Divisional Court File No.: 533/77
Court File No. CV-17-11822-00CL

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

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/Respondent

- 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/Appellants

BOOK OF AUTHORITIES OF THE PLAINTIFF/RESPONDENT

(Motion to Admit Fresh Evidence)

October 17, 2018

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6.	*Clark v Clark*, 2014 ONCA 175, 2014 CarswellOnt 2477.
7.	*1307347 Ontario Inc. v 1243058 Ontario Inc.*, [2001] OJ No 257 (Sup Ct), 2001 CarswellOnt 221.

TAB 1

1979 CarswellBC 533
Supreme Court of Canada

Palmer v. R.

1979 CarswellBC 533, 1979 CarswellBC 541, [1979] S.C.J. No. 126, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 30 N.R. 181, 50 C.C.C. (2d) 193

Douglas Garnet Palmer and Donald Palmer, Appellants and Her Majesty The Queen Respondent

Laskin C.J.C., Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

Heard: June 26 and 27, 1979
Judgment: December 21, 1979
Docket: None given

Counsel: Harry Walsh, Q.C., for the appellants
Mark M. de Weerdt, Q.C., for the respondent

Subject: Criminal; Evidence

***McIntyre J.*:**

1 This is an appeal against the refusal of the British Columbia Court of Appeal to admit fresh evidence in the appeal of the appellants Palmer against their conviction in the Supreme Court of British Columbia before Macfarlane J, sitting without a jury upon an indictment charging a conspiracy to traffic in heroin, A separate appeal relying on the same grounds was taken by Thomas Maxwell Duncan, John Albert Smith and Robert Porter who were named conspirators in the same indictment with the Palmers and who were convicted at the same trial. Although the appeals were heard together, these reasons will deal with the Palmers only.

2 The indictment dated November 24th, 1975, charged in count 1 a conspiracy to traffic in heroin between the 1st day of February 1969 and the 30th day of April 1975. This count is the only one in issue on this appeal. A preliminary hearing commenced in February of 1975, after a postponement from September 1974, because the witness Ford, of whom much more will be said, had then absented himself. The trial, which lasted several weeks, commenced on January 12, 1976. The appellants were found guilty on March 23, 1976.

3 One of the important witnesses called for the Crown, both at the preliminary hearing and at the trial, was Frederick Ford, referred to above, an admitted heroin trafficker and

a disreputable character with a criminal record. His evidence was accepted by the trial judge and clearly played a significant part in the result. After the trial, Ford, in a series of declarations, asserted that his trial evidence was untrue, that it had been fabricated in its entirety, and that he had been influenced by threats and inducements, including the promise of payments of money, by the police. When this material came into the hands of the legal advisers of the appellants, they applied in the Court of Appeal to adduce this new evidence in affidavit form. The application was dismissed by the Court of Appeal and the appeals of all the appellants, which raised other grounds of appeal as well, were dismissed. This appeal is taken by leave of this Court upon two points which are set out hereunder:

> 1. Did the Court of Appeal of British Columbia err in refusing to allow the appellants to adduce fresh evidence before it based on the affidavits and statements of the principal Crown witness Frederick Thomas Ford who received $25,000.00 from the police "in payment for services" about a week after the trial judgment herein?
>
> 2. Did the trial Judge err in rejecting the testimony of the appellant Douglas Garnet Palmer with respect to three incidents concerning the observed movements of Frederick Thomas Ford on July 18, 1972, November 8, 1972 and January 23, 1973 when the said Ford gave no evidence on those incidents and the appellant Palmer was not cross-examined thereon, and did the Court of Appeal err in not quashing the convictions accordingly?

4 The principal point argued in this Court was point 1. It will, of course, be seen at once that this point raises no question as to the conduct of the trial and attacks no determination made by the trial judge. The sole issue raised relates to the disposition made by the Court of Appeal.

5 Ford gave evidence both at the preliminary hearing and at the trial that in June of 1971 he had approached Douglas Palmer, whom he had known for some fifteen years, and asked for a job in the drug business. After some delay, he was introduced into the business and he worked with the Palmers in the trafficking of heroin during the period covered by the indictment. He said that on numerous occasions he had received bulk heroin from Douglas Palmer. It was then his task, with the assistance of others, to put the heroin into gelatin capsules and bundles of the capsules into glass containers and to bury the containers at locations, particulars of which he would give to Palmer. As the heroin was sold, Palmer, or others under his direction, were thus enabled to direct purchasers to the hidden heroin to complete the sales. During this period. Ford was paid for his services by Douglas Palmer.

6 Ford said that during the summer of 1972 he had employed his nephew to plant out caches of heroin for him. The nephew was caught by the police and Ford was able, by giving the police information which led to the arrest of one of his associates named DeRuiter, to

procure the release of his nephew and have the prosecution dropped. It seems that it was this contact with the police which led Ford at or about that time to furnish information concerning the activities of the Palmers to the police.

7 Ford said that he received a call from Douglas Palmer on January 20, 1973, in which he was instructed to get together all the heroin in his possession and to meet another member of the organization for the purpose of getting rid of the heroin all at once so a purchase of newer stock could be made. In compliance with these instructions, the heroin was disposed of at night by throwing it from a moving car in a garbage bag. When this was completed. Ford reported to Palmer who told him that he was fired. He gave evidence at trial of the conversation which passed between them on this occasion in these words:

> A. Well, I said "What do you mean?" He said, "Well, I found out that you are the one that set up De Ruiter for the bust" he said, "So you are fired." And I just said, you know, "I don't know what you are talking about." And then I said, "Well, what about my money you owe me?" and he said, "You are not getting any money." And I said, "Well, you know, you owe me the money" and he said, "Tough", you know.
>
> Q. How much money did he owe you at that time?
>
> A. Oh, 12,500 or something.
>
> Q. Did you ever receive that from him?
>
> A. No.
>
> Q. Was there any further conversation on that occasion when he terminated your services?
>
> A. Well, other than "If I ever find out for sure it was you ...", you know, that's all. Other than that. I am lucky to be alive, that's all.
>
> Q. I am sorry, would you speak up?
>
> A. He said that I am lucky to be alive. If he finds out for sure that it's me that set up DeRuiter, I am in big trouble.

8 Ford continued trafficking independently until on January 6, 1975, he was shot in the street near his home. A police officer, one Steer, a member of the Vancouver City Police and not connected with the investigation of this case, attended at the scene of the shooting and had a conversation with Ford just before he was taken to hospital. Steer asked "Who shot you?". Ford replied "Pick up Doug Palmer". The officer then said "Did Palmer shoot you?". Ford said "Just pick up Doug Palmer". Ford was taken to hospital and while still in the

emergency section had another conversation with a Vancouver police officer named Caros. The version given by the police officer follows:

Caros: "Who shot you?"

Ford: "I don't know."

Caros: "You mentioned a man at the scene of the shooting."

Ford: "Yes, Doug Palmer. He didn't do it, he's too chicken. He hired someone."

Caros: "Why did he do it?"

Ford: "Guess he didn't like me."

Caros: "How many men involved?"

Ford: "One."

Caros: "Did he have two guns?"

Ford: "Yes."

Caros: "Did you see a car?"

Ford: "No."

Caros: "What did he look like?"

Ford: "He had a dark mask, a toque and a dark coat on."

Caros: "Did you know him?"

Ford: "No."

9 I consider it significant that moments after the shooting Ford identified Palmer as either his assailant or the instigator of the attack. The circumstances of the shooting, the earlier dismissal from the organization coupled with the disagreement about money, furnish a motive for Ford's later conduct.

10 After Ford's dismissal by Palmer, he agreed to testify for the Crown. The precise date of such agreement is unclear. He gave evidence at the preliminary hearing and at the trial, and on each occasion his evidence was essentially the same. He was cross-examined closely on both occasions. He admitted that in return for his agreement to give evidence against Douglas Palmer, and for the actual giving of the evidence, he had been promised immunity from prosecution on certain charges which were outstanding against him and protection for himself and his family. To that end he said he had been paid an allowance of $1,200 per month

up to the time of the trial. He said the police had agreed as well to provide for relocation and maintenance expenses after the trial for himself and his family until they were re-established in life and secure from danger.

11 The defence was a flat denial by Palmer of any involvement with drugs and with Ford. It was asserted that Ford's evidence was completely fabricated.

12 At the outset of the appeal, in which various other grounds were raised, the appellants moved under s. 610(1)(d) of the *Criminal Code* to have the Court receive evidence in the form of declarations from Douglas Palmer, Donald Palmer, Edith Twaddell and Thomas Ford. Section 610(1)(d) of the *Criminal Code* is set out hereunder:

> 610. (1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interests of justice,
>
> . . . . .
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

13 On this motion, the Court of Appeal had before it the various declarations referred to above and in addition affidavits in reply from Crown counsel and several police officers including affidavits from officers of the Vancouver Police Force concerning the words spoken by Ford after the shooting incident. Upon a consideration of this material, the Court refused the motion and disposed of the other grounds raised and dismissed the appeal.

14 The argument in this Court centered on the declarations made by Ford and the Crown affidavits in reply. The declaration of Edith Twaddell is of no significance and requires no further mention. The other declarations produced in support of the motion are largely explanatory of the events leading to the production of Ford's documents. Ford made four declarations dated, respectively, April 20, 1976, May 21, 1976, October 7, 1976, and October 13, 1976. In his first declaration, he said that he received $25,000 in cash from the R.C.M.P. in April 1976 for services rendered which he described as testifying in the Palmer drug conspiracy trial. He exhibited a receipt to the declaration prepared by the R.C.M.P. which he had signed. It was on a printed form acknowledging the receipt of $25,000 from R.C.M.P. Inspector Eyman. The printed words "Payment in full for services rendered" had been struck out and the words "Payment for services" had been written in.

15 In his second declaration, he referred to and verified a hand written statement which he had signed dated May 21, 1976, in these terms;

> May 21, 1976.

To whom it may concern

Any evidence I gave at the Douglas Palmer trial in 1976 was not of my own free will. I was pressured into saying what I said and also promised payment of $60,000 dollars. I never had any drug dealings with Doug Palmer, Don Palmer, Tom Duncan or Jake Smith. Any drug dealings I had were on my own and had nothing whatsoever to do with the above mentioned names. In April 1976 I rec. $25,000 Cash from the R.C.M.P.

Fred Ford

Also I had dealings with Roy Twaddell and he asked me to introduce him to Doug Palmer and I said I knew nothing about him and as far as I know he only dealt with me in drugs until he went to jail. Fred Ford.

Witnessed: J. Wood

J. B. Clarke

16 In his third declaration dated October 7, 1976, he swore to the truth of another statement he had prepared and which bears date October 7, 1976, and which is in these terms:

Oct. 7/1976

To whom it may concern.

My name is Frederick Thomas Ford of Vane. B.C. Everything I am about to write in this statement is the truth and I am writing it of my own free will without any threats or inducements from anyone! I started dealing in Heroin (drugs) in 1972. My nephew worked for me burying drugs and got caught, I went to the police and made a deal to turn someone in if they gave him a stay of proceedings (which they did). I talked with R.C.M.P. Staff Sgt. Jim Locker. He asked me if I knew a person named Doug Palmer, I said Yes and he said we want him for dealing in drugs and we will let you deal in drugs without getting caught if you can help us nail Doug Palmer. I didn't really know a thing about Doug Palmer but I saw an easy way for me to stay on the street and make money. I kept telling them different stories about Palmer none of them true! In Jan. 1975 I was shot in front of my home 3475 Triumph St. The R.C.M.P. (Neil McKay) came and saw me at the hospital he said it was a hired killer paid for by Doug Palmer. I knew this was not so but in order for me to get their protection I played along with what they said. In Feb. or Mar. 1975 I went to a Preliminary hearing concerning a drug case against Doug Palmer and some assoc. I got up on the stand and made up a bunch of lies only because I didn't want to go to jail also I was promised a large cash settlement new I.D. and transportation to anywhere I wanted to go. Naturally I would not turn this down.

The R.C.M.P. kept me and provided myself and family with $1200.00 per month to live on. In Jan. 1976. They took me to the Plaza 500 Hotel on 12th Ave Vane. There Staff Sgt. Almrud, Neil McKay and other R.C.M.P. officers kept harrassing me and threatening me to get on the stand and say some things about Doug Palmer. By then I was in so deep I had to go along. Niel McKay said he could not tell me personally how much I would get but he told Corp. Hoivik to tell me I would get $60,000 some I.D. and relokate me. The Prosecutor Art McLennan and Neil McKay came to see me and threatened me with all kinds of charges if I did not give evidence at the trial of Doug Palmer. They said make sure I brought up Doug Palmer's name any chance I got. So I gave the same evidence was before (All Lies) After the trial they took me and my family to Victoria B.C. At the end of April 1976 they took me to there office on Heather St. and offered me $25,000 so I said no. Finally I went to the Bank of Commerce (Main Branch) Hastings St. with Inspector Elman and got $25,000. He said I would have to wait for the other $35,000 and take it up with Neil McKay when he got back from holidays. I'm still waiting! In regards to "Roy Twaddell" I sold him drugs for months and months. He owed me $2,000 I had him beat up to make him pay me. It was the day after that I was shot. I believe he had it done! There is no proof, but I heard through the grape vine it was him! He couldn't possibly have been getting drugs from anyone else as he had no money. I had to give him credit every time he got heroin off of me. I believe like me he was scared and promised lots of things to induce him to take the stand against Doug Palmer. The Police (R.CM.P.) told me time and again they would do anything to nail Doug Palmer.

This Statement is all true —

17 His final declaration dated October 13, 1976, contains serious charges against the police and Crown counsel. It takes the form of answers to a series of questions put to him in writing by solicitors acting for the appellants in the matter. The questions were not leading in nature, they merely directed Ford's attention to matters and incidents that he had apparently raised. Since the answers are contained in the declaration, and provide such evidence as the declaration is capable of giving, I have omitted the questions. I reproduce the declaration hereunder:

CANADA PROVINCE OF BRITISH COLUMBIA

IN THE MATTER OF FREDERICK THOMAS FORD AND DONALD PALMER, DOUGLAS GARNET PALMER, THOMAS DUNCAN, JOHN ALBERT SMITH, ROBERT PORTER AND CLIFFORD LUTHALA

TO WIT:

I, FREDERICK thomas ford, of the City of Vancouver, in the Province of British Columbia, do solemnly declare:

1) I think I met Twaddell late 1973 or early 1974. Sold him drugs of and on for 1 yr. Was introduced to him through Oscar Hansen on the 1900 Turner St. I sold him drugs on credit!

2) Neil McKay and Art Mclennan [Crown counsel] came to the Plaza 500 Hotel in January 1976 and told me I had better testify at Doug Palmer's trial or I would have so many charges against me I would never see day light. Also they said you'll be killed as soon as you get in the Pen (jail). Also they said to use Doug P. name every chance I got!

3) They said not to mention money promised only to answer that I would be relocated elsewhere not to elaborate any further. This was said to me many times.

4) They came to me in Jan. 1976, at Plaza 500 and showed me pictures of Doug P., his brother, Roy Dorn, Tom Duncan, and many others and the same thing as before. Kept insisting I take stand and give evidence against Doug P. They said they really wanted him.

5) It was in 1975 Jan. I was shot! They put me into protective custody. I was really scared! I would have done or said almost anything at that point. They said they would pay me $25,000 and relocate me. I agreed! They arc-Neil McKay and Art Mclennan.

6) Stayed at Plaza 500 1 wk. before and 1 wk. after. Corporal Art Hoivik was instructed to make sure I read transcripts and to memorize. He read me questions and I answered them.

7) Neil McKay came to see me after and kept on insisting I testify or I would be charged with many charges. He kept saying Doug P. had me shot and it was my only way to get even.

8) My nerves were shot. So the R.C.M.P. on Neil McKay's orders went to a doctor and get me sleeping pills (I was taking 3 at once) also I had codine pills 1 wk. before and 1 wk. after trial.

9) Same as question (2).

10) I had 2 robbery and poss. jewellery against me they said these would be dropped. But if I did not testify I would be charged with alot more than that!

11) Art Mclennan came to see me 2 or three times at Plaza 500. He also said I had no choice but to testify at Doug P. trial. He said you will make money and be clear of all charges. If you don't testify you will have many charges against you.

12) Neil McKay and Art Mclennan both told me I would be paid the date after I gave my evidence!

13) After I gave my evidence Neil McKay Art Hoivik and other R.C.M.P. officers were in room with me. They all said we have got Palmer for sure now.

14) While at Plaza 500 I told Staff Sgt. Almrud I would not testify for $25,000. He said how much do you want? I said $60,000. He said I do not have the authority to authorize it, I'll be back later with answer. He came back a couple of hours later and said okay you can have $60,000 if you give evidence. Art Hoivik was there at the time. He also told me Neil McKay said $60,000 but for me not to mention money on stand.

15) Neil McKay told Corp. Hoivik to tell me about money as if he told me himself and was asked directly on stand about money and me he would have to answer truthfully, but if someone else told me he could say I never talked with Mr. Ford regarding any monies.

16) Same as No. (14).

17) Art Mclcnnan gave the transcripts to Neil McKay and he gave them to me. They both said to read trans. and to be more specific!

18) Neil McKay Art Mclennan and every R.C.M.P. officer I came in contact with kept saying I should testify against D. Palmer.

19) As I've said before — I was in 24 hr. contact with R.C.M.P. they all kept at me to testify and nail D. Palmer.

20) Went to Heather St. as it is main office. Inspector Ehman was there. He took me to Main Branch of C. Imperial Commerce on Hastings. Signed money draft and I was paid right in Bank. Cash and travellers cheques. I told him I was to get $60,000 not $25,000. He said he was not aware of this but to take it up with Neil McKay and Inspector White when they returned from holidays in 2 wks. Which I did. They said they were sorry but Ottawa would not pay anymore than $25,000. I'm still waiting for my other $35,000.00.

21) Met White after I was shot. He said in his office that any deals I was to make would be through Neil McKay.

22) Have telephoned Art Mclellan and he said he told R.C.M.P. to pay me the other $35,000. He can't understand why they haven't kept up there part of bargain!

