: *Ivandaeva Total Image Salon Inc. v. Hlembizky* (2003), 63 O.R. (3d) 769 (Ont. C.A.). The proprietary interest is said by the Appellants to be the interest in the outcome of the litigation between Rosemary and the solicitor. Master Abrams found that the parties were not "affected" by the order, because, inter alia, their beneficial interests remain intact regardless of the existence of the stay. In my view, she was correct. There was no basis for her to set aside or vary the order.

Conclusion

22 As there were no errors made by Master Abrams, the appeal is dismissed.

Costs

23 At the hearing, after reviewing the costs outlines and submissions of the parties, I ordered that the following costs be paid:

- To RBC and Crawford: $6000.00
- To Paquette: $7000.00
- To Rosemary Marchant: $5000.00

Colin, Ian, and Kenning Marchant are jointly liable for these costs, which are to be paid within 30 days of today's date.

Appeal dismissed.

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TAB 6

Most Negative Treatment: Check subsequent history and related treatments.

2005 CarswellOnt 2283
Ontario Superior Court of Justice

Brown v. Matawa Project Management Group Inc.

2005 CarswellOnt 2283, [2005] O.J. No. 2313,
[2005] O.T.C. 429, 139 A.C.W.S. (3d) 816

ROBERT BROWN (Plaintiff) and MATAWA PROJECT MANAGEMENT GROUP INC. (Defendant)

Smith J.

Heard: March 10, 2005
Judgment: March 24, 2005
Docket: 04-0890

Counsel: Michael Harris for Plaintiff
G. Lorne Firman for Defendant

Subject: Civil Practice and Procedure; Employment; Public

Related Abridgment Classifications

Civil practice and procedure
XIX Pre-trial procedures
XIX.6 Consolidation or hearing together
XIX.6.b Hearing together or sequentially
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.h Miscellaneous

Headnote

Civil practice and procedure --- Pre-trial procedures — Consolidation or hearing together — Hearing together or sequentially

Plaintiffs were three employees of defendant management group who alleged constructive dismissal from employment — Each employee commenced separate action, two to proceed under Simplified Rules of Procedure and one in ordinary fashion — First two actions involved same defendant employer while third action involved different but related legal entity — All three actions were at pleadings stage — Two actions were scheduled for pre-trial and third had not yet proceeded to discovery — Employer brought motion for consolidation of all three actions or for sequential trial to proceed in ordinary fashion — Employees

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opposed consolidation on basis that first two actions would be delayed, employees would incur additional legal expenses and prejudice would attach by possible compromise of trial strategy — Motion granted in part; consolidation ordered of first two actions with third action to be tried immediately afterward by same judge — Employer failed to meet onus to justify consolidation of all three actions — All three actions arose from common fact situation but given simplified procedure of only two actions, consolidation with third action would delay and add additional expense — Defendant in third action was different entity than in first two actions — Reduction of trial time and facilitation of attendance of out of town witnesses was enhanced by consolidation and sequential trial of third action — No prejudice arose by reason of consolidation of first two actions and argument with respect to possible compromise of trial strategy was purely speculative.

Employment Law — Termination and dismissal — Miscellaneous issues

Plaintiffs were three employees of defendant management group who alleged constructive dismissal from employment — Each employee commenced separate action, two to proceed under Simplified Rules of Procedure and one in ordinary fashion — First two actions involved same defendant employer while third action involved different but related legal entity — All three actions were at pleadings stage — Two actions were scheduled for pre-trial and third had not yet proceeded to discovery — Employer brought motion for consolidation of all three actions or for sequential trial to proceed in ordinary fashion — Employees opposed consolidation on basis that first two actions would be delayed, employees would incur additional legal expenses and prejudice would attach by possible compromise of trial strategy. — Motion granted in part; consolidation ordered of first two actions with third action to be tried immediately afterward by same judge — Employer failed to meet onus to justify consolidation of all three actions — All three actions arose from common fact situation but given simplified procedure of only two actions, consolidation with third action would delay and add additional expense — Defendant in third action was different entity than in first two actions — Reduction of trial time and facilitation of attendance of out of town witnesses was enhanced by consolidation and sequential trial of third action — No prejudice arose by reason of consolidation of first two actions and argument with respect to possible compromise of trial strategy was purely speculative.