23) Whenever I refer to D. Palmer or Doug P. in this statutory declaration I am in fact referring to Douglas Palmer.

and I make this solemn declaration, conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the "Canada Evidence Act".

declared before me at the City of Vancouver, in the Province of British Columbia, this 13th day of October, A.D.1976.

"Fred Ford"

Frederick Thomas Ford

A commissioner for taking

Affidavits for British Columbia

18 In reply to this motion, the Crown filed extensive material. Arthur MacLennan, Crown counsel, denied, in his affidavit, all improprieties alleged by Ford. He swore that he saw Ford in the Plaza Hotel only once. They had an interview lasting three or four minutes during which he showed Ford some photographs and left a transcript of Ford's evidence taken at the preliminary hearing so any mistakes could be corrected. He explained his actions regarding money in paras. 6, 7 and 8 in these words:

6. THAT I at no time, nor did Sgt. McKay at any time in my presence, say to Ford that he would receive $25,000.00 or any sum whatsoever, nor that Ford would be paid the day after he gave his evidence, or at any time;

7. THAT in or about the month of May 1976, Ford telephoned me to request that I assist him in obtaining a further $35,000.00 from the RCM Police. At that time I had become aware that Ford had already received $25,000.00 in lieu of the re-location arrangements to which he had testified at the trial. I told Ford that notwithstanding he had himself elected after the trial to receive $25,000.00 instead of the re-location he had been promised, I had already tried to get for him some additional money because ! felt he might come to harm if he remained in the Vancouver vicinity; that a lump sum payment totalling $60,000.00 was perhaps not excessive to keep him out of danger until he could establish himself elsewhere. I also informed Ford on that occasion that a superintendent of the RCM Police had refused to recommend payment of any further money as considered Ford's insistence on a further payment to be close to blackmail. Ford replied that he would never try to blackmail the RCMP; that he had already given his evidence and was not about to change that;

> 8. THAT I never at any time told Ford I could not understand why the RCMP had not "kept up their part of the bargain;"

19 The various police officers mentioned by Ford in his declarations denied any impropriety in their affidavits. They denied any harassing of Ford or the putting of any pressures upon him. From their affidavits the Crown position is made clear. There was an arrangement with Ford that he would give evidence against the Palmers. At the preliminary hearing as at the trial Ford admitted the particulars of this arrangement. A condition of the arrangement was that the police would provide protection, and maintenance payments in the amount of $ 1,200 a month, until the trial was over. Thereafter provision would be made for the maintenance and relocation of Ford and his family, as well as for their protection until he could re-establish himself elsewhere. The payments made for relocation would have included travelling and moving expenses and, if necessary, a down payment on a new house. Pursuant to this arrangement, Ford gave evidence at the preliminary and no difficulties arose until just before the trial.

20 According to the police affidavits, at that time Ford seemed to have changed his mind. He decided that he wanted a cash payment rather than relocation expenses as agreed. He requested a sum in the neighbourhood of $50,000 and indicated that he would go to England to live after the trial and from this cash payment he would cover his own expenses. The police officers who were responsible for the immediate custody and protection of Ford agreed to take the matter up with superior officers and, in discussions between themselves, considered that a $60,000 payment would not be unreasonable in the circumstances. This figure would presumably have replaced all payments for maintenance, moving and relocation expenses until Ford was re-established after trial and what could be required for a down payment on a house. It is not clear from the evidence what recommendations were made to superior officers on this subject but the Crown, after the trial, was prepared to pay only $25,000. This payment was arranged by R.C.M.P. Inspector Eyman who met Ford, took him to the bank, procured $25,000 by cashing a cheque, and gave it to Ford in cash and travellers cheques. At the time of payment, he procured the receipt from Ford exhibited to Ford's first declaration. The Crown submits that Ford, dissatisfied by the payment of $25,000, and no doubt influenced by fear as well, has changed his story.

21 The Court of Appeal, when dealing with the motion, had before it in addition to the materials already referred to some fifty-four volumes of evidence from the preliminary hearing and the trial and therefore had a much greater knowledge of the evidence than could be drawn from the brief summary I have set out above. In dealing with the motion, McFarlane J. A., speaking for the Court, said:

> Section 610(1) provides that for the purposes of an appeal under Part XVIII of the Code the Court of Appeal may, if it considers it in the interests of justice, receive the evidence

of any witness. Parliament has here given the Court a broad discretion to be exercised having regard to its view of the interests of justice. In my opinion it would not serve the interests of justice to receive the tendered evidence of Ford and Twaddell because it is simply not capable of belief. I am satisfied that it is untrue and that any intelligent adult would reject it as wholly untrustworthy. Moreover, the trial Judge was well aware of the weaknesses in the testimony of Ford and Twaddell. He had not found them to be honourable, upright witnesses but he accepted testimony which they gave because it was consistent with, and in harmony with, other testimony placed before him. He found the testimony, not the witnesses, to be credible. In my opinion the tendered evidence if adduced before the trial Judge or other tribunal of fact could not possibly affect the verdict. This view is in accord with the decision of this Court in *R. v. Stewart* (1972), 8 C.C.C. (2d) 137, leave to appeal to Supreme Court of Canada refused 8 C.C.C. (2d) 280n

I have considered the judgments of the Supreme Court of Canada in *McMartin v. R.*, [1964] S.C.R. 484, 43 C.R. 403, 47 W.W.R. 603, 46 D.L.R. (2d) 372 and *Horsburgh v. R.*, [1967] S.C.R. 746, 2 C.R.N.S. 228, [1968] 2 C.C.C. 288, 63 D.L.R. (2d) 699. I find nothing in those judgments which requires me to accept this evidence. With particular reference to the latter judgment, I should add that I do not reject the evidence of Ford on the ground that he testified and was cross-examined at the trial.

22 Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them — see for example *R. v. Stewart*, supra; *R. v. Foster* (1978), 8 A.R. 1 (Alta. C.A.); *R. v. McDonald*, [1970] 2 O.R. 114, 9 C.R.N.S. 202, [1970] 3 C.C.C. 426 (C.A.); and *R. v. Demeter* (1975), 10 O.R. (2d) 321, 25 C.C.C. (2d) 417, affirmed [1978] 1 S.C.R. 538, 38 C.R.N.S. 317, 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, 16 N.R. 46. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. R.* [1].

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

23 The leading case on the application of s. 610(1) of the *Criminal Code* is *McMartin v. R.*, supra. Ritchie J., for the Court, made it clear that while the rules applicable to the introduction of new evidence in the Court of Appeal in civil cases should not be applied with the same force in criminal matters, it was not in the best interests of justice that evidence should be so admitted as a matter of course. Special grounds must be shown to justify the exercise of this power by the appellate court. He considered that special grounds existed because of the nature of the evidence sought to be adduced and he considered that it should not be refused admission because of any supposed lack of diligence in procuring the evidence for trial. The test he applied on this question was expressed in these terms at p. 493:

> With the greatest respect, it appears to me that the evidence tendered by the appellant on such an application as this is not to be judged and rejected on the ground that it "does not disprove the verdict as found by the jury" or that it fails to discharge the burden of proving that the appellant was incapable of planning and deliberation, or that it does not rebut inferences which appear to have been drawn by the jury. It is enough, in my view, if the proposed evidence is of sufficient strength that it might reasonably affect the verdict of a jury.

24 The evidence was admitted and a new trial ordered.

25 In my view, the approach taken in the authorities cited above follows that of this Court in *McMartin*. The evidence in question in the case at bar was not available at trial and it would be, if received, relevant to the issue of guilt on the part of the Palmers. The evidence sought to be introduced in *McMartin* was evidence of an expert opinion not of matters of fact and therefore no issue of credibility in the ordinary sense arose. It is clear, however, that in dealing with matters of fact a consideration of whether, in the words of Ritchie J., the evidence possessed sufficient strength that "it might reasonably affect the verdict of the jury" involves a consideration of its credibility as well as its probative force if presented to the trier of fact.

26 Because the evidence was not available at trial and because it bears on a decisive issue, the inquiry in this case is limited to two questions. Firstly, is the evidence possessed of sufficient credibility that it might reasonably have been believed by the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and believed, would the evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? If the answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced.

27 It is evident that the Court of Appeal applied the test of credibility and found the evidence tendered as to the validity of Ford's trial evidence to be wholly unworthy of belief. It therefore refused the motion and in so doing made no error in law which would warrant interference by this Court. While it may not be necessary to do so in view of this conclusion, I express the view that the Court of Appeal was fully justified in reaching the conclusion it did upon a consideration of all the evidence adduced on the motion before it and the evidence appearing in the trial transcripts.

28 It was argued for the appellants that Ford's trial evidence was totally fabricated as a result of police pressures and inducements. In his declarations, Ford says that he was frightened and under pressure and accordingly when the time for the preliminary hearing came he merely got in the witness box and made up a bunch of lies. It should be noted, however, that at the trial, almost a year later, he gave the same evidence and, despite strenuous cross-examination on both occasions, no assertion is made that there was any significant difference in the evidence. The accurate repetition of extemporaneous inventions after such a long interval would be a remarkable performance on Ford's part under any circumstances but, when one adds the fact that the trial judge considered that his evidence was in harmony with the general picture of events which emerged from the evidence of many other witnesses, it becomes impossible to believe that the evidence was fabricated on the spur of the moment. Furthermore, it should be observed that the modification of the financial arrangements with Ford occurred, according to Ford's own declaration, after the preliminary hearing where he had given evidence and before the trial when, it is conceded, he repeated it. It is impossible to believe that the nature of his evidence given at trial was affected by the payment or promise of money. Considering the suggestion that this arrangement was undisclosed and that the trial judge could therefore have been misled in his assessment of Ford's credibility, reference may be made to a passage in his reasons for judgment where he said:

> Ford testifies that the police promised to protect him and his family if he gave evidence on behalf of the Crown, and that they have fulfilled this promise by paying for the cost of relocating him and his family, and of maintaining them since February 1975. The cost of such maintenance said to have been $1,200 a month.

29 A careful review of the police evidence drawn from the affidavits filed confirms the version of the agreement made with Ford which he himself described in evidence at the trial. The police contention that Ford changed his mind shortly before the trial and wanted cash in lieu of unspecified relocation expenses is confirmed, at least in part, by Ford's later acceptance of the sum of $25,000 and his insistence upon more. It seems clear that he abandoned the original arrangement in favour of a sum of money as contended by the police. It was argued that the police had offered $60,000 when all that Ford had sought was $50,000.

The police affidavits confirm that Ford requested a sum in the neighbourhood of $50,000. It also appears from the affidavits that the police officers themselves said, after some discussion between themselves, that they would recommend $60,000 to their superior officers. When it is considered that this payment was to be in lieu of all other provision for Ford after the trial and that it would serve to cover all the expenses involved in maintenance for Ford and his family including travel and relocation expenses and even a possible down payment on a new house, it does not seem an unreasonable amount.

30 The manner of payment of the $25,000 to Ford, which involved no secrecy and was done openly by cheque, negates improper motives on the part of the police. The use of the words "services rendered" and "services" on the receipt has, in my opinion, no sinister significance. It is evident that these words were employed to describe the arrangement here discussed. In my opinion, the rejection of Ford's evidence by the Court of Appeal was amply justified.

31 I cannot leave this part of the case without making some general remarks upon the situation it reveals. There can be no doubt that from time to time the interests of justice will require that Crown witnesses in criminal cases be protected. Their lives and the lives of their families and the safety of their property may be endangered. In such cases the use of public funds to provide the necessary protection will not be improper. When the need arises, the form of protection and the amount and method of the disbursement of moneys will vary widely and it is impossible to predict the precise form the required protection will take.

32 The dangers inherent in this situation are obvious. On the one hand, interference with witnesses cannot be tolerated because the integrity of the entire judicial process depends upon the ability of parties to causes in the courts to call witnesses who can give their evidence free from fears and external pressures, secure in the knowledge that neither they nor the members of their families will suffer in retaliation. On the other hand, the courts must be astute to see that no steps are taken, in affording protection to witnesses, which would influence evidence against the accused or in any way prejudice the trial or lead to a miscarriage of justice. However, in cases where the courts are, after careful examination, satisfied that only reasonable and necessary protection has been provided and that no prejudice or miscarriage of justice has resulted in consequence, they should not draw unfavourable inferences against the Crown, by reason only of this expenditure of public funds.

33 It must be recognized that when cases of this nature arise, charges of bribery of witnesses will, from time to time, be made. It is for this reason that the courts must be on guard to detect and to deal severely with any attempt to influence or corrupt witnesses. The courts must discharge this duty with the greatest care to ensure that while no impropriety upon the part of the Crown will be permitted, the provision of reasonable and necessary protection for witnesses is not a prohibited practice. In the United States, there are statutory provisions expressly contemplating such expenditure under the authority of the Attorney General.

34 I now turn to the second point raised in this appeal. There was evidence at trial, resulting from police surveillance, that Ford and Douglas Palmer met on three separate occasions. It was presumably led to afford some evidence of association between them. On July 18, 1972, Ford was seen to leave a car and walk up Palmer's driveway then return to the car in three or four minutes and depart. Ford, in giving evidence in chief, was not asked about this incident and he was not cross-examined about it. Palmer disclaimed any knowledge of Ford's visit. On November 8, 1972, Palmer was seen travelling in Ford's automobile as a passenger with Ford driving. Ford was not examined or cross-examined on this incident. Palmer said that he had been waiting at a bus stop near his home because he was going to pick up a truck which was under repair and Ford happened by in his car and gave him a lift. The event he said was not prearranged. On January 23, 1973, at 11:30 p.m.. Ford was observed leaving his automobile from which he went down a driveway to Palmer's house and spoke to Douglas Palmer for a few minutes then returned to his car and left. Ford, as before, gave no evidence relating to this event and was not cross-examined upon it. Palmer said that Ford had come to his house and offered to sell some tires at a reasonable price and Palmer had merely sent him away. Palmer was net cross-examined on his evidence relating to the three meetings.

35 The trial judge found that Palmer was not a credible witness and indicated that he was not willing to accept his testimony on important matters. In dealing with this question, he made reference to these incidents as well as much other evidence. Counsel for Palmer objects to this on the basis that Palmer's version of what occurred on these occasions stands uncontroverted and, particularly in view of the Crown's failure to examine Ford upon these matters, it is argued that the trial judge should have accepted Palmer's version of events and not drawn inferences adverse to him. The point was summarized in the appellants' factum in these words:

> It is submitted that the Court of Appeal for British Columbia erred in concluding that it was not necessary for the prosecution to have examined Ford in-chief with respect to the three incidents and that it was not necessary to cross-examine the Appellant Douglas Garnet Palmer when he testified with respect to the said three incidents. Had the Court of Appeal for British Columbia found that the learned trial Judge had erred in rejecting the testimony of Douglas Garnet Palmer with respect to the said three incidents then the basis for the learned trial Judge's acceptance of Ford's testimony would have disappeared and the Court of Appeal would then have quashed the convictions against the Appellants.

36 In dealing with this argument in the Court of Appeal, McFarlane J.A. said for the Court:

> The second ground of appeal argued was that the trial Judge should have found that the evidence of Douglas Palmer raised at least a reasonable doubt of his guilt. With

particular reference to the three occasions to which I have just referred, it was said that Palmer's evidence was not shaken in cross-examination and it is suggested he was not specifically questioned about one or two of them. Reference was made to *Browne v. Dunn*, (1894) The Reports 67 and to *R. v. Hart* (1932), 23 Cr. App. R. 202. I respectfully agree with the observation of Lord Morris in the former case at page 79:

> I therefore wish it to be understood that I would not concur in ruling that it was necessary in order to impeach a witnesses' credit, that you should take him through the story which he had told, giving him notice by questions that you impeached his credit.

In my opinion the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule. It is a matter of weight to be decided by the tribunal of fact, vide: *Sam v. C.P. Ltd.* (1975), 63 D.L.R. (3d) 294 (B.C.C.A.) and cases cited there by Robertson, J.A. at 315-7. In the present case Douglas Palmer was cross-examined extensively. It seems to me the circumstances are such that it must have been foreseen his credit would be attacked if he testified to his innocence. In any event, this was made plain when he was cross-examined. The trial Judge gave a careful explanation for his acceptance of the story of Ford and rejecting that of Douglas Palmer. I cannot give effect to this ground of appeal.

37 I am in full agreement with these words and I do not consider it necessary to add to them save to emphasize that the finding against the credibility of Palmer was made upon much more than the evidence of these three events. It was based upon a consideration of the whole of the evidence including the full examination and cross-examination of Palmer, I would dismiss the appeal.

Appeal dismissed,

Footnotes

1 [1964] S.C.R. 484.

TAB 2

2005 CarswellOnt 6285
Ontario Superior Court of Justice (Divisional Court)

Monteiro v. Toronto Dominion Bank

2005 CarswellOnt 6285, [2005] O.J. No. 4749,
143 A.C.W.S. (3d) 787, 20 E.T.R. (3d) 305

JUANITA MONTEIRO (PLAINTIFF / APPELLANT) AND TORONTO DOMINION BANK (DEFENDANT / RESPONDENT) AND JOSEPH MONTEIRO, EVELYN MONTEIRO AND FRANK MONTEIRO (THIRD PARTIES / RESPONDENTS)

Epstein J., Greer J., and Lane J.

Heard: October 24, 2005
Judgment: October 24, 2005
Docket: 624/04

Counsel: Gregory M. Sidlofsky for Plaintiff / Appellant
Colin C. Taylor for Defendant / Respondent, Toronto Dominion Bank
Debra L. Stephens for Third Party / Respondent, Evelyn Monteiro

Subject: Civil Practice and Procedure

MOTION by plaintiff and third parties to introduce fresh evidence on appeal.

***Lane J.*:**

1 Fresh evidence is proffered to the Court to be introduced by both appellant and third parties. In each case, the nature of the evidence is that it is a further development in the ongoing appeal process taking place in Kuwait in connection with the judgment there, which is the foundation of the plaintiff's action here.

2 As to the test for the introduction of fresh evidence on appeal, we were referred to *Mercer v. Sijan* (1976), 14 O.R. (2d) 12 (Ont. C.A.), a decision of the Court of Appeal. Since 1976, the Supreme Court of Canada decided in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), that at least in a criminal case, a slightly different test should be adopted. In *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 (Ont. C.A.), our Court of Appeal in a civil proceeding applied the Supreme Court of Canada's test from *R. v. Palmer*. Accordingly, we adopt the *Palmer* test as the appropriate test for considering the motions to introduce new evidence in this civil proceeding.

3 The *Palmer* test appears as follows:

(i) The evidence should generally not be admitted if, by due diligence it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;

(ii) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

(iii) The evidence must be credible in the sense that it is reasonably capable of belief, and,

(iv) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

4 Since the events recorded in the evidence proffered took place after the decision of Siegel J. which is appealed from, there can be no issue as to the first point.

5 We are satisfied that the evidence proffered has relevance and that it is capable of belief.

6 As to the fourth point, the motion judge found in part that the decision of the Kuwait Court of Appeal is not entirely clear in all respects. See paragraphs 32 through 35 of his reasons.

7 The proffered evidence as noted is a further decision of the Kuwait Court of Appeal and a further report of the Expert's Department in Kuwait. Such developments might well have some bearing on the clarity of the situation in Kuwait and so might well have affected the result of a motion such as that before Siegel J. had the evidence been available.

8 We are accordingly of the view that the fourth test is also met.

9 It was submitted that the proof of the fresh documents tendered was unsatisfactory. That proof is by an affidavit and an attached translation of the Kuwait documents. The history of this case appears to be that formal proof under the seal of the Kuwait Court has not always been insisted upon in prior instances. That has evidently become an issue on the appeal itself.

10 We have concluded that proof of the fresh documents can be dealt with together with the issue as to the proof of those already in evidence. On these terms, we admit the proffered evidence of both parties.

Motion allowed.

TAB 3

2008 CarswellOnt 78
Ontario Superior Court of Justice (Divisional Court)

Lafontaine-Rish Medical Group Ltd. v. Global TV News Inc.

2008 CarswellOnt 78, [2008] O.J. No. 76, 163 A.C.W.S. (3d) 343, 232 O.A.C. 198

LAFONTAINE-RISH MEDICAL GROUP LIMITED, MEDICAL GROUP RESEARCH ASSOCIATES LIMITED, LAFONTAINE-RISH MEDICAL ASSOCIATES, SONIA LAFONTAINE AND ARTHUR FROOM (Plaintiffs / Appellants) and GLOBAL TV NEWS INC., PETER VINER, JAMES SWARD, ROBERT DAVIDSON, PETER KENT, MARLEEN TROTTER, GREGORY DENNIS, PAUL ROGERS, COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, JERRY LEVITAN, THOMAS BELL, M.D., TRACY HYNES, RAQUEL NAVARRO, RALPH NAVARRO and OLGA NAVARRO (Defendants / Respondent)

Carnwath J.

Heard: January 7, 2008
Judgment: January 14, 2008
Docket: 525/07

Proceedings: additional reasons at *Lafontaine-Rish Medical Group Ltd. v. Global TV News Inc.* (2008), 2008 CarswellOnt 1289 (Ont. Div. Ct.); and affirming *Lafontaine-Rish Medical Group Ltd. v. Global TV News Inc.* (2007), 2007 CarswellOnt 2636 (Ont. Master)

Counsel: Robert Zigler for Appellants, Lafontaine-Rish Medical Group Limited, Arthur Froom
Bruce Thomas for Respondents, Global TV News Inc., Peter Viner, James Sward, Robert Davidson, Peter Kent, Marleen Trotter, Gregory Dennis, Paul Rogers
Marcela Saitua for Respondent, College of Physicians and Surgeons of Ontario
Lorne Honickman for Respondent, Jerry Levitan
Roy Stephenson, Trevor Shaw for Respondent, Thomas Bell, MD

Subject: Civil Practice and Procedure

APPEAL by plaintiffs from judgment reported at *Lafontaine-Rish Medical Group Ltd. v. Global TV News Inc.* (2007), 2007 CarswellOnt 2636 (Ont. Master), dismissing action against certain defendants for delay.

Carnwath J.:

1 The first eight respondents to this appeal (the "Global defendants"), along with the defendants, College of Physicians and Surgeons of Ontario, Jerry Levitan and Dr. Thomas Bell (together the "moving defendants"), moved for a second time to dismiss this action before Master Hawkins, the Case Management Master. The motion was heard on March 7, 2007, and for reasons released March 23, 2007, the Master dismissed this action against the moving defendants.

2 Master Hawkins found the plaintiffs, Lafontaine-Rish and Mr. Froom, contumelious and their delay intentional, inordinate and inexcusable. The plaintiffs now appeal the dismissal of their action.

3 The appeal raises the following questions:

1. Should the plaintiffs' motion to lead fresh evidence be granted?

2. What is the appropriate standard of review where a case management Master dismisses an action for delay?

3. Applying the appropriate standard of review, should the Master's decision be overturned?

4. Was the Master's decision a denial of natural justice?

Background

4 The action commenced on September 18, 1998.

5 The action arose from a television news broadcast on the Global Television Network. The plaintiffs allege that the broadcast suggested the corporate plaintiff, Lafontaine-Rish Medical Group Limited, ("Lafontaine-Rish") should be shut down because it was being operated in a negligent manner. The plaintiff, Arthur Froom, is a shareholder and director and the controlling mind of the corporation.

6 By February 4, 1999, Statements of Defence had been filed on behalf of the moving defendants.

7 Over one year later, on March 14, 2000, counsel for the corporate plaintiff, David Cousins, requested the defendants' affidavit of documents. Shortly thereafter, the Global defendants met the request. It was not until December 12, 2000, that the affidavit of documents of the corporate plaintiff was delivered.

8 On March 2, 2001, Mr. Cousins gave notice that the only plaintiffs intending to proceed with the action would be Lafontaine-Rish and Mr. Froom.

9 On March 5, 2001, Mr. Froom delivered his affidavit of documents, two-and-a-half years after the action started. A motion to dismiss his action had been delivered and was scheduled to be heard later that month.

10 A series of examinations-for-discovery took place leading to a motion brought by the Global defendants for satisfaction of undertakings, returnable June 28, 2002. This motion was adjourned until finally a case conference was held with Master Hawkins on July 16, 2002. At that case conference, November 13 and 14, 2002, were set aside for undertakings and refusal motions.

11 The undertakings and refusal motion of the Global defendants proceeded on November 13 and 14, 2002. The balance of the motion was scheduled to continue and was finally re-scheduled to October 2 and 3, 2003.

12 The motion continued on October 2 and 3, 2003 with Master Hawkins reserving on certain issues and ordering Mr. Froom to deliver answers to all undertakings by January 9, 2004. The motion was resumed on January 27, 2004 for the purposes of a confidentiality order since Mr. Froom refused to produce financial statements without it. On that date, the date by which the plaintiffs were to deliver answers to undertakings was extended to May of 2004. The January 27, 2004 hearing resulted in the Master issuing an order on February 13, 2004, following which the Global defendants made submissions as to costs. Mr. Froom asked for an extension of the time to file his costs submissions to March 24, 2004. Mr. Froom failed to file any submissions and was requested again in August of 2004 to file his costs submissions. On September 7, 2004, Master Hawkins ordered costs in the amount of $1,500 to be paid by the plaintiffs within thirty days.

13 In April of 2005, Mr. Froom delivered answers to undertakings, provided financial material and paid the costs order, seven months after the costs order.

14 The Global defendants then scheduled a motion to amend the Statement of Defence for June 29, 2005. The motion was re-scheduled for July 20, 2005, as Mr. Cousins was not available. Mr. Froom then reported that he had broken his leg on June 6, 2005 and was not able to prepare a response for the motion scheduled for July 20, 2005.

15 A special appointment was set for September 21, 2005. The plaintiffs requested an adjournment on that date, the request was granted and Master Hawkins re-scheduled a new motion date of January 25, 2006. Mr. Froom then brought a motion to amend his Statement of Claim returnable on that date.

16 The Global defendants consented to the amendments to the plaintiffs' Statement of Claim. Master Hawkins, on January 25, 2006, ordered that the amended Statement of Claim be delivered within fifteen days. I note here that it was not delivered until over a year later in February of 2007.

17 The Global defendants' brought their first motion to dismiss the action for delay returnable July 18, 2006. At the request of the plaintiffs and over the opposition of the defendants, the Master adjourned the motion to November 9, 2006. The motion proceeded on November 9, 2006 and by reasons issued December 5, 2006, the Master dismissed the defendants' motion to dismiss and awarded costs against the plaintiffs.

18 On December 6, 2006, Mr. Froom was incarcerated at the Metro West Detention Centre on immigration matters, including his possible extradition to the United States. He remained in custody at the Detention Centre until May 22, 2007, when he was released on bail.

19 In his order issued December 5, 2006, the Master provided that a case conference could be requested within fifteen days. The moving defendants requested such a case conference, which was conducted by telephone on Monday, February 12, 2007.

20 On Sunday, February 11, 2007, the day before the scheduled conference, the plaintiffs finally served their amended Statement of Claim approximately one year after they had been ordered to do so in the Master's order of January 25, 2006. The costs award flowing from the Master's order issued December 5, 2006, was finally paid on March 5, 2007, some three months late.

21 Following the telephone conference of February 12, 2007, the Master fixed the date of March 7, 2007 for the hearing of the moving defendants' second motion to dismiss the action for delay. At no time during the telephone conference of February 12, 2007, did Mr. Cousins advise the Master and the defendants that Mr. Froom was in custody.

22 On March 7, 2007, Mr. Schuetz, a solicitor, appeared on behalf of Mr. Froom. He told the Master that he was retained only for the purpose of asking for an adjournment. When asked about the whereabouts of Mr. Froom, Mr. Schuetz replied that he was "in custody, in Ontario". Mr. Cousins, who appeared on behalf of the corporate defendant, offered no explanation as to Mr. Froom's whereabouts. The Master, for reasons developed later in this decision, refused the adjournment and heard argument on the merits of the motions to dismiss. He granted the motions and dismissed the action with costs to the moving defendants to be assessed.

The Master's Orders

The Order of September 7, 2004

23 The order of September 7, 2004 was the culmination of motions heard November 13 and 14, 2002, May 8, 2003 and January 27, 2004. In reviewing the costs submissions of the parties following the motions, the Master is reported, at para. 76 of his reasons, as follows:

> [76] However, there are other considerations. Mr. Froom was frequently late in appearing. Mr. Cousins was late on occasion as well. This put the other parties to needless expense. Further, the plaintiffs failed to complete the responding party's column in the chart of questions the defendants were moving on and thus did not indicate in advance why they objected to answer questions. Time was wasted as a result. In instances where Mr. Froom took the position (as he did on a number of occasions) that a particular refused question had been asked and answered elsewhere he often did not have the transcript references at hand. Counsel and the court were kept waiting while he looked for the references he relied upon.

24 Taking those factors into consideration, despite the divided success on the motion, the Master ordered the plaintiffs to pay the moving defendants $1,500 in costs within thirty days.

The Master's Order of December 5, 2006

25 This order issued following the hearing on November 9, 2006 of the moving defendants' first motion to have the action dismissed for delay.

26 The Master began by finding that two affidavits sworn by Mr. Froom were not served within the time limits he had established. These affidavits were rejected by the Master. The Master then turned to consider the plaintiffs' failure to deliver their amended Statement of Claim within the original fifteen-day deadline established in the timetable set on January 25, 2006. The following paragraphs from his order are significant:

> [19] As a result, the timetable I set on January 25, 2006 cannot be met. The position of the plaintiffs seems to be that because they wish to make still further amendments to the amended statement of claim not contemplated in January 2006 they may ignore the January 25, 2006 timetable order altogether. I find that attitude most disturbing. The remaining plaintiffs have known for months that the Global defendants would not consent to the latest proposed amendments, yet they waited until November 2, 2006 to bring a motion for leave to amend.
>
> [20] The remaining plaintiffs submit that the defendants have not suffered and will not suffer prejudice through delay because a record of the broadcast giving rise to this action has been preserved. This ignores the fact that those defendants who have raised a justification defence must rely upon the evidence of non-parties to prove the truth of

the statements complained of. Memories fade over time. While there is no evidence that any potential witness has died or disappeared, that is simply fortuitous.

[21] I am not prepared to dismiss these motions on the ground that the moving defendants are themselves in default. There is no evidence before me that they are. If defence defaults were really serious enough to concern the plaintiffs, Mr. Froom would have mentioned these defaults in his first or September 15, 2006 affidavit. He did not.

[22] While the default of a moving party is an automatic bar to a motion to dismiss for delay brought under subrule 24.01(1)(c), it is not an automatic bar to a motion to dismiss under subrule 57.03(2), rule 60.12 or subrule 77.10(7)(b). A default of that kind is simply a matter for the court to consider when deciding what order to make. Here the remaining plaintiffs are in a class by themselves when it comes to defaults.

[23] Several of the moving defendants also relied upon subrule 57.03(2) and the failure of the plaintiff to pay the costs of a motion. On September 7, 2004 I ordered the remaining plaintiffs to pay the Global defendants and several other defendants $1,500 in costs of an undertakings and refusal motion. These costs were to be paid within 30 days. In fact the plaintiffs did not pay these costs until April, 2005.

[24] I am not prepared to dismiss this action on the basis of late payment of these costs. This default was cured by the time the present motions were brought. However I recognize this as another instance where the plaintiffs failed to meet a deadline set by court order.

[25] I am not prepared to dismiss this action for delay and non-compliance with court orders at this time. I have reached this conclusion for two reasons. First and foremost this action has not ground to a complete halt. This is not a case where there has been absolutely no activity for a significant period of time. The parties have recently been in negotiations about dropping some of the Global defendants from the action and about amending pleadings. The plaintiffs may well feel that they are moving this action forward. If that is how they feel, I have to say that the pace of progress is glacial. Secondly since there has been no defence prejudice in the form of a witness who has died or disappeared or documentary evidence that has been lost, I have decided that the plaintiffs should be warned and given one last opportunity to change their ways.

[26] The plaintiffs' mindset must undergo a fundamental change if this action is to survive a second motion to dismiss for delay. Right now this action hangs by a thread. The plaintiffs' attitude of indifference to court orders and deadlines must cease and cease now.

[27] The plaintiffs should not regard any dismissal of these motions as wiping the slate clean as regards past defaults. If any of the defendants are in future instructed to bring

a second motion to dismiss for delay and defaults they may rely upon the plaintiff's [*sic*] defaults and delays described in the Global defendants [*sic*] present affidavit as part of the basis for that second motion.

The Order of April 11, 2007

27 The order dated April 11, 2007 followed the second motion to dismiss brought by the moving defendants and heard on March 7, 2007. The Master began his reasons by noting that he had given a special appointment for the argument of the motions and that his order was noted "This motion date is peremptory to all parties. Adjournments will be only in exceptional circumstances."

28 The Master then put on record the events which took place on March 7, 2007:

> [10] On March 7, 2007 counsel for Mr. Froom advised the court that Mr. Froom was currently incarcerated. When asked where Mr. Froom was incarcerated, he simply replied 'In Ontario'. He said that he had met Mr. Froom many times but that he had just been retained the previous day. He said that he was having difficulty getting instructions from Mr. Froom. He did not say how long Mr. Froom had been incarcerated. He denied that counsel for La-Fontaine-Rish was instructing him. He did not profer [*sic*] any affidavit supporting the statements he made to the court. Counsel for the moving defendants were clearly and justifiably upset at the lack of information from or about Mr. Froom. They were not aware until just before I convened court that any adjournment would be requested.
>
> [11] The basis of the present motions is no surprise to the plaintiffs. They have known since mid-February 2007 that the Global defendants and the other active defendants would be moving to have this action dismissed on March 7, 2007. That gave them plenty of time to prepare affidavit material supporting, explaining or justifying their position. Neither plaintiff filed any material.
>
> [12] Counsel for La-Fontaine-Rish did not complain of any inability to obtain instructions. I have been involved with this action since July 2002 and have case managed this action for several years. Mr. Froom and counsel for La-Fontaine-Rish have been before me many times. They have always worked closely together. Counsel for La-Fontaine-Rish is experienced and competent. He knows how to respond to motions. Mr. Froom could easily have retained him.
>
> [13] However, from the perspective of Mr. Froom on March 7, 2007, counsel for La-Fontaine-Rish had one shortcoming. He could not say that he was new to this action and that he needed time to become familiar with this action and to prepare a response to these motions. For someone inclined to delay this action that is a significant shortcoming.

> [14] In all these circumstances I declined to grant the plaintiffs' request for an adjournment of these motions. I then heard argument [*sic*] the merits of these four motions.

29 The Master then turned to hear arguments on the merits of the four motions. He is reported, as follows:

> [15] In my decision of December 5, 2006 I described how the plaintiffs had repeatedly delayed this action and were frequently in default of court orders. I said that I wanted my decision to be a warning that the plaintiffs had one last opportunity to change their ways. Finally, I said that the plaintiffs' mindset must undergo a fundamental change if this action were to survive a second motion to dismiss for delay and that this action hung by the thread. I said that the plaintiff's [*sic*] attitude of indifference to court orders and deadlines must cease immediately.
>
> [16] Since December 5, 1006 I have not seen any change in the plaintiffs' mindset. Their attitude of indifference to court orders and deadlines had continued despite my warning.
>
> [17] At a telephone case conference on January 25, 2006 I ordered the plaintiffs to deliver their amended statement of claim within 15 days. It was not delivered by the time I released my December 5, 2006 decision on the first round of dismissal motions. Had the plaintiffs delivered their amended statement of claim promptly after that decision was released, that would have been evidence of a change in the plaintiffs' mindset and evidence that the plaintiffs were taking my warning to heart. It was not so delivered. In fact, it was not delivered until February 11, 2007, approximately one year late.
>
> [18] When the first round of dismissal motions were argued on November 9, 2006 the plaintiffs had a pending motion for leave to make further amendments to the amended statement of claim. In my December 5, 2006 decision I stated that I had not dealt with all aspects of all motions pending before me at that time and that those who wished to pursue the unargued aspects of those motions had 15 days to request a case conference at which time I would make a timetable order respecting such motions. The plaintiffs never requested any such case conference. Their motion for leave to amend their amended statement of claim was never argued.
>
> [19] In argument before me on March 7, 2007 counsel for Mr. Froom submitted that I should not dismiss this action because it was close to the state where it could be set down for trial. If that were true, the plaintiffs' opportunities for further delay would be limited. But it is not true. At the telephone case conference January 25, 2006 I scheduled six more days of examinations for discovery, three of the plaintiffs and three for the Global defendants. I also set deadlines for answering undertakings, bring discovery motions

and setting this action down for trial. The timetable could not be met because of the plaintiffs' failure to deliver their amended statement of claim when ordered.