Table of Authorities

Cases considered by *Smith J.*:

Fruit of the Loom Inc. v. Chateau Lingerie Manufacturing Co. (1984), 3 C.I.P.R. 53, 79 C.P.R. (2d) 274, 1984 CarswellNat 582 (Fed. T.D.) — considered

Mon-Oil Ltd. v. R. (1989), (sub nom. *Mon-Oil Ltd. v. Canada*) 27 F.T.R. 50, 26 C.P.R. (3d) 379, 1989 CarswellNat 153 (Fed. T.D.) — considered

Shah v. Bakken (1996), 46 C.P.C. (3d) 205, 20 B.C.L.R. (3d) 393, 1996 CarswellBC 289 (B.C. Master) — considered

Webster v. Webster (1979), 12 B.C.L.R. 172, 10 C.P.C. 248, 1979 CarswellBC 129 (B.C. S.C.) — considered

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Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Generally — referred to

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

s. 138 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.04(1) — considered

R. 6.01 — considered

R. 76 [en. O. Reg. 533/95] — referred to

MOTION by defendants for consolidation or sequential trial of actions.

Smith J.:

1 There are three separate actions before the court. Two of those actions (CV-04-0889 (Benc) and CV-040890 (Brown)) have been commenced under the Simplified Rules of Procedure pursuant to Rule 76. The remaining action (CV-04-0891 (Tetlock)) has been commenced in the ordinary fashion.

2 The first two actions involve the same Defendant (Matawa Project Management Group Inc.) while the third action (Tetlock) involves a different but related legal entity (Matawa First Nations Management).

3 The Defendants have brought a motion for an order that all three actions be consolidated into one action or, in the alternative, that they be tried one after the other by the same trial judge. The Notice of Motion also requests an order that the Brown and Benc actions be removed from proceeding under the Simplified Procedure Rules and that they proceed in the ordinary fashion along with the Tetlock action.

4 Rule 6 of the *Rules of Civil Procedure* empowers a court to order consolidation proceedings in the following circumstances:

> **Where Order May Be Made**
>
> 6.01(1) Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) they have a question of law or fact in common;
>
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of occurrences; or

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(c) for any other reason an order ought to be made under this rule,

the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

5 The general policy underlying Rule 6 is aimed at avoiding a multiplicity of proceedings and the promotion of expeditious and inexpensive hearings. These principles are reflected in Section 138 of the *Courts of Justice Act* and also in Rule 1.04(1).

6 Rule 1.04(1) provides:

General Principle — These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

7 Section 138 of the *Courts of Justice Act* states:

Multiplicity of proceedings — As far as possible, multiplicity of legal proceedings shall be avoided.

8 A review of the three statements of claims indicates that all actions have a common question of law and arise from similar factual circumstances.

9 The defendants maintain that central to all three actions is a meeting of the Matawa Chiefs held on August 2, 2001 and alleged comments made at that meeting relative to each of the three plaintiffs.

10 The relief claimed by the plaintiffs arises from the same transaction namely, a decision by the defendants to suspend the employment of the plaintiffs pending an investigation. After a period of time, all plaintiffs advised their defendant employers that they if they were not reinstated they would consider themselves constructively dismissed. All three actions arise out of the suspension of the plaintiffs from their employment with the defendants.

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11 All three actions are currently at the pleadings stage although the Benc and the Brown actions were scheduled to be pre-tried on March 21, 2005 while the Tetlock case has not yet proceeded to the discovery stage.