[20] The plaintiffs have never asked for a case conference to set a new timetable to reschedule those examinations for discovery and any other steps to be taken before this action is set down for trial. Over one year has passed since that timetable order was made.

[21] Finally, Mr. Froom did not retain counsel in order to instruct him to move this action forward. The retainer of Mr. Froom's counsel was limited to seeking an adjournment of these motions.

[22] Over eight years have passed since the television programme which gave rise to this action was aired. Despite my clear warnings of dire consequences, the plaintiffs' default and attitude of indifference to court orders remains unchanged. The plaintiffs are contumelious. If I were to dismiss these motions it would likely be several more years before this action reached the trial stage. That would be manifestly unjust to the defendants. By that time there is a virtual certainty that a fair trial of the issues in this action would not be possible, with resultant real prejudice to the defendants.

[23] The plaintiffs have led no evidence to rebut the presumption of prejudice to the defendants. The plaintiffs' delay has been intentional, inordinate and inexcusable. They have squandered their last chance.

[24] For all these reasons these motions are granted. This action is dismissed with costs to the moving defendants to be assessed.

1. Should the plaintiffs' motion to lead fresh evidence be granted?

30 The first order of business on the appeal was consideration of the plaintiffs' motion to introduce fresh evidence. Sealed envelopes were filed with the Court containing the motion to receive fresh evidence and Mr. Froom's affidavit. Also filed in sealed envelopes were the responses of the various defendants objecting to the introduction of fresh evidence, including factums and authorities. I told counsel at the beginning of the motion that I had opened the sealed envelopes on Sunday, January 6 and reviewed the contents. I invited counsel to make submissions with respect to any objections they might have for doing so. No objections were made.

31 Baldly put, the basis for Mr. Froom's motion to receive fresh evidence is his sworn affidavit that he did not receive or have any knowledge of Master Hawkins' endorsement, dated December 5, 2006, until March 2, 2007. This state of affairs, he swears, prevented him from complying with the costs order of December 5, 2006; it prevented him from knowing about or participating in the telephone conference of February 12, 2007; and it prevented

him from instructing counsel on his behalf to appear on March 7 to make submissions with respect to the motion for dismissal.

32 For this state of affairs to exist means that Mr. Froom made no efforts to find out the results of the first motion for dismissal. It means that his office took no steps to communicate the results of that motion which that office received on or shortly after December 6, 2006, three months before the hearing. It means that Mr. Cousins, Mr. Froom's lawyer, retained to represent the interests of Lafontaine-Rish made no efforts to communicate the results of the motion to Mr. Froom. In addition, it appears, Mr. Cousins made no effort to inform the Master or the defendants in the telephone conference of February 12, 2007, that Mr. Froom was in custody. Indeed, on March 7, 2007, Mr. Cousins had nothing to say about Mr. Froom when the Master inquired where he might be.

33 Almost every day in Canada juries are instructed to use their common sense and their ordinary life experience when assessing credibility. When I consider Mr. Froom's sworn statement that he didn't learn of the December 5 order until March 2, 2007, through the optic of common sense and ordinary life experience, I can find only two explanations for this statement. One explanation is that he is attempting to deceive the court while knowing full well of the December 5 order well in advance of the March 7 hearing and, indeed, well in advance of the February 12 telephone conference. The other explanation is that he deliberately organized his affairs and crafted his instructions to his counsel and to his employees in such a way that he would remain ignorant of the contents of the order until such time as it suited him to learn of them.

34 In considering whether due diligence was exercised by the plaintiffs, it matters not which explanation obtains. In either instance, due diligence has not been exercised. I reject the sworn statement of Mr. Froom that the circumstances of his incarceration made it impossible for him to find out the results of the December 5, 2006 decision. Persons in Canadian custody have access to lawyers and have access to correspondence, both sent and received. If Mr. Froom chose not to use these avenues to inform himself, he has not exercised due diligence. If Mr. Froom knew very well the contents of the December 5, 2006, before March 2, 2007, as I suspect he did, he has not exercised due diligence. It is trite law that fresh evidence should generally not be admitted if, by due diligence, it could have been adduced at first instance. (*R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.) at p. 775; *SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of)* (2005), 78 O.R. (3d) 521 (Ont. Div. Ct.), at paras. 53, 55 & 63) Following the submissions on the motion to introduce fresh evidence, I adjourned briefly and returned to advise the parties that the motion was denied with reasons to follow, together with the results of the appeal. It is for the above reasons the motion to introduce fresh evidence was denied.

35 There had been an additional motion brought by the plaintiffs whose consideration depended upon the fresh evidence being admitted. Plaintiffs' counsel agreed it was unnecessary to deal with it.

2. What is the appropriate standard of review where a case management Master dismisses an action for delay?

36 The plaintiffs submit that the standard of review of the Master's decision to dismiss the action is one of correctness. The moving defendants submit that a degree of deference is owed to the Master by virtue of his position as case management Master of the action since 2002.

37 This is an appeal from a final order of a Master exercising discretion. Ontario case law has been inconsistent with respect to how an appellate court should deal with such an appeal. In *Hudon v. Colliers Macaulay Nicolls Inc.*, [2001] O.J. No. 1588 (Ont. Div. Ct.), the appeal was from a final order of a Master exercising discretion. A panel of the Divisional Court stated that "on an appeal from a discretionary order of a Master which is final, or which determines a matter vital to the final issue of the case, the judge hearing the appeal is entitled to conduct a re-hearing and — after according some deference to the Master's expertise in the field — substitute his or her discretion for that of the Master".

38 An example of the contrary view, is the decision of Nordheimer J., in *Noranda Metal Industries Ltd. v. Employers Liability Assurance Corp.* (2000), 49 C.P.C. (4th) 336 (Ont. S.C.J.). Nordheimer J. stated that "the appropriate standard of review is one of deference, regardless of whether or not the Master's decision disposed of the final issue; appeals should be heard as appeals and not *de novo*". The policy reasons offered for this conclusion included the fact that Masters are on the frontline in determining many matters, the fact that case management Masters must have reasonable and fair control over their process and that if matters are heard *de novo*, it would encourage parties to launch appeals and thereby obtain a new hearing.

39 In *Moritex Europe Ltd. v. Oz Optics Ltd.* (2006), 81 O.R. (3d) 783 (Ont. Div. Ct.), Epstein J. made an extensive review of the two approaches, touching on over thirty-five cases which touched on the subject. She concluded that it would be useful if a higher court were to resolve the issue and reconcile the *Hudon* line of cases with the policy concerns raised in the line of cases following *Carter v. Brooks* (1990), 2 O.R. (3d) 321 (Ont. C.A.). Epstein J. concluded by finding that she was obliged to follow the test established in *Hudon*, that is to say, the standard of review is correctness.

40 I respectfully suggest that in certain circumstances, the standard of review established in *Moritex Europe Ltd.* may require further examination on a case-by-case basis. *Moritex* involved a motion for summary judgment granted by the Master. The Master was required

to consider facts presented by affidavit evidence. There is no suggestion in the judgment that the Master was a case management Master and thereby intimately familiar with the history of the matter. A standard of review of correctness was appropriate in those circumstances.

41 However, in *Bank of Nova Scotia v. Liberty Mutual Insurance Co.*, [2003] O.J. No. 4474 (Ont. Div. Ct.), a panel of the Divisional Court echoed Nordheimer J. in *Noranda Metal*, above, when speaking of the role of a Case Management Master:

> Case management masters play an important role in shepherding cases through the pre-trial process and ensuring that the purposes of Rules 77 are achieved. In furtherance of their role in this regard, case management masters must have the ability to exercise some reasonable and fair control over the discovery process without being second-guessed by judges who will normally be very much less familiar with the history of the proceeding.
>
> (*Bank of Nova Scotia v. Liberty Mutual*, above, at para. [10])

42 In this appeal, the case management Master was faced with a motion to dismiss an action for delay. The action was one with which he was intimately involved since 2002. He had presided over lengthy motions for completion of undertakings and refusals on examinations. He was ideally situated over a period of four years to form an opinion as to the manner in which the plaintiffs were conducting the litigation. I asked myself how appropriate would it be for me to deal with this appeal by way of hearing *de novo*, while giving deference to the Master's conclusion. I find it would be inappropriate, indeed approaching judicial arrogance, to, in effect, say that I am in a better position to consider the issue of delay than the Master.

43 It must be remembered that this final order bears no relation to an order for summary judgment. The issue between the parties was delay; that issue brings into play the special knowledge acquired by the Master during the course of his case management responsibilities.

44 In the circumstance of this appeal, I adopt a standard of review where I must be convinced the Master made a palpable or overriding error, misapprehended the evidence or was clearly wrong in his conclusion. I do not propose to conduct a re-hearing where my discretion may be substituted for that of the Master.

45 In the event I should have conducted a hearing *de novo*, while giving some deference to the Master's decision, I would have refused leave to introduce fresh evidence. I would have based my refusal on the evidence that was before the Master, from the start of the action to March 7, 2007.

3. Applying the appropriate standard of review, should the Master's decision be overturned?

46 The plaintiffs' submit the Master committed a reversible error in dismissing the action for delay.

47 An action should not be dismissed for delay unless one of two requirements are met:

(a) the default is intentional and contumelious; or

(b) the plaintiff and his/her lawyers are responsible for the inexcusable delay that gives rise to a substantial risk that a fair trial may not now be possible.

(*Armstrong v. McCall*, [2006] O.J. No. 2055 (Ont. C.A.) at para. 11)

48 In determining part one of the test, the court looks at the evidence to determine whether the delay on the part of the plaintiff has been intentionally disdainful or disrespectful.

49 A review of the Master's ruling issued December 5, 2006 shows the following findings of fact made by the Master in his unique position in managing the litigation:

(i) The plaintiffs' mindset must undergo a fundamental change if the action is to survive a second motion to dismiss for delay;

(ii) The plaintiffs' attitude of indifference to court orders and deadlines must cease and cease now;

(iii) The moving defendants were fully justified in complaining of the plaintiff's delays and defaults to date.

50 In his March 23, 2007 ruling, the Master made the following findings of fact:

(i) Despite my clear warnings of dire consequences, the plaintiffs' default and attitude of indifference to court orders remained unchanged;

(ii) The plaintiffs are contumelious;

(iii) The plaintiffs' delay has been intentional, inordinate and inexcusable.

These were findings the Master was entitled to make on the state of the evidence before him as of March 7, 2007. I find no palpable or overriding error, no misapprehension of the evidence nor any suggestion that the Master was clearly wrong in his conclusion.

51 It may be said that his findings were based on incomplete information, that if he knew the circumstances of Mr. Froom's incarceration, he might have come to a different conclusion. Any lack of knowledge on the part of the Master is directly attributable to Mr. Froom and his solicitors. Earlier in these reasons, I found that either Mr. Froom attempted to deceive the court or arranged his affairs in such a way as to remain in an ignorant state about the order of December 5, 2006. The plaintiffs can not rely on the conduct of Mr. Froom and his solicitors to impair the findings of fact made by the Master on March 7, 2007. Added to

what he already knew was the failure of Mr. Froom to engage in the telephone conference of February 12, 2007 and his failure to appear on March 7, 2007 other than by the appearance of counsel retained solely for the purpose of asking for an adjournment. The failure of Mr. Cousins to acquaint the Master of Mr. Froom's circumstances is the failure of Mr. Froom.

52 In determining part two of the test, an inordinate delay may give rise to a presumption of prejudice. Where a presumption of prejudice exists, the defendants do not have to lead evidence of actual prejudice, rather the action will be dismissed unless and until the plaintiffs are able to successfully rebut that presumption. The presumption of prejudice may be rebutted by evidence that all documentary evidence has been preserved and the issues in the lawsuit do not depend on the recollection of witnesses. (see: *Woodheath Developments Ltd. v. Goldman*, [2003] O.J. No. 3440 (Ont. Div. Ct.), at paras. 4 and 5)

53 In para. [22] of his reasons, dated April 11, 2007, the Master found that if he were to dismiss the Global defendants' motions, "it would be likely to be several more years before this action reached the trial stage. That would be manifestly unjust to the defendants. By that time there is a virtual certainty that a fair trial of the issues in this action would not be possible, with resultant real prejudice to the defendants".

54 The Master's reasons continue, at para. [23]:

> The plaintiffs have led no evidence to rebut the presumption of prejudice to the defendants. The plaintiffs' delay has been intentional, inordinate and inexcusable.

55 The Master was entitled to come to these conclusions on the evidence before him as of March 7, 2007. I find no palpable or overriding error, no misapprehension of evidence and no suggestion that he was clearly wrong in his conclusions.

56 The plaintiffs' submit that the defendants are responsible for delay since they did not file their amended Statement of Defence. There is no merit in this submission. The plaintiffs did not produce their amended Statement of Claim until March of 2007. To suggest the defendants had an obligation to produce an amended Statement of Defence before receiving the amended Statement of Claim is preposterous.

57 The plaintiffs submit that the doctrines of *res judicata* and issue estoppel apply to the findings of the Master in his decision issued December 5, 2006, wherein he concluded there was no evidence of prejudice which would justify a dismissal of the action. I find no merit in this submission. His statement that there was no evidence that a potential witness had died or disappeared or that documentary evidence had been lost does not mean that further inordinate or inexcusable delays by the plaintiffs would not give rise to prejudice to the defendants. Master Hawkins specifically stated the plaintiffs should not regard his

dismissal of the motions of November 9, 2006 as "wiping the slate clean as regards to past defaults". In para. 27 of the December 5, 2006 reasons, he is reported:

> If any of the defendants are in future instructed to bring a second motion to dismiss for delay and defaults they may rely upon the plaintiffs' defaults and delays described in the Global defendants' present affidavit as part of the basis for that second motion.

58 The plaintiffs' submit that the Master erred in dismissing the action for failure to comply with court orders, including failure to pay costs. I find no merit in this submission.

59 Rules 57.03(2), 60.12 and 77.10(7) of the *Rules of Civil Procedure* provide as follows:

> 57.03
>
> (2) Where a party fails to pay the costs of a motion...the court may dismiss or stay the party's proceeding...
>
> . . . . .
>
> 60.12. Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,
>
> . . . . .
>
> (b) dismiss the party's proceeding...
>
> . . . . .
>
> 77.10.
>
> (7) If a party fails to comply with a time requirement set out in a timetable established under this rule, a case management judge or case management master may,
>
> . . . . .
>
> (b) dismiss the party's proceeding...

60 The plaintiffs' repeated breach of court orders, including orders to pay costs within a certain time and their breaches of timetables provided sufficient grounds for Master Hawkins to dismiss the plaintiffs' action.

61 Where a plaintiff has breached numerous orders and is found to have shown "utter disregard" for court orders, it will be appropriate for an action to be dismissed pursuant to Rules 60.12 and 77.10(7).

62 The plaintiffs in this case had continuously breached court orders and timetables. The Reasons for Decision of Master Hawkins issued December 5, 2006 make it clear the plaintiffs were being given "one last opportunity" to comply with the orders of the court and to move their matter along. When the plaintiffs continued to breach court orders after the motion of

November 9, 2006, Master Hawkins found the plaintiffs to be contumelious. The finding was justified on the state of the matter as he knew it.

63 The plaintiffs' submit the Master unlawfully fettered his discretion in his order of December 5, 2006 by issuing a warning to the plaintiffs as to what might happen if further instances of delay occurred. I find no merit in this submission. The plaintiffs were entitled to know the Master's view of the conduct of the proceedings to that point. The Master fulfilled his obligations to the plaintiffs by telling them exactly where they stood.

4. Was the Master's decision a denial of natural justice?

64 The plaintiffs allege the Master denied their rights to natural justice by refusing the adjournment. When a denial of natural justice is alleged, a standard of review analysis is not required. Rather, the inquiry is directed simply to whether the Master lost jurisdiction by proceeding with the motion to dismiss when informed that Mr. Froom was in custody.

65 Earlier in these reasons, I heard submissions relating to the request of the plaintiffs to motion to introduce fresh evidence. In the course of that motion, I received and read affidavit material filed by the plaintiffs and the moving defendants. There are two reasons why I find it appropriate that I should consider that evidence when ruling on the allegation of denial of natural justice.

66 The fresh evidence which the plaintiffs sought to introduce on this appeal was ruled inadmissible because it failed to meet the test for such a motion as previously discussed in these reasons. I found they had failed to demonstrate due diligence in bringing the evidence before the court. Evidence ruled inadmissible for one purpose may, nevertheless, be admissible for another purpose. The affidavit of Mr. Froom and the affidavit of Ms. Clark, filed on behalf of the Global defendants, are properly before me in considering the alleged denial of natural justice.

67 Moreover, where a denial of natural justice is alleged, there is authority for the proposition that affidavit evidence may be admitted on a judicial review application (and by extension, on an appeal of the nature before me) where the evidence contained in the affidavits bears on the issue of jurisdictional error based on a denial of natural justice. In *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (Ont. C.A.), Morden J.A. is reported at p. 521:

> I would express the view...that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error.

68 *Keeprite*, above, was applied by the Divisional Court in a matter which subsequently went to the Court of Appeal, *Hinds v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 367 (Ont. C.A.). The Divisional Court had struck out the majority of affidavits filed on an application for judicial review, but retained a portion of an affidavit speaking to the question of an alleged loss of jurisdiction. The Court of Appeal found the Divisional Court's understanding and application of *Keeprite* were correct.

69 For the reasons expressed in my ruling on the motion to introduce fresh evidence, I find Mr. Froom to be the author of his own misfortune. By his own actions and inactions, he left the Master with no alternative but to refuse the request for adjournment. I find no denial of natural justice.

70 The appeal is dismissed.

71 Brief submissions as to costs, limited to three pages, may be made by the respondents by February 9, 2008, after service on the plaintiffs. The plaintiffs shall have fifteen days thereafter to respond.

Appeal dismissed.

TAB 4

2013 ONCA 361
Ontario Court of Appeal

Nissar v. Toronto Transit Commission

2013 CarswellOnt 7174, 2013 ONCA 361, [2013] O.J. No. 2553, 115 O.R. (3d) 713, 229 A.C.W.S. (3d) 398, 309 O.A.C. 8

Rabeka Nissar, Appellant and The Toronto Transit Commission, Respondent

R.A. Blair J.A., Paul Rouleau J.A., M. Tulloch J.A.

Heard: November 22, 2012
Judgment: June 4, 2013
Docket: CA C55342

Counsel: William G. Scott, for Appellant, Rabeka Nissar
Norma Priday, for Respondent, Toronto Transit Commission

Subject: Civil Practice and Procedure; Torts

APPEAL by plaintiff passenger from judgment of motions court dismissing passenger's motion to have action against respondent transit authority restored to trial list.

***M. Tulloch J.A.*:**

A. Overview

1 This appeal concerns an action initiated in 2001 in relation to a March 2, 1999 accident involving a Toronto Transit Commission ("TTC") bus and another vehicle. The appellant was a passenger on the bus and, shortly after, retained her first lawyer to sue for the alleged injuries she sustained when the bus came to a sudden stop.

2 As I will outline below, the action has been plagued by significant delay. For the reasons that follow, I am not convinced that the motion judge erred by refusing to restore the action to the trial list. I would therefore dismiss the appeal.

B. Background

(1) Chronology of the action

3 On March 1, 2001, two years less one day after the appellant's accident, her first lawyer issued a notice of action in this matter. There is some dispute between the parties whether the statement of claim was properly issued or served on the TTC.

4 In November 2001, the TTC delivered a statement of defence and alleged that the accident was caused by the negligence of the driver of an unidentified vehicle that had improperly cut off the bus.

5 In April of 2002, the appellant and the driver of the TTC bus, Phillips, were examined for discovery. The transcripts of the driver's examination were never ordered.

6 In June 2002, counsel for the TTC arranged for a medical examination of the appellant. One month later, in July 2002, the parties attempted to mediate the matter. However, counsel for the TTC refused to proceed due to the failure of the appellant and her first lawyer to answer undertakings given on the examination for discovery in April 2002.

7 In October 2003, the TTC arranged for a second medical examination of the appellant.

8 In November 2004, the appellant's first lawyer served a trial record on the TTC and set the matter down for trial.

9 Unbeknownst to the respondent at the time, the matter was struck off the trial list by a judge in April 2005.

10 Nothing happened with the case until December 2005 when the parties made a second attempt to mediate the case. Again, the mediation failed for the same reason as the first mediation.

11 In May 2006, the appellant's second lawyer, prior to serving a notice of change of solicitor, arranged for another mediation. That mediation failed for the same reason as the first and second mediation.

12 In February 2007, the appellant's second lawyer served a notice of change of solicitor on the TTC. She attempted to settle the matter again by mediation. Once again, the attempt failed because of the appellant's failure to answer undertakings. Over the next year, the appellant's second lawyer attempted mediation a further two times. Counsel for the TTC refused on the basis of failure of the appellant and her counsel to answer undertakings given during her 2002 examination for discovery.

13 At some point prior to October 2009, the appellant retained her third lawyer. In that same month, the appellant's third lawyer served a notice of change of solicitor on the TTC. He requested a list of the undertakings outstanding from the 2002 examination for discovery.

14 In December 2010, the appellant's third lawyer suggested mediation again. In this correspondence, the appellant's third lawyer advised counsel for the TTC that no transcript of Phillip's testimony was ever ordered and that the original tapes have been destroyed due to the passage of time and because no-party ever requested that they be transcribed. The appellant's third lawyer requested that the TTC produce Phillips again for an examination for discovery. Counsel for the TTC refused to do so.

15 The appellant's third lawyer brought a motion for an order that Phillips reattend for a further examination for discovery and that the action be restored to the trial list. The motion was returnable June 16, 2011. Since the action was struck off the trial list by a judge, the motion to restore the action was required to be heard by a judge. To that end, the motion was adjourned to March 2012.

(2) Decision of the motion judge

16 The motion judge dismissed the motion to restore the action to the trial list. In a short set of reasons, the motion judge found there was no explanation in the evidence for why it had taken seven years to bring a motion to restore the action to the trial list. He held that, on any reasonable formulation, the test to restore an action to the trial list would not have been met on the record before him.

17 In addition, the motion judge found actual prejudice to the defendant in two respects. First, the appellant's OHIP pre-accident medical records were unavailable. Second, Phillips may not remember the details of an accident from 13 years earlier and there was no evidence on Phillips' ability to remember or his current health status.

18 The motion judge concluded that it would be fundamentally unfair to the defendant to allow the action to proceed. In any event, the appellant would have a remedy in the form of a negligence action against her two former lawyers. In the result, he dismissed the appellant's motion to restore the action to the trial list.

C. Discussion

(1) Submissions of the parties

19 The appellant submits that the motion judge erred by not applying the test to restore an action to the trial list as articulated in *Ruggiero v. FN Corp.*, 2011 ONSC 3212, [2011] O.J. No. 2732 (Ont. Master)). At para. 20 of *Ruggiero*, this test was articulated by the master as:

1. Is the delay intentional and contumelious?

2. If not, is there an inordinate and inexcusable delay in the litigation for which the plaintiff or his solicitors are responsible, such as would give rise to a presumption of prejudice?

3. If so, has the plaintiff provided evidence to rebut the presumption of prejudice arising from the delays?

4. If so, have the defendants provided evidence of actual prejudice?

20 The master reasoned by analogy from this court's decision in *Armstrong v. McCall* (2006), 213 O.A.C. 229 (Ont. C.A.) to formulate the above test. In *Armstrong*, the court was entertaining an appeal from a decision on a rule 24.01 motion brought by a defendant to dismiss a plaintiff's action for delay.

21 The appellant submits that, had the motion judge applied the correct test, he would have granted the motion and ordered that the appellant's action be restored to the trial list.

22 The respondent agrees that the jurisprudence relating to Rule 48 and not Rule 24 ought to govern a court's discretion whether to restore an action to the trial list. The respondent submits, however, that regardless of the test applied, the motion judge was correct in refusing to restore the action to the trial list.

(2) The test to restore an action to the trial list pursuant to rule 48.11

23 In an appeal released contemporaneously with the case at bar, *Faris v. Eftimovski*, 2013 ONCA 360 (Ont. C.A.), I analyzed the provisions of the *Rules of Civil Procedure* concerning the procedures by which an action could be dismissed for delay.

24 *Faris* was an appeal from a judge's decision to dismiss an action for delay after a status hearing pursuant to rule 48.14(13) of the *Rules of Civil Procedure*.

25 In *Faris*, I noted that Rule 48 provides a mechanism enabling the court to control the pace of litigation and ensure that disputes are resolved efficiently. A rule 24.01 motion, on the other hand, enables a defendant, who has complied with the rules, to take a deliberate procedural step to dismiss an action where the plaintiff has been delinquent in a manner enumerated under that rule.

26 For the reasons I gave in *Faris*, a court should treat as distinct a defendant's motion to dismiss for delay under Rule 24 from those procedures made available to the court under Rule 48. Like a status hearing, the requirement that leave be obtained to restore an action to the trial list under rule 48.11 is simply another weapon in the Rule 48 judicial arsenal "to promote the timely resolution of disputes, to discourage delay in civil litigation and to give

the courts a significant role in reducing delays": Todd Archibald, Gordon Killeen & James C. Morton, Ontario Superior Court Practice (Markham: LexisNexis Canada, 2011), at p. 1205.

27 In *Ruggiero*, Master Graham noted that there was a dearth of authority with respect to the test that should be applied on a motion seeking leave to restore an action to the trial list. He reasoned by analogy that the plaintiff was in the same position as if the defendants had moved to dismiss the action for delay. Therefore, the master adopted the test set out in *Armstrong v. McCall* (2006), 28 C.P.C. (6th) 12 (C.A.), a decision concerning a rule 24.01 motion to dismiss.

28 This test has been followed in subsequent decisions: see *Williams v. John Doe*, 2012 ONSC 2514, [2012] O.J. No. 1822 (Ont. Master) and *1351428 Ontario Ltd. v. 1037598 Ontario Ltd.*, 2011 ONSC 4767, [2011] O.J. No. 3597 (Ont. S.C.J.).

29 However, for the sake of consistency and for the reasons I gave in *Faris*, I would instead adapt those factors informing the rule 48.14(13) test recently confirmed by this court in *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67 (Ont. C.A.) to determine when an action should be restored to the trial list.

30 In my view, it is preferable to place the onus on a plaintiff to explain the delay and satisfy the court that it would not be unfairly prejudicial for the defendant to have the action restored to the trial list. This court has held that it is the plaintiff's responsibility to move the action forward and prosecute the matter as diligently as possible: see *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, 102 O.R. (3d) 555 (Ont. C.A.), at para. 48.

31 Therefore, the applicable test is conjunctive: a plaintiff bears the burden of demonstrating that there is an acceptable explanation for the delay in the litigation *and* that, if the action was allowed to proceed, the defendant would suffer no non-compensable prejudice.

(3) Application to the case at bar

32 The motion judge expressed the view that, no matter how the test to restore an action to the trial list was formulated, the appellant's motion should be dismissed. He made it clear that he was unsatisfied with the lack of an explanation for why it took seven years to bring a motion to restore the action to the trial list.

33 I agree with his conclusion: the conduct of the appellant's first and second lawyers delayed any real progress in this action. It is regrettable, therefore, that the appellant's third lawyer entered on the scene at such a late stage of the proceedings. It is my understanding that he has made an appreciable effort to turn the appellant's fortunes around and has

initiated an action sounding in negligence against the appellant's two former lawyers alleging mismanagement of her case.

34 With respect to the issue of prejudice, the motion judge found real and actual non-compensable prejudice. The appellant's OHIP records are only available from 1997. Understandably, records going back further would be required to objectively assess the appellant's health status before and after the accident. Further, it is likely that some relevant doctors' records would no longer be available. The transcript of Phillips' examination for discovery, conducted in 2002, was never ordered by the appellant's first or second lawyer. Having never been ordered, the recording has since been destroyed and is similarly unavailable.

35 Phillips could not be expected to recall these events in any great detail. As this court stated in *Wellwood*, at para. 72: "since the memories of witnesses fade over time, the passage of an inordinate length of time after a cause of action arises or after an applicable limitation period expires gives rise to trial fairness concerns."

36 In my view, it would be unfair to force the respondent to deal with this matter after such inordinate delay and on such an incomplete record. The respondent has, in the words of Sharpe J.A. in *1196158 Ontario Inc.*, been kept in a state of having the "claim hanging over its head in a kind of perpetual limbo."

(4) The appellant's motions to adduce fresh evidence

37 Before this court, the appellant brought two motions to introduce fresh evidence on appeal. On the first motion, the appellant sought to submit an affidavit of her third lawyer to which she attached her decoded OHIP treatment summary from April 1997 to June 2010. The second motion concerns the affidavit evidence of a solicitor who alleges that she met with Phillips, the retired TTC bus driver, to discuss the accident that occurred in 1999. In her affidavit, the solicitor deposes that Phillips "recalls the incident".

38 I would deny the motions to adduce fresh evidence. There is no dispute that the test to receive fresh evidence in this court was established by the Supreme Court in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.). As a general rule, evidence should not be admitted in civil cases if it could have been adduced in the court below. Furthermore, the appellant's proposed fresh evidence must be relevant, credible and sufficiently cogent such that, if believed, it could reasonably be expected to have affected the result reached by the motion judge.

39 Again, the motion judge found unacceptable delay in this action and that there would be extreme prejudice to the defendant if the action were allowed to proceed and restored to the trial list. Assuming without deciding that the proposed fresh evidence is relevant, credible and that due diligence was exercised on the part of the appellant, I am not convinced that

the motion judge's decision to dismiss the action would have been different if he had had the benefit of the OHIP summaries or Phillips' assertion that he had some recollection of the incident. After all, whether the fresh evidence could be expected to have affected the result in the court below is a necessary condition of its admission on appeal: see *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 93 O.R. (3d) 483 (Ont. C.A.), at para. 78.

D. Disposition

40 In the result, I would dismiss the appeal.

41 Costs are fixed at $8,900 to the respondents, inclusive of all applicable taxes and disbursements.

R.A. Blair J.A.:

I agree

Paul Rouleau J.A.:

I agree

Appeal dismissed.

TAB 5

2014 ONSC 1083
Ontario Superior Court of Justice (Divisional Court)

Payne v. Law Society of Upper Canada

2014 CarswellOnt 3568, 2014 ONSC 1083, 238 A.C.W.S. (3d) 792, 319 O.A.C. 176

Jonathan Bruce Payne, Applicant and The Law Society of Upper Canada, Respondent

Kiteley J., Aston J., Whitaker J.

Heard: February 10, 2014
Judgment: March 25, 2014
Docket: 13-369-JR

Counsel: Applicant, for himself
Leslie Maunder, for Respondent

Subject: Civil Practice and Procedure; Evidence; Public; Torts

APPLICATION by individual for judicial review of Law Society's decision not to issue him paralegal licence; MOTION by same individual to admit fresh evidence.

Decision of the Board:

1 The applicant seeks judicial review of a decision of the Appeal Panel [1] of the Law Society of Upper Canada dated July 15, 2013, dismissing an appeal from a decision of the Hearing Panel dated June 13, 2012 that dismissed his application for a paralegal licence because he had not met the good character requirement in s. 27(2) of the *Law Society Act* [2] .

Motion for leave to file fresh evidence

2 Prior to the hearing of the judicial review application, we heard and dismissed the applicant's motion to introduce fresh evidence indicating that reasons would follow. These are the reasons.

3 The fresh evidence fell into two categories:

(a) evidence that Jason Herbert worked in the office of Susan Hare (Chair of the Hearing Panel) and for Mary Ann MacDonald (a witness called by Law Society counsel);

(b) evidence aimed at impeaching the credibility of the witness Mary Ann MacDonald.

4 The evidence that Mr. Herbert was associated to Ms. Hare's office and then later to Ms. MacDonald's office is tenuous. It has no probative value in support of the applicant's submission that there was a reasonable apprehension of bias on the part of the Hearing Panel. The applicant was aware of the evidence at the time of the Appeal Panel hearing but did not raise it or attempt to rely upon it.

5 The fresh evidence aimed at impeaching the witness was known to the applicant prior to the hearing by the Hearing Panel. It was not used at that time. Indeed, counsel for the applicant did not cross-examine Ms. MacDonald.

6 All of the proposed fresh evidence was available prior to the hearing of the Appeal Panel and could have been adduced then by the exercise of due diligence. The evidence has little or no probative value and does not bear upon a decisive or potentially decisive issue. The evidence could not be expected to have affected the result of the Hearing Panel, much less the Appeal Panel. The evidence tendered does not meet the test in *R. v. Palmer*.[3]

Issues raised by the applicant

7 The applicant argues that the conclusions of the Appeal Panel are not supported by the evidence and adequate reasons or are the result of a misapplication of the appropriate standard; that the Appeal Panel's findings with respect to his breach of the undertaking are not supported by the evidence or are the result of the application of an arbitrary and unilateral standard; that the Appeal Panel's findings with respect to the truthfulness of the witnesses called on behalf of the Law Society are not supported by the evidence and the Appeal Panel prejudged the applicant's submissions on this issue; that the Appeal Panel discriminated against the applicant or engaged in abuse of process by permitting counsel for the Law Society to elicit false testimony from its witnesses; that there was a reasonable apprehension of bias against the applicant arising from a potential conflict of interest of the Hearing Panel Chair; that the applicant had ineffective counsel[4] before the Hearing Panel and the Appeal Panel should have taken that into consideration; that the cumulative errors amount to an abuse of process or denial of natural justice or procedural fairness.

Standard of Review

8 A finding of fact or of mixed fact and law cannot be reversed absent a palpable and overriding error. Questions of law and principle are reviewable for correctness.[5]

9 On issues of denial of procedural fairness or a breach of the principles of natural justice, there is no standard of review. A person who is denied procedural fairness or natural justice has not had a fair hearing and the decision flowing from that hearing must be set aside. [6]

The Undertaking

10 The applicant was called to the bar in British Columbia in 1983. His discipline history is contained in the earlier decisions. In 1995, he moved back to Ontario and in 1998 began practicing as a paralegal. In 2000, the Law Society considered prosecuting him for unauthorized practice. The matter was resolved when the applicant signed an undertaking on May 30, 2000 which included the following paragraph:

> That I will cease forthwith in providing any assistance or legal advice or representation in areas not authorized by Statutes for agents and including, without restricting the generality of the foregoing, separation agreements, divorce, wills, real estate, incorporations and the provision of legal advice [generally [7]].

11 That undertaking was a key issue before the Hearing Panel, the Appeal Panel and before this court.

The Hearing Panel

12 The Hearing Panel found that the applicant was obligated to disclose the undertaking in his application to be licensed as a paralegal and that his failure to do so was misleading. Notwithstanding that the Hearing Panel rejected much of the evidence of the witnesses called on behalf of the Law Society, the Hearing Panel made findings regarding the applicant's conduct of the client files which findings were consistent with the applicant's evidence that he had provided unauthorized services by negotiating separation agreements and drafting Superior Court documents, that he failed to advise of his bankruptcy in a timely manner, that he failed to serve his client (by not filing the amended Lewis Claim), failed to protect client funds, and failed to protect a client's confidentiality. The Hearing Panel's greatest concern was that he had failed to follow the undertaking for a period of approximately 5 years. The Hearing Panel dismissed his application.