12 The plaintiffs are currently represented by the same solicitor as are the defendants.

13 The argument of the plaintiffs against consolidation is threefold and can be summarized as follows:

> 1. consolidation would delay and impede the Benc and Brown cases from being heard in a timely fashion since they are at a different stage than the Tetlock action;
>
> 2. consolidation would cause the plaintiffs, Benc and Brown, to incur additional legal expenses, such as those involved in having to proceed to discoveries; and would undermine the primary rationale of the Simplified Procedure Rules;
>
> 3. consolidation could prejudice all plaintiffs by possibly compromising their trial strategy

14 The defendants submit that consolidation of all three actions is necessary, justified and sensible because it avoids trials of three separate actions arising out of similar or common factual circumstances. While acknowledging that the plaintiffs Benc and Brown may suffer some delay and additional expense by having to proceed in the ordinary course, the defendants argue that any such prejudice can be eliminated by case management and by an order for costs. Consolidation would reduce expense, court time and avoid the possibility of inconsistent findings.

15 The defendants submit that there is added and unnecessary expense and inconvenience in requiring them to call as witnesses their forensic accountant and all or some of the ten Matawa representatives present at the August 2 meeting at three separate trials.

16 If the three actions are not consolidated and are allowed to proceed separately at different times, the defendants argue that all necessary witnesses will be greatly inconvenienced in having to travel to Thunder Bay to testify on three separate occasions.

17 Finally, the defendants point out that each of the three plaintiffs will be witnesses for each of the other plaintiffs and that they will likely call each of the plaintiffs as witnesses in defending all three actions.

Factual Background

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18 The plaintiffs, through the offices of their common solicitor, notified the defendants on December 18, 2001 that they considered themselves to be constructively dismissed and that their employment relationship with the defendants to be at an end.

19 During the month of January 2002, the plaintiffs filed individual complaints of unjust dismissal against the defendants under the provision of the Canada Labour Code. All three matters were scheduled to be adjudicated together in October 2003.

20 On October 2, 3, and 24 2003, a hearing was held before a Human Resources Development Canada ("HRDC") adjudicator. For the purposes of that hearing all three cases were consolidated.

21 On May 25, 2004, a decision was released holding that, since the defendants were provincial legal entities, HRDC did not have jurisdiction to hear the complaints.

22 On November 9, 2004 the plaintiffs served and filed the existing statements of claims seeking damages for wrongful dismissal.

Analysis

23 The legal test of when an order for consolidation should be made is well established. Ultimately a court must balance the competing interests of expediency along with convenience and possible prejudice to the parties.

24 In *Mon-Oil Ltd. v. R.* (1989), 27 F.T.R. 50 (Fed. T.D.) Cullen J. described this balance as follows:

> Certainly, for the defendant, it would be more convenient and administratively easier to consolidate/join the action or require that they be heard consecutively in a pre-determined order. However, that is clearly not the test, and is a long way from meeting the heavy onus. Inconsistent findings of fact may well occur but vigilant counsel and a vigilant court can minimize that possibility, and in any event is not a sufficient ground to warrant consolidation.

25 With respect to the onus on the applicants, the law is quite clear and is succinctly described by Mulcoon, J. in *Fruit of the Loom Inc. v. Chateau Lingerie Manufacturing Co.* (1984), 79 C.P.R. (2d) 274 (Fed. T.D.) at page 278 when he stated:

> A genuine onus rests in the applicant seeking to interfere with a plaintiff's right to pursue a lawful cause of action. Such applicant must persuade the court that continuing the action would be an abuse of process in which the applicant would somehow be prejudiced and not merely inconvenienced.

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26 The two cases of *Webster v. Webster* (1979), 12 B.C.L.R. 172 (B.C. S.C.) and *Shah v. Bakken*, [1996] B.C.J. No. 2836 (B.C. Master)provide a useful, but not exhaustive list, of criteria to be used when balancing the various interests involved in an application for consolidation. Some of these criteria are:

- Will the order sought create a savings in pretrial procedures?
- Will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?
- What is the potential for party to be seriously inconvenienced by being required to attend a trial in which that party may only have a marginal interest?
- Will there be real savings in experts' time and witness fees?
- Is one of the actions at a more advanced stage that the others?
- Will the order result in a delay on one of the action?
- Are any of the action proceeding in a different fashion e.g. as a simplified procedure as opposed to by way of an ordinary procedure?