The Appeal Panel

13 The Appeal Panel agreed with the applicant that the Hearing Panel erred in finding that his application for a licence was misleading for not disclosing his undertaking. While agreeing that that was a fact material to the application, the Appeal Panel held that none of the questions on the application form required the applicant to disclose the undertaking. The Appeal Panel considered whether the error had mattered and held that the Hearing Panel's

conclusion as to the applicant's good character would not have been any different because the decision to reject his application was based largely on the breach of the undertaking and his own admitted conduct of his client files. The Appeal Panel dismissed all other grounds of appeal.

Analysis

A. Inconsistent findings of fact

14 The applicant took the position that the Hearing Panel made inconsistent findings in that it held at paragraph 84 of its decision that the Panel was "not sure" if he understood at the time of the hearing what the limitations were according to the undertaking yet went on to reject his uncontradicted evidence that he honestly but mistakenly believed that the undertaking did not prohibit the services he had performed. He argued that the decision of the Appeal Panel failed to address this apparent discrepancy.

15 We do not accept that submission. In paragraph 54(f) the Appeal Panel did address the apparent discrepancy, at least by necessary inference where it held that the undertaking was unequivocal and the applicant had clearly breached the undertaking. In the course of its reasons, the Appeal Panel accepted the findings of the Hearing Panel that the applicant had breached the undertaking in relation to Ward by drafting Superior Court documents for her; by preparing a separation agreement for Keetch; and by representing Coombs in negotiating the terms of a separation agreement.

16 There was evidence before the Hearing Panel that was affirmed by the Appeal Panel, that the applicant had breached his undertaking repeatedly over the course of several years. The Appeal Panel drew the reasonable inference that because the undertaking was so clear and unequivocal, that it was deceitful and dishonest for the applicant to claim an honest but mistaken belief in that regard.

17 To accept the submission as to the apparent inconsistency would require us to analyze the reasons for decision of the Appeal Panel by focusing on specific passages. On a judicial review application, the court must not parse reasons too closely to find some error, but must look at the reasons as a whole. In the context of the other findings of fact by the Hearing Panel, the apparent discrepancy noted in paragraph 84 of its reasons can be understood to mean that the applicant may not have known all of the exact boundaries of the undertaking but that he must have known from the clear wording of the undertaking that certain activities he engaged in were prohibited.

B. Effect of the Appeal Panel overturning the finding of the Hearing Panel

18 As indicated above, the Appeal Panel overturned the finding of the Hearing Panel that the failure of the applicant to disclose the undertaking on his application for a licence was misleading. The Appeal Panel then reviewed the impact of that finding on the decision made by the Hearing Panel that the applicant had failed to fulfill his onus of establishing the good conduct requirement. We are not persuaded that the Appeal Panel made any errors in law in its analysis of this issue or its conclusion that the finding that it overturned did not have an impact on the outcome.

C. Credibility of evidence of LSUC witnesses

19 The Hearing Panel rejected much of the evidence called by counsel for the Law Society. Before the Appeal Panel and before us, the applicant argued that the evidence was deliberately false and that counsel for the Law Society had knowingly led false evidence.

20 The Hearing Panel carefully analyzed the evidence and was clear on that evidence which it accepted and on which it relied. On this issue, we are not persuaded that the Appeal Panel made palpable and overriding errors. Indeed there is no basis in the record before us for the allegation that the evidence was deliberately false or that counsel knowingly led false evidence.

D. Rejection of uncontradicted evidence

21 The Applicant challenged the acceptance by the Appeal Panel of the findings made by the Hearing Panel. He pointed out that the Hearing Panel had rejected much of the evidence of witnesses called on behalf of the Law Society and that left his own evidence which was uncontradicted in many important areas.

22 It is not an error of law to reject evidence just because that evidence is uncontradicted. Where the evidence is of one's state of mind, it is sometimes appropriate to be skeptical of that evidence, even if the witness is found to be candid and honest on other aspects of his or her testimony. The Law Society conceded that the applicant had been candid in his application to be licensed and on many facts and issues. We agree that it was open to the Hearing Panel to reject his uncontradicted evidence in light of all of the other evidence including the evidence about breaches of the undertaking. We are not persuaded that the Appeal Panel made palpable and overriding errors in accepting those findings of fact and findings of mixed fact and law.

E. Apprehension of bias or abuse of process or denial of natural justice or procedural fairness

23 As indicated above, we dismissed the motion for leave to file fresh evidence on which much of the applicant's submissions on these points were based. There is no basis in the record before us for these allegations.

Conclusion

24 We have arrived at similar conclusions to those reached by the Divisional Court in *Gold v. Law Society of Upper Canada*[8], namely that the Appeal Panel's finding that the good character hearing was fair and its conclusion that the Hearing Panel's findings were amply supported by the evidence is entitled to deference and was reasonable. The decision of the Appeal Panel to uphold the Hearing Panel (except in one respect which did not impact the outcome) was reasonable. No errors of law have been established. The applicant is seeking to reargue his case on the merits and have this court reweigh the evidence. This is not our role on judicial review. Furthermore, relying on natural justice submissions does not advance his position when there is no basis in the record before us for any of those allegations.

25 The application for judicial review is dismissed. The applicant and counsel for the Law Society agreed on the amount of costs depending on which party was successful. Accordingly, the applicant shall pay costs to the respondent fixed in the amount of $2500 all inclusive.

Application dismissed; motion dismissed.

Footnotes

1 The Applicant also seeks judicial review of a decision of the Hearing Panel but that is not properly the subject of this judicial review application.

2 R.S.O. 1990, c. L.8

3 (1979), [1980] 1 S.C.R. 759 (S.C.C.), at 775-777

4 The applicant did not pursue the issue of ineffective counsel.

5 *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.)

6 *Igbinosun v. Law Society of Upper Canada*, 2008 CarswellOnt 4276 (Ont. Div. Ct.) at para 10

7 The Applicant takes the position that the word "generally" was added after he had signed the undertaking. Whether it was added after he signed is not relevant to the words which precede it. Nor is it relevant to this judicial review application.

8 2013 ONSC 1229 (Ont. Div. Ct.) at para 6 and 8

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TAB 6

2014 ONCA 175
Ontario Court of Appeal

Clark v. Clark

2014 CarswellOnt 2477, 2014 ONCA 175, [2014] W.D.F.L. 1742, [2014] O.J. No. 965, 237 A.C.W.S. (3d) 834, 318 O.A.C. 66, 40 R.F.L. (7th) 14

Georgia Anne Clark, Applicant (Respondent in Appeal) and Gregory Lawrence Clark, Respondent (Appellant)

E.A. Cronk, Paul Rouleau, M. Tulloch JJ.A.

Heard: October 17, 2013
Judgment: March 5, 2014
Docket: CA M42120, M42106, M42981, C56511

Proceedings: varying *Clark v. Clark* (2012), 2012 CarswellOnt 4582, 2012 ONSC 1965 (Ont. S.C.J.); adding reasons to *Clark v. Clark* (2012), 2012 ONSC 1026, 2012 CarswellOnt 1515 (Ont. S.C.J.)

Counsel: Howard J. Feldman, for Appellant
William H. Abbott, Aaron M. Mastervick, for Respondent

Subject: Civil Practice and Procedure; Family

APPEAL by husband from order granting extension of time, on terms, to file application for leave to appeal and notice of appeal from costs order reported at *Clark v. Clark* (2012), 2012 ONSC 1965, 2012 CarswellOnt 4582 (Ont. S.C.J.), denying all other relief sought by husband; for leave to file fresh evidence concerning his review motion; for order granting him leave to appeal costs order; for order validating form of security for costs provided by him in alleged compliance with extension of time order; and if leave to appeal costs order granted, appeal from costs order; MOTION by wife to quash appeal of costs order.

***E.A. Cronk J.A.*:**

I. Introduction

1 There are several matters before this court arising from this protracted matrimonial litigation.

2 First, the proposed appellant, Gregory Lawrence Clark ("Gregory"), moves: (1) to review the chambers order of Doherty J.A. of this court, dated January 11, 2013 (the "January Order"), granting Gregory an extension of time, on terms, to file an application for leave to appeal and a notice of appeal from the costs order of Conlan J. of the Superior Court of Justice, dated March 27, 2012 [2012 CarswellOnt 4582 (Ont. S.C.J.)] (the "Costs Order"), both by January 21, 2013, and denying all other relief sought by Gregory; (2) for leave to file fresh evidence concerning his review motion; (3) for an order granting him leave to appeal the Costs Order; and (4) for an order validating the form of security for costs provided by him in alleged compliance with the January Order.

3 Second, if leave to appeal the Costs Order is granted, Gregory appeals from the Costs Order.

4 Third, the respondent, Georgia Anne Clark ("Georgia"), moves for an order quashing the appeal of the Costs Order on the grounds that Gregory failed to comply with: (1) that term of the January Order requiring, as a condition of the time extension granted thereunder, that he post security in the amount of $25,000, on or before February 1, 2013, for the costs of the proposed appeal from the Costs Order; and (2) two prior court orders, as described in further detail later in these reasons, namely: (a) that part of the order of Snowie J. of the Superior Court of Justice, dated October 22, 2002, requiring Gregory to fund a registered educational savings plan ("RESP") for the children of the marriage; and (b) the order of Edwards J. of the Superior Court of Justice, dated April 26, 2013, requiring Gregory to produce a statement showing the balance contained in the children's RESP.

II. Background Facts

5 It is unnecessary for the disposition of the matters now at issue before this court to set out the myriad background facts in detail. The following summary will suffice.

6 The parties were married in February 1994 and separated on December 26, 1997. There are two children of the marriage: Courtney Amber Clark, born January 30, 1995, and Mackenzie Alexandra Clark, born April 21, 1996.

7 On October 22, 2002, Snowie J. of the Superior Court of Justice granted a consent order in accordance with minutes of settlement concluded by the parties, addressing various issues relating to the children (the "Snowie Order"). Among other matters, the Snowie Order provided that: (1) custody of the children was to be joint, with access to Gregory at specified times; (2) Gregory was to pay $20,000 to Georgia on account of child support arrears; (3) no prospective child support was payable by either party, other than extraordinary expenses for the children under s. 7 of the *Child Support Guidelines*, O. Reg. 391/97 (the "Guidelines"), to be shared on a set *pro-rata* basis; (4) Gregory was to contribute the sum of $150 on a monthly

basis to a RESP on behalf of the children; and (5) the parties were to exchange full releases respecting child support.

8 Unfortunately, approximately six years later, litigation between the parties again erupted. In late-August 2008, Gregory brought a motion to change the Snowie Order, seeking full custody of Courtney, who was then 13 and one-half years old. In November 2008, Georgia initiated her own motion to change the Snowie Order. She sought orders for ongoing child support, child support retroactive to November 1, 2002, reinstatement of all child support arrears as at October 22, 2002 and payment of those arrears by Gregory, and payment by Gregory of his proportionate share of extraordinary expenses for the children under s. 7 of the Guidelines, among other relief.

9 Three years later, on November 4, 2011, Gregory filed an amended change motion in which he sought orders granting him primary residence of both children of the marriage and retroactive and ongoing child support from Georgia, commencing in January 2011, in addition to other alternative relief.

10 Georgia resisted Gregory's change motion. In her initial response to the motion, delivered in November 2011, she sought a final order for joint custody of the children of the marriage, with access to Gregory. She also sought an order for no base child support payable by either party or, in the alternative, an order varying the Snowie Order so as to require Gregory to pay the full arrears of child support owing as at October 2002, retroactive child support for the period November 2002 to December 2010, and his proportionate share of the children's extraordinary expenses under s. 7 of the Guidelines. In the further alternative, Georgia sought an order that she pay monthly child support to Gregory in accordance with the Guidelines. In early December 2011, Georgia filed a further response to Gregory's change motion, reiterating her November 2011 position on child support.

11 On December 23, 2011, Gregory again amended his change motion, renewing his previous claims for primary residence of the children and ongoing child support from Georgia and seeking leave of the court, in certain circumstances, to advance set-off claims in respect of Georgia's alternative child support claims.

12 Throughout this flurry of motions, neither party advanced a spousal support claim.

13 In January and February 2012, a ten-day trial was conducted before Conlan J. of the Superior Court of Justice. At the commencement of trial, counsel filed a joint statement of agreed issues. The questions of liability for child support and s. 7 extraordinary expenses remained in dispute. However, the parties consented to an order providing for joint custody of the children with no designation of primary residence. Neither party raised any issue regarding spousal support. In the result, the remaining issues in dispute concerned child

support (both retrospective and prospective), s. 7 extraordinary expenses, and the costs of a psychological assessment and counselling for the children.

14 By orders dated February 3 and 14, 2012, the trial judge disposed of several substantive issues between the parties (collectively, the "Trial Judgment"). He dismissed Gregory's claim for child support, ordered support to be paid on account of s. 7 extraordinary expenses, and directed Gregory to pay 50% of the costs of the psychological assessment and the counselling fees incurred for the children. Thus, Georgia was largely successful at trial.

15 The Costs Order was made on March 27, 2012. Under paragraph 1 of the Costs Order, the trial judge granted Georgia costs of the trial in the total amount of $185,000. Paragraph 2 of the Costs Order states:

> The costs set out in paragraph 1, shall be paid as lump sum spousal support from the Respondent [Gregory] to the Applicant [Georgia] and shall be enforceable by the Family Responsibility Office.

16 In January 2013, approximately 11 months after the Trial Judgment, Gregory moved before a single judge of this court for an extension of time to appeal the substantive aspects of the Trial Judgment and for leave to appeal the Costs Order. He also sought a stay of the Costs Order pending appeal.

17 By the January Order, Doherty J.A. of this court granted Gregory's motion only in respect of the proposed appeal of the Costs Order. In all other respects, he dismissed Gregory's motion.

18 The January Order required Gregory to serve and file a notice of motion for leave to appeal the Costs Order and a notice of appeal concerning the Costs Order, both by January 21, 2013. It also required him to post security for the costs of the appeal of the Costs Order, in the amount of $25,000, on or before February 1, 2013.

19 Gregory filed his leave motion and notice of appeal on time. The parties dispute whether he properly complied with his further obligation under the January Order to post security for costs by February 1, 2013.

III. Motions to Review the January Order and to File Fresh Evidence in Support of the Review Motion

20 At the conclusion of oral argument, this court dismissed Gregory's review motion, with reasons to follow. These are those reasons.

21 Gregory attacked the January Order on various grounds. I see no merit to his challenge of the January Order.

22 In detailed reasons dated January 11, 2013, Doherty J.A. held:

> (1) apart from serving Georgia with a purported notice of appeal, Gregory did nothing to pursue an appeal in respect of the Trial Judgment for more than six months "after the latest possible deadline for filing a notice of appeal in respect of any of the orders made at trial" (at para. 12);
>
> (2) there was no basis in the record before him upon which to find any explanation, "much less a reasonable explanation", for Gregory's inordinate delay in pursuing his proposed appeal, even assuming that he had any intention of doing so (at para. 14); and
>
> (3) the absence of a *bona fide* intention to appeal, and of any explanation for the long delay in pursuing the appeal, told strongly against granting an extension of time within which to appeal the substantive aspects of the Trial Judgment (at para. 15).

23 In addition, at paras. 15 and 16 of his reasons, Doherty J.A. held:

> If I could be satisfied that the father [Gregory] had a meritorious appeal, particularly as it relates to matters affecting the children, I might be inclined to grant the extension despite the factors I have listed above.
>
> I am, however, satisfied there is no merit to any of the grounds of appeal, apart from those relating to the cost order. The trial decision is fact-driven and well-reasoned. On my review of the trial judge's reasons, his findings are fully and amply supported by the evidence. I think it is also relevant that several of the proposed grounds of appeal involve parts of the trial judge's orders that award amounts far below the minimum amount required to establish this court's jurisdiction. Bluntly put, apart from the cost issues, there is no chance that this proposed appeal could succeed. I, therefore, refuse any extension of time to appeal any of the matters addressed in the trial judge's orders of February 3rd and February 14th.

24 As appears from these holdings, Doherty J.A. addressed all the relevant factors governing the determination whether to grant an extension of time to appeal the substantive aspects of the Trial Judgment and properly applied those factors to the evidentiary record before him. Moreover, I see no error in his assessment of the merits of Gregory's proposed appeal from the Trial Judgment. Indeed, I agree with it.

25 Accordingly, I see no basis for interference with Doherty J.A.'s discretionary decision to deny an extension of time to appeal from the substantive aspects of the Trial Judgment.

26 Nor do I see any reviewable error in Doherty J.A.'s refusal to stay the Costs Order pending Gregory's proposed appeal of that order. On the record before Doherty J.A., it

appeared that the Family Responsibility Office (the "FRO") had not been served with Gregory's motion and that, potentially, it was a proper party to an application to stay the Costs Order. The refusal of a stay order in these circumstances cannot be faulted. [1]

27 Gregory seeks leave to file fresh evidence on his review motion, in support of his renewed request that he be granted an extension of time within which to appeal from the substantive aspects of the Trial Judgment. The fresh evidence consists of: (1) affidavits sworn by the two children of the marriage, who are now approximately 18 years of age (Courtney) and 17 years of age (Mackenzie); and (2) extracts from the transcript of the costs hearing before Conlan J.

28 In my opinion, the proposed fresh evidence does not meet the applicable test for the admission of fresh evidence at this stage: see *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.). All the fresh evidence could have been obtained by Gregory prior to the motion before Doherty J.A. on the exercise of due diligence. In any event, the fresh evidence does not alter my conclusions regarding the substance of the January Order, set out above.

29 Accordingly, the motion to review the January Order is dismissed.

IV. Motion for Leave to Appeal Costs Order

30 In my opinion, leave to appeal from the Costs Order should be granted for three reasons. First, as I have already said, Gregory filed his leave motion and his notice of appeal in respect of the Costs Order within the timelines set by the January Order.

31 Second, as Doherty J.A. noted at para. 17 of his reasons, Gregory made his objections to the Costs Order known shortly after the order was made.

32 Third, as I will explain, I agree with Doherty J.A.'s conclusion, at para. 17 of his reasons, that there is some merit, albeit on a narrow issue, to the proposed appeal from the Costs Order. As a result, the interests of justice militate in favour of Gregory being allowed to pursue his appeal from the Costs Order.

33 I would therefore grant leave to appeal the Costs Order.

V. Motion to Quash the Appeal

34 I next address Georgia's motion to quash Gregory's appeal from the Costs Order.

35 During oral argument, Georgia narrowed the focus of her motion to quash considerably. As argued, the main issue is whether Gregory properly complied with his obligation under the January Order to post security for the costs of the appeal from the Costs Order.

36 Under the January Order, the posting of security for the costs of the proposed appeal, by February 1, 2013, was a pre-condition to Gregory's entitlement to seek leave to appeal the Costs Order and, if leave be granted, to appeal the Costs Order. Paragraph 20 of Doherty J.A.'s reasons in support of the January Order reads:

> The extension of time to file is granted on the condition that the father will post security for the costs of the appeal in the amount of $25,000 on or before February 1, 2013.

37 It appears that, through administrative error, the appeal from the Costs Order was set down for hearing, after perfection, without proof of Gregory's compliance with the security for costs term of the January Order. Be that as it may, the central issue on the motion to quash is whether Gregory, in fact, properly satisfied this term of the January Order.

38 Gregory did not pay the monies ordered to be posted as security for costs into court, nor did he post a letter of credit in the required amount ($25,000) by February 1, 2013. Instead, on that date, Gregory's then counsel informed Georgia's counsel by email that Gregory's parents had furnished a second mortgage in the amount of $25,000, in Georgia's favour as second mortgagee, on a home owned by them in Mississauga, Ontario. The home in question was and remains Gregory's residence. Georgia's counsel was also informed that the second mortgage had been registered on title to the property. These events took place without prior notice to or any consultation with Georgia.

39 Gregory took the position that the provision of this second mortgage satisfied his obligation under the January Order to post security for costs.

40 Georgia disagreed. Among other objections to the mortgage, her counsel maintained that Georgia was not obliged to look to enforce any costs award that she might ultimately receive by being forced to deal with the first mortgagee on the property in question.

41 Subsequently, Gregory proposed that the second mortgage be refinanced and that the proceeds of the refinancing be used to pay $25,000 into court in satisfaction of his obligation under the January Order to post security for the costs of the appeal from the Costs Order and, further, to pay $25,000 into the children's RESP. Gregory sought Georgia's consent to the discharge of the second mortgage to permit the proposed refinancing to proceed. Georgia declined to consent. She took the position that her consent to a discharge was not required since she never received or consented to the mortgage security and, in any event, this security was improper and inappropriate.

42 Before this court, Georgia renews her objection to the form of security provided by Gregory. She argues that Gregory failed to post security for costs in proper form and that, as

a result, his appeal from the Costs Order should be quashed by reason of his non-compliance with the January Order.

43 In my view, there is much to commend Georgia's argument. The purpose of an order for security for costs is to ensure the existence of a ready source of funds to which a successful litigant may look to satisfy the costs of a proceeding that he or she has been compelled to incur. For this reason, security for costs is generally intended to be in a form that is readily accessible to the party ultimately awarded the costs of the relevant proceeding.

44 The security afforded by a second mortgage on a residential property is neither immediately liquid, nor readily accessible by the affected mortgagee. Moreover, depending on the value of the secured property and the amount of the first mortgage, a second mortgage of this type may not afford reliable security for costs at all.

45 Notwithstanding these considerations, when Gregory's actions are viewed in full context and in light of the language of the January Order, I am unable to conclude that he clearly failed to comply with the security for costs term of the January Order.

46 Both the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and the *Family Law Rules*, O. Reg. 114/99 (the "FLRs") afford the courts a wide discretion to determine the amount and form of security for costs, as well as the time for paying the ordered security into court or otherwise giving the required security: rule 56.04 of the *Rules of Civil Procedure*; rule 24 (13-17) of the FLRs. In this fashion, both sets of rules contemplate that the form of security to be provided is to be crafted on a case-specific basis, to meet the particular exigencies of the case. Neither set of rules requires that security for costs be in the form of a payment into court or the posting of a letter of credit, in all cases.

47 In this case, Doherty J.A.'s reasons concerning the posting of security for costs, quoted above, do not specify the form of the security to be provided. Moreover, paragraph 1 of the January Order, as issued and entered, expressly contemplates that the form of the ordered security remained to be determined. Paragraph 1 reads as follows:

> THIS COURT ORDERS that the Appellant Father's Motion shall be dismissed save and except that the Appellant Father shall be and is hereby granted an extension of time to file an application for leave to appeal and a notice of appeal from the costs order of Justice Conlan dated March 27, 2012, to January 21, 2013, on the condition that the Appellant Father shall post security for costs of the appeal in the amount of $25,000.00 on or before February 1, 2013, *without a determination at this time as to what form the security should be.*
>
> [Emphasis added.]

48 Thus, both the January Order itself and Doherty J.A.'s reasons in support of that order are silent as to the form of the security for costs to be furnished by Gregory. Although she was free to do so, Georgia did not move before Doherty J.A. or otherwise in this court to clarify and establish the form of the security for costs to be given by Gregory. Nor, as I have said, did she consent to the refinancing of the second mortgage security when proposed by Gregory in May 2013.

49 In these somewhat unusual circumstances, I do not think that it can reasonably be said that the security eventually provided by Gregory fell short of satisfying a clear term of the January Order. Accordingly, I would not quash his appeal from the Costs Order on this ground.

50 During oral argument, Georgia did not press her assertion, detailed in her factum on her motion to quash, that Gregory's appeal from the Costs Order should be quashed on the basis of his alleged non-compliance with the Snowie Order and the order of Edwards J. relating to the children's RESP, described above.

51 This was prudent. The Snowie Order required Gregory to contribute a set amount (the total amount of $150 per month) to the children's RESP. Subsequent court orders confirmed this obligation, requiring Gregory to bring the RESP into good standing and to provide documentary proof of having done so. The April 2013 order of Edwards J. directed that Gregory provide Georgia with a statement from the relevant financial institution of the balance held in the children's RESP.

52 Georgia concedes that Gregory eventually brought the RESP into good standing, although he was apparently late in doing so. Quite properly, her counsel also acknowledged during this hearing that Gregory provided the required statement of the balance held in the children's RESP in May 2013. Although Georgia maintains that Gregory has dissipated the funds held in the RESP for his own benefit, there is no judicial finding to that effect and, in my view, the admissible evidentiary record before this court does not clearly establish this claim.

53 In all these circumstances, I would dismiss the motion to quash Gregory's appeal from the Costs Order.

VI. Motion to Validate Security

54 At the commencement of oral argument of these proceedings, Gregory sought to file, on short notice, yet another motion before this court, which he termed a motion "deeming security to be valid". In his motion, Gregory sought, among associated relief, orders "validating" the second mortgage security given by his parents on the home occupied by him

and "deeming" that the mortgage security satisfied his obligation under the January Order to post security for the costs of the appeal from the Costs Order.

55 I have already concluded that Georgia's motion to quash the costs appeal should be dismissed. As I have indicated, I am not satisfied that Gregory can reasonably be said to have breached a clear term of the January Order regarding the posting of security for costs. Consequently, even assuming that Gregory's 'validation motion' is properly conceived and should be considered by this court notwithstanding its patent late filing, matters upon which I express no view, it is unnecessary for the disposition of Gregory's costs appeal to address the merits of the motion. I would therefore decline to do so.

VII. Appeal from the Costs Order

56 I turn now to Gregory's appeal from the Costs Order.

57 Gregory attacks the Costs Order on numerous grounds. I will consider his principal grounds of appeal in turn.

58 At the outset, I note that this court's consideration of Gregory's appeal from the Costs Order must proceed in recognition of the high threshold for appellate interference with a trial judge's award of costs. Unless the challenged costs award is plainly wrong or tainted by an error in principle, there is no basis for interference by a reviewing court with a trial judge's discretionary costs award: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

(1) Enforcement of Costs Award as Lump Sum Spousal Support

59 Gregory argues that the trial judge erred by granting Georgia costs enforceable by the FRO as lump sum spousal support when no spousal support was claimed at trial.

60 There is no dispute that spousal support was not in issue before the trial judge. Nonetheless, he directed that his costs award in favour of Georgia "shall be paid as lump sum spousal support ... and shall be enforceable by the [FRO]". In so doing, the trial judge indicated, at paras. 20 and 21 of his costs reasons:

> As contemplated by section 1(1) of the *Family Responsibility and Support Arrears Enforcement Act, 1986*, as amended, the $185,000.00 in costs is to be enforced in its entirety by the Family Responsibility Office (FRO) as a lump sum spousal support Order.
>
> Although Mr. Clark vigorously opposed that, Mr. Peticca [Gregory's former counsel] made no submissions on that issue, and more important, enforcement through the FRO is well justified in this case. The authority for such an Order can be found in the decisions

of the Court of Appeal for Ontario in *Drygala v. Pauli*, 167 O.A.C. 274, *Wildman v. Wildman*, 215 O.A.C. 239 and *Writer v. Peroff*, 2006 CarswellOnt 6218. Mr. Clark is an experienced litigant who has a history of disobeying Court Orders (see paragraph 36 of Ms. Clark's written submissions on costs as well as my Reasons for Judgment). He has attempted to make himself "Judgment-proof". This is one of those cases where, to be anything more than illusory, the costs award must be enforced through the FRO.

61 Under s. 1(1)(g) of the *Family Responsibility and Support Arrears Enforcement Act, 1996*, S.O. 1996, c. 31 (the "Act"), costs awards that relate to support or maintenance may be enforced by the FRO. The English language version of s. 1(1)(g) of the Act states:

> In this Act
>
> . . . . .
>
> "support order" means a provision in an order made in or outside Ontario and enforceable in Ontario for the payment of money as support or maintenance, and includes a provision for,
>
> . . . . .
>
> (g) interest or *the payment of legal fees or other expenses arising in relation to support or maintenance*... [Emphasis added.]

62 The French language version of s. 1(1)(g) of the Act is cast somewhat more narrowly than its English language counterpart. Whereas the latter version of the section refers to legal fees or other expenses "arising in relation to" support or maintenance, the French language version employs the phrase "*découlant de*" [*i.e.* 'flowing from'] a support or maintenance obligation. It reads:

> Les définitions qui suivent s'appliquent à la présente loi.
>
> . . . . .
>
> <<ordonnance alimentaire>> Disposition contenue dans l'ordonnance qui est rendue en Ontario ou ailleurs et exécutoire en Ontario, et qui a trait au versement de sommes d'argent à titre d'aliments ou d'entretien. S'entend notamment de la disposition portant, selon le case, sur:
>
> . . . . .
>
> g) le versement d'intérêts ou le paiement de frais juridiques ou autres *découlant de l'obligation alimentaire ou d'entretien*. [Emphasis added.]

63 Thus, under both official language versions of the section, by reason of the inclusion in the s. 1(1)(g) definition of "support order" of "the payment of legal fees or other expenses arising in relation to" or flowing from support or maintenance, costs awards concerning support or maintenance form part of a "support order" that is "enforceable in Ontario for the

payment of money as support or maintenance". In Ontario, the FRO is the body responsible for the enforcement of such orders.

64 The issue here is whether, spousal support not being at issue before him, the trial judge erred in characterizing the costs awarded to Georgia as lump sum spousal support for the purpose of triggering FRO enforcement of the Costs Order. In my opinion, this characterization of the costs awarded to Georgia is unsustainable for the following reasons.

65 First, and most obviously, the costs awarded at trial did not arise, flow from or otherwise relate to a spousal support claim. Both entitlement to and the appropriate quantum of child support were live issues before the trial judge. However, the question of spousal support was simply not in play. It follows that describing the costs awarded to Georgia as "lump sum spousal support" is factually inaccurate. This description finds no support in the record before the trial judge.

66 Second, the FLRs afford judges in matrimonial cases a wide discretion to make any order considered necessary for a just determination of the case, including an order for costs. At the time of the trial judge's costs disposition, [2] rule 1(8) of the FLRs confirmed this broad discretionary authority in order to deal with a party's "failure to follow [the FLRs]" or failure to obey a court order. But nothing in rule 1(8) of the FLRs authorized a trial judge to deem costs awarded in a matrimonial case to be "in relation to support or maintenance" in a case where support or maintenance was never in issue. Similarly, rule 1(8) afforded no licence to trial judges to characterize costs in a matrimonial proceeding as relating to spousal support where spousal support was never in issue. [3]

67 The broad discretion to order costs conferred by rule 1(8) is concerned with entitlement to and the quantum of costs. As I read rule 1(8), it does not extend to characterizing the nature of costs awarded in a manner that is at odds with the substance of the proceeding in which the costs are awarded.

68 Third, I do not read the cases cited by the trial judge as providing authority for characterizing costs awarded in a matrimonial proceeding as relating to spousal support when spousal support was neither claimed nor adjudicated upon in the relevant proceeding.

69 The trial judge, at para. 21, quoted above, referenced three decisions of this court: *Drygala v. Pauli*, [2003] O.J. No. 3, 167 O.A.C. 274 (Ont. C.A.); *Wildman v. Wildman* (2006), 82 O.R. (3d) 401, 215 O.A.C. 239 (Ont. C.A.); and *Writer v. Peroff*, [2006] O.J. No. 4567 (Ont. S.C.J.), aff'd [2006] O.J. No. 4061 (Ont. C.A.). In each of these cases, this court upheld a trial judge's discretionary decision to order costs awarded in a matrimonial proceeding enforceable by the FRO as support. Indeed, in *Drygala*, at para. 16, the validity of an order making a costs award at trial enforceable in its entirety by the FRO was specifically affirmed.

70 However, the validity of an FRO enforcement order *per se* is not challenged in this case. There can be no tenable suggestion, and Gregory does not argue, that the courts lack jurisdiction to direct that costs awarded in a matrimonial proceeding be enforceable as support or maintenance by the FRO. The Act provides otherwise.

71 The critical question is whether the FRO enforcement mechanism can be triggered by characterizing the costs of a matrimonial proceeding as referable to lump sum spousal support where no claim for spousal support was advanced or adjudicated upon at trial. None of the cases cited by the trial judge supports that proposition. To the contrary, in each of *Drygala*, *Wildman* and *Writer*, child and/or spousal support, among other matters, was in issue at trial. And, in each of these cases, the costs of the underlying proceeding and of the appeal before this court were ordered enforceable by the FRO as support.

72 Nor do any of the appellate-level cases relied upon by Georgia stand for this proposition. For example, *Sordi v. Sordi*, 2010 ONSC 6236 (Ont. S.C.J.), aff'd 2011 ONCA 665, [2011] O.J. No. 4681 (Ont. C.A.), cited by Georgia, provides no authority for the approach employed by the trial judge. In *Sordi*, this court upheld a trial judge's order that part of the costs awarded at a matrimonial trial should be enforceable by the FRO as support. However, the issues at trial included claims for child and spousal support, thus linking the costs award to support.

73 The relevant authorities, including those mentioned above, confirm that a trial judge's allocation of costs as relating to support or maintenance for FRO enforcement purposes attracts considerable deference from a reviewing court. That said, in those authorities cited above where costs were designated enforceable by the FRO as "spousal support", the costs were incurred in a proceeding in which spousal support was implicated.

74 I therefore conclude that the trial judge erred in this case by characterizing his costs award as lump sum spousal support for the purpose of invoking enforcement of the award by the FRO. For the reasons given, this characterization of Georgia's costs award cannot stand.

75 Although the trial judge erred in making his costs award enforceable as spousal support, his reasons leave no doubt that he intended the awarded costs to be enforceable by the FRO. Georgia argues that, in these circumstances, the reference in the Costs Order to "lump sum spousal support" should be deleted and a reference to child support or simply "support" should be substituted in its stead. This remedy, she submits, would achieve the trial judge's objective of ensuring that the costs awarded against Gregory remain enforceable by the FRO by reason of s. 1(1)(g) of the Act.

76 For his part, Gregory contends that because his claim for child support was dismissed, because no child support was awarded to Georgia at trial, and because Georgia concedes before this court that the costs of counselling and the assessment report for the children are

not support-related, only those costs concerning the payment of extraordinary expenses for the children of the marriage under s. 7 of the Guidelines, at best, may properly be viewed as part of a support order under s. 1(1)(g) of the Act for the purpose of FRO enforcement.

77 I disagree. Gregory has pointed to no authority for the contention that where a child support claim is dismissed, costs incurred in respect of that claim cannot form part of a support order enforceable by the FRO.

78 There is no doubt that child support was a live issue at trial. By order dated February 14, 2012, the trial judge dismissed Gregory's claim for child support and further ordered, "There shall continue to be no base child support payable by either parent to the other party."

79 Thus, the trial judge was required to consider and adjudicate upon a child support claim. In these circumstances, if the Costs Order is otherwise sustainable, it is my opinion that it may be enforced by the FRO as arising in relation to support within the meaning of the Act. I will return to this issue later in these reasons.

80 It is appropriate to address one additional aspect of Gregory's challenge to the Costs Order at this stage. Gregory argues that only costs related to support are eligible for enforcement by the FRO under the Act. Accordingly, he submits, the trial judge erred by failing to identify those costs of the trial that were unrelated to support issues and by failing to direct that only those costs relating to support should be enforceable by the FRO.