Disposition

27 I am not satisfied that the applicants have met the onus placed upon them to justify consolidating all three actions.

28 While it may be inconvenient for the defendants to have all three actions consolidated, I cannot say that it would be prejudicial to the them if they were not.

29 Although all three actions arise from a common fact situation, two of the actions, Benc and Brown, have been commenced under the Simplified Rules of Procedure. To order consolidation with the Tetlock action could delay them and possibly expose Benc and Brown to additional legal costs.

30 Further, there is a different defendant in the Tetlock action. While there may be some corporate relationship between Matawa Project Management Group Inc. and Matawa First Nations Management, the exact nature of this corporate relationship is unknown.

31 I find however, that there is no evidence of any prejudice to the Benc and Brown actions being consolidated.

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32 Counsel for the plaintiffs raised the possibility that there could be some prejudice to trial strategy if consolidation were ordered. While it may be possible that trial strategy may be affected, frankly this prospect is hypothetical at best.

33 The interests of justice, when balanced against the rights of the plaintiffs and any probable prejudice suffered by them, justify an order for consolidation.

34 Consolidation will reduce trial time and facilitate the attendance of numerous out of town witnesses including the parties and the expert that will be called by the defendants in all three cases.

35 For the same reasons it would also be in the best interests of justice to have the Tetlock action proceed to trial immediately following the Benc and Brown actions.

36 Many of the same witnesses, including the expert forensic accountant, called in the Benc and Brown matters will be required in the Tetlock case.

37 Many of the witnesses would otherwise be required to travel from remote areas of Northwestern Ontario on two occasions.

38 Finally, by trying all three cases in the fashion set out above avoids or minimizes the possibility of inconsistent verdicts being reached.

39 To avoid unduly delaying the Benc and Brown actions, it is advisable that the Tetlock case proceeds to trial without delay.

40 During argument, counsel for the applicants offered to prepare a timetable setting out an efficient timeline ensuring that the trial of this action not be delayed.

41 For the above reasons the following orders are made:

1. an order consolidating the Benc and Brown actions. Henceforth they will proceed using the existing file number of the Brown action;

2. an order that the Tetlock action be tried by the same trial judge immediately following the trial of the Benc and Brown actions; and

3. an order requiring counsel for the defendant in the Tetlock matter to provide counsel for the plaintiff and this court with a detailed timetable of how and when the case will proceed to the trial stage. This timetable shall be provided within 14 days of the release of these reasons. In the event that the Tetlock action unduly delays the trial of the Benc and Brown matters, leave is hereby granted to the plaintiffs, Benc and Brown, to have the timing of their trials reviewed by me.

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42 If the parties cannot agree on the disposition of the costs of this motion, they may make written submissions to me. The defendants' submissions are to be filed within 10 days of the release of these reasons and the plaintiffs' response is to be delivered within 10 days thereafter. No reply submissions are to be filed without leave. The submissions shall include the requisite material that will permit me to fix the costs of the motion should I determine that costs are to be awarded.

Order accordingly.

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THE SUPERINTENDENT OF FINANCIAL SERVICES
Applicant

-and-

TEXTBOOK STUDENTS SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION et al.
Respondents

Court File No: CV-16-11567-00CL

IN THE MATTER OF THE RECEIVERSHIP OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

AND IN THE MATTER OF A MOTION PURSUANT TO SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No: CV-17-11689-00CL

IN THE MATTER OF THE RECEIVERSHIP OF TEXTBOOK (445 PRINCESS STREET) INC.

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No: CV-17-589078-00CL

KSV KOFMAN INC. in its capacity as Receiver and Manager of Certain Property of Scollard Development Corporation, et al.
Plaintiff

v.

JOHN DAVIES et al.
Defendants

Court File No: CV-17-11822-00CL

GRANT THORNTON LIMITED, in its capacity as Trustee of Textbook Student Suites (525 Princess Street) Trustee Corporation et al.
Plaintiffs

v.

JOHN DAVIES et al.
Defendants

Court File No: CV-18-60616-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES
(Motion Returnable May 29, 2019)

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