81 The decision of this court in *Wildman* provides a full answer to this claim. In *Wildman*, a similar argument was advanced and rejected. *Wildman* holds, at para. 59, that where, as here, a support claim is a principal issue at a multi-issue matrimonial trial, the allocation of costs as between support and non-support issues may be both impractical and inappropriate. Although a trial judge, in the exercise of his or her discretion, may identify those costs of a proceeding that were directly incurred in relation to a contested support claim, so as to designate those costs as enforceable by the FRO, this is not a necessary undertaking. As this court noted in *Sordi*, at para. 25, trial courts have considerable discretion concerning requests that legal costs in a multi-issue matrimonial proceeding be designated as support for the purpose of FRO enforcement. Absent legal error, designations of this kind attract considerable deference from this court.

82 It bears repeating that, despite the trial judge's error in tying his costs award to spousal support, his intention that all the awarded costs be enforceable by the FRO is clear. This discretionary decision was squarely within his domain. In my opinion, it is reasonable in all the circumstances. I would therefore give effect to the trial judge's intention by amending the Costs Order, as urged by Georgia, to characterize the awarded costs as "support".

83 It remains to consider Gregory's other grounds of appeal from the Costs Order.

(1) Other Grounds of Appeal from the Costs Order

(a) Hearing fairness

84 Gregory argues that he was denied procedural fairness at the costs hearing because his former counsel was removed as solicitor of record on short notice and he was compelled to respond as a self-represented litigant to a substantial costs claim by Georgia. I would reject this argument.

85 Gregory's former counsel obtained an order removing him as solicitor of record on March 23, 2012, the day that oral costs submissions were received by the trial judge. Gregory does not challenge the removal order itself. Rather, he contends that the effect of the removal order was to place him, as a self-represented litigant, in an untenable position, thereby compromising hearing fairness.

86 The record belies Gregory's complaint of hearing unfairness. Notwithstanding his removal from the record, Gregory's former counsel agreed, at the trial judge's request, to participate as a friend of the court in the costs hearing and to present evidence on Gregory's behalf. The record confirms that counsel, in fact, made several costs submissions on Gregory's behalf. Further, both Gregory and his former counsel were afforded full opportunity to present relevant evidence and submissions regarding costs. The trial judge's detailed costs reasons reveal that he took account of both parties' submissions on costs and expressly addressed specific arguments made by Gregory and his former counsel in opposition to Georgia's costs claim.

87 For example, Gregory argued before the trial judge, as he does before this court, that a costs award in the sum of $185,000 is excessive and could not have been within the reasonable expectations of the parties for a trial originally estimated to last two days. The trial judge was uniquely positioned to assess the causes of the length of the trial. He addressed Gregory's argument directly. He noted, at para. 8 of his reasons, that the trial actually lasted 10 days and that, "all counsel and both parties are equally responsible for the vast underestimate of the Trial time". He continued:

> There is no evidence to support [Gregory's] assertion that [Georgia's] counsel deliberately prolonged the Trial. In fact, the longest part of the Trial by far was [Gregory's counsel's] cross-examination of [Georgia].

88 Moreover, the trial judge expressly directed himself, at para. 18 of his reasons, to assess a fair and reasonable amount for costs, "taking into account all of the circumstances, including [Gregory's] ability to pay". In the end, for reasons he explained, he reduced Georgia's total costs claim from $236,211.16 to $185,000, a discount of approximately $51,000.

89 I see nothing in the record, including in the trial judge's costs reasons, to ground Gregory's complaint of hearing unfairness. To the contrary, in my view, the trial judge's approach to the assessment of costs as reflected in his reasons was even-handed and fair.

(b) Gregory's ability to pay

90 Gregory next submits that the trial judge erred by failing to properly consider his ability to pay an adverse costs award.

91 Once again, the record undercuts this submission. The trial judge specifically considered Gregory's ability to pay when determining the appropriate quantum of costs to be awarded to Georgia. On at least two occasions in his costs reasons, the trial judge adverted to Gregory's ability to pay costs as a relevant consideration in his costs analysis. Indeed, this factor, together with Gregory's status as a father, caused the trial judge to observe, at para. 18, that he did not wish "to crush" Gregory and motivated the trial judge to significantly reduce the quantum of the costs awarded to Georgia from the amount claimed by her, as I have already described.

92 I would not give effect to this ground of appeal.

(c) Georgia's position on child support

93 Gregory argues that by reason of the contents of her November 2011 response to his change motion, described earlier in these reasons, Georgia essentially withdrew her claim for child support, initiated in November 2008. Relying on rule 12(3) of the FLRs, Gregory therefore submits that the trial judge erred by failing to hold Georgia liable for the costs associated with her late withdrawal of her child support claim.

94 I disagree, for several reasons. First, several rules under the FLRs are engaged by this argument. Rule 12(3) of the FLRs provides that a party who withdraws "all or part of an application, answer or reply" shall pay the costs of the other party in relation to the matter withdrawn, up to the date of the withdrawal, "unless the court orders or the parties agree otherwise". In addition, under rule 24(1), a successful party in a family law proceeding is presumptively entitled to the costs of the proceeding. However, a successful party "who has behaved unreasonably during a case may be deprived of all or part of [his or her] own costs or ordered to pay all or part of the unsuccessful party's costs": rule 24(4).

95 The plain language of rule 12(3) contemplates that the payment of costs by a party on withdrawal of part of the party's application, answer or reply may be relieved against by court order. Thus, the costs consequences of rule 12(3) are not inviolate.

96 Second, in this case, the trial judge found that Georgia was largely successful at trial. The record amply supports this finding. Georgia, therefore, was presumptively entitled to her costs of the trial, in an amount that the trial judge viewed as fair and reasonable for Gregory, as the unsuccessful party, to pay having regard to all the circumstances: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.).

97 It also appears to have been undisputed at the costs hearing that the result achieved by Georgia at trial exceeded that proposed by her in various offers to settle. Consequently, under rule 18(14) of the FLRs, she was entitled to full recovery of her costs from the date of her first offer to settle and to partial indemnity costs up to the date of that first offer.

98 The trial judge, as he was obliged to do, took account of Rules 18 and 24 of the FLRs and their application to the facts of this case. The determination of the reasonableness of Georgia's position on child support throughout the trial proceeding was the trial judge's call to make.

99 Finally, I note that the trial judge carefully examined the costs claimed by Georgia's counsel. I again underscore that he substantially reduced the total costs awarded by approximately 22% ($51,000) from the amount of costs that Georgia claimed ($236,211.16).

100 In summary, for the reasons given, I am not persuaded that the trial judge erred in principle or that his Costs Order is plainly wrong due to his failure to hold Georgia liable for some costs associated with her original claim for child support. The question of child support was contested over the course of a 10-day trial and eventually adjudicated upon. Georgia was largely successful on this issue. I see no reversible error in the trial judge's treatment of this issue in his costs analysis.

(d) Quantum of costs awarded by the trial judge

101 Gregory also complains about the overall quantum of the Costs Order. He argues, on various grounds, that the trial judge's costs award is excessive, disproportionate and unreasonable. Indeed, Gregory goes further. He contends that he, rather than Georgia, should have been awarded costs of the trial or, at least, costs associated with Georgia's "withdrawn" child support claim, discussed above. In the alternative, he says, no costs should have been awarded.

102 I see no merit to these arguments.

103 The trial judge's costs analysis was thorough and considered. He took into account all relevant factors, including: the nature and facts of the case; the governing legal principles; the parties' submissions, conduct and offers to settle; the bill of costs submitted by Georgia's

counsel, including the time spent, the rates charged and the number of involved counsel; the length of the trial; Gregory's ability to pay costs; and the fairness and reasonableness of the costs claimed. The trial judge also properly treated Georgia's success at trial and Gregory's history of repeated non-compliance with court orders as relevant considerations in fixing an appropriate costs award.

104 The trial judge, in the exercise of his discretion, was in the best position to determine entitlement to and the appropriate scale and quantum of any costs to be awarded. Save for his characterization of the costs awarded as lump sum spousal support, which I have already discussed, Gregory has failed to demonstrate that the trial judge's costs award is plainly wrong or tainted by an error in principle.

(2) Conclusion regarding Costs Appeal

105 For the reasons given, I would allow the costs appeal in part, in respect only of the trial judge's characterization of the costs awarded as lump sum spousal support for the purpose of enforcement by the FRO. In that regard, I would delete the phrase "lump sum spousal support" in paragraph 2 of the Costs Order and substitute, in its stead, the word "support". In all other respects, I would dismiss the appeal from the Costs Order.

VIII. Disposition of Matters Before the Court

106 I would dispose of the parties' various motions before this court and Gregory's appeal from the Costs Order in accordance with these reasons.

107 On the basis of my proposed disposition of them, success on the motions has been divided. Georgia succeeded on Gregory's motions to review the January Order and to file fresh evidence in support of his review motion. For his part, Gregory succeeded on his motion for leave to appeal the Costs Order and on Georgia's motion to quash the appeal from the Costs Order. As I have explained, I view it as unnecessary to address Gregory's motion to "validate" the security for costs that he furnished in alleged compliance with the January Order. In these circumstances, I would award no costs of any of the motions.

108 Gregory attacked the Costs Order on numerous grounds. Although I would allow the appeal from the Costs Order on one narrow ground — the question of the propriety of the trial judge's characterization of the costs for the purpose of FRO enforcement — Georgia has otherwise been entirely successful on the appeal.

109 I have considered the joint costs outline provided by the parties following the completion of oral argument. In that outline, the parties jointly allocated $2,000 in costs to the issue of the trial judge's characterization of the costs he awarded. The parties also agreed that the costs of the appeal should be viewed, in total, as approximately $18,000.

110 In light of the parties' joint costs outline and the extent of Georgia's success on the appeal, I would award Georgia costs of the appeal in the total amount of $15,000, inclusive of disbursement and all applicable taxes.

Paul Rouleau J.A.:

I agree

M. Tulloch J.A.:

I agree

Order accordingly.

Footnotes

1 On the materials now before this court, it emerged that the FRO takes no position on the merits of any entitlement issue raised by Gregory before Doherty J.A. or this Panel, including in respect of the determination of costs by the trial judge. The FRO, therefore, did not participate in these proceedings.

2 On January 1, 2014, rule 1(8) of the FLRs was revoked and replaced by O. Reg. 322/13. As amended, rules 1(8) to 1(8.3) confirm the court's authority to deal with a party's failure to obey a court order or to follow the FLRs by making an order for costs or granting other relief that the court considers necessary for a just determination of the matter.

3 Nor do the January 2014 amendments to rule 1(8) provide authority to do so.

TAB 7

2001 CarswellOnt 221
Ontario Superior Court of Justice

1307347 Ontario Inc. v. 1243058 Ontario Inc.

2001 CarswellOnt 221, [2001] O.J. No. 257, 102 A.C.W.S. (3d) 1061, 4 C.P.C. (5th) 153

1307347 Ontario Inc., Plaintiff and 1243058 Ontario Inc. Operating as Golden Seafood Restaurant, Defendant

1243058 Ontario Inc. Operating as Golden Seafood Restaurant, Plaintiff by counterclaim and 1307347 Ontario Inc. and The Bank of China (Canada) and Yuk Chen Jo, Defendants by counterclaim

Nordheimer J.

Heard: January 25, 2001
Judgment: January 26, 2001 *
Docket: 00-CV-197213CM

Proceedings: additional reasons to 2001 CarswellOnt 16 (Ont. S.C.J.); additional reasons at 2001 CarswellOnt 492 (Ont. S.C.J.)

Counsel: *Christine A. Zablocki, Robert J. Osborne*, for Plaintiff/Defendant by counterclaim. *Duncan C. Boswell*, for Defendant/Plaintiff by counterclaim.

Subject: Corporate and Commercial; Civil Practice and Procedure; Property

ADDITIONAL REASONS to judgment reported at (January 9, 2001), 2001 CarswellOnt 16 (Ont. S.C.J.) concerning further motion by tenant for rehearing of motion and for stay of order, and further motion by landlord to find tenant in contempt of order.

***Nordheimer J.*:**

1 There are two further motions that were brought before me yesterday in this matter. These motions arise from my decision of January 9, 2001 wherein I granted an injunction restraining the defendant, until the trial of this action or further order of the court, from operating its restaurant at 4466 Sheppard Avenue East at all times other than between the hours of 7:00 a.m. and 12:00 a.m. seven days a week or from advertising, displaying or representing its hours of operations as other than these stipulated hours. First, there is a motion by the defendant for a rehearing of the motion based on new evidence that has been obtained and

for a stay of the order pending the hearing of a motion for leave to appeal. Second, there is a motion by the plaintiff to find the defendant in contempt of the order.

Motion for rehearing

2 In my reasons for decision of January 9, 2001, I was critical of the defendant for its failure to place before the court evidence that ought to have been available to it to corroborate the defendant's contention that it operated for most of its existence on a 24 hour basis. I was also critical of the fact that the defendant had failed to put before the court any financial information regarding its restaurant business in support of its contention that an injunction would cause considerable financial hardship to the defendant. On this motion for a rehearing, I am now presented with no less than ten new affidavits which are directed at either or both of these criticisms.

3 The test for reopening a matter after a decision has been rendered has been the subject of a number of cases although, as counsel pointed out, all of the available authorities appear to deal with reopening matters after a trial as opposed to after the hearing of a motion. However, I do not see any reason why a different test would be applied. In fact, it seems to me that an argument could be advanced that the test for reopening a motion ought to be more stringent since a motion does not usually result in the final determination of a matter. It normally involves, as is the case here, an interim determination that is going to be subject to a more thorough consideration at a trial. Having said that, I recognize that interim relief, such as an injunction, can still have a significant impact on the parties.

4 The test is most recently stated by the Court of Appeal in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2000), 183 D.L.R. (4th) 488 (Ont. C.A.) where Sharpe J.A. said, at p. 499:

> It was common ground between the parties before the trial judge and before this court that, in the circumstances of this case, the appellant had to establish two points:
>
> 1. that the evidence "might probably have altered the judgment" and,
>
> 2. that the evidence "could not with reasonable diligence have been discovered sooner".
>
> (See *Becker Milk Co. v. Consumers' Gas Co.* (1974), 2 O.R. (2d) 554 (Ont. C.A.) at p. 557, (1974), 43 D.L.R. (3d) 498 (Ont. C.A.).)

5 The defendant has retained new counsel. Mr. Boswell, fairly and frankly, acknowledges that the information contained in these new affidavits was probably available to the defendant prior to the original motion. However, it is submitted that this information was not put before the court because of a miscommunication between the defendant and its former

counsel arising, at least in part, because of the language difference between Mr. Lo (the owner of the defendant) and Mr. Hodder (the defendant's former counsel).

6 The defendant also submits that the reasonable diligence requirement can be avoided if the court is satisfied that the failure to reopen a hearing would result in a miscarriage of justice being visited on a party notwithstanding that the new evidence could have been obtained with reasonable diligence. The defendant relies on *Mele v. Royal Bank* (1994), 29 C.P.C. (3d) 3 (Ont. Gen. Div.) where Davidson J. said, at p. 10:

> In considering the grounds urged for reopening the motion for summary judgment I consider that my discretion should be guided by the concerns expressed in all of the above cases but that I must not lose sight of the fact and, indeed, in my opinion I should be guided by exercising a discretion which will avoid a miscarriage of justice.

7 The defendant also relies on *Castlerigg Investments Inc. v. Lam* (1991), 2 O.R. (3d) 216 (Ont. Gen. Div.) where Mr. Justice D. Lane, at p. 223, adopted the following approach of the British Columbia Court of Appeal in *Clayton v. British American Securities Ltd.* (1934), [1935] 1 D.L.R. 432 (B.C. C.A.) at p. 441:

> The prudent course is to permit the trial judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.

8 There is some criticism of the decision in *Castlerigg* arising from the fact that Mr. Justice D. Lane was not referred to the decision of the Court of Appeal in *Becker Milk Co. v. Consumers' Gas Co.*, *supra*, which sets out the two-prong test that I have referred to above. That issue was raised but not decided in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, *supra*, where Sharpe J.A. said, at p. 502:

> I would add here that we were not asked to consider whether a trial judge has a broad discretion to reopen the trial "to avoid a miscarriage of justice": see *Castlerigg Investments Inc. v. Lam*, *supra*; *Scott v. Cook*, *supra*. As I have concluded that the appellant has met the test set out in *Becker Milk Co. Ltd. v. Consumers' Gas Co.*, *supra*, it is unnecessary for me to consider this issue.

9 I would consider it to be beyond peradventure that a court will not knowingly allow a miscarriage of justice to occur. As well, until the matter is determined otherwise, I accept that, to avoid such a miscarriage, a trial judge or a motions judge has the discretion to permit a matter to be reopened and new evidence to be admitted even if the evidence could have been placed before the court in the first instance. However, it is also my view that a miscarriage of justice involves more than just a finding that a different result might have occurred. It involves a finding that, absent the reopening of the matter and the reversal of the

original determination, a fraud would be perpetrated or the giving of perjured evidence or the deliberate misleading of the court would be countenanced — see *DeGroote v. Canadian Imperial Bank of Commerce*, [1998] O.J. No. 1696 (Ont. Gen. Div.); aff'd. [1999] O.J. No. 2313 (Ont. C.A.).

10 I am far from satisfied that the failure to re-open this matter based on the new affidavit evidence filed would lead to a miscarriage of justice. I have reviewed each of the affidavits which the defendant now seeks to rely upon. I am also mindful of the fact that none of these affidavits have been the subject of cross-examination. I do not find in these affidavits any basis upon which I could conclude that a fraud was being perpetrated on the court nor do I see any basis upon which I could conclude that perjury was being committed or that the court was being actively misled.

11 The evidence which the defendant now seeks to put before the court goes solely, in my view, to the balance of convenience part of the test for an interlocutory injunction. It was during the consideration of that aspect of the test that I referred to the evidence that was not put forward by the defendant. While two of those affidavits do address the issue of the 24 hour operation of the restaurant, the other affidavits are directed to the issue of loss of business. Those latter affidavits, I must say, still fall considerably short of establishing irreparable harm to the defendant from the impact of the injunction. What they do establish is that any loss of business is likely quantifiable. I also note that even with the advent of these additional affidavits, there is still no specific financial information forthcoming from the defendant regarding its operations.

12 Given my conclusion that a miscarriage of justice will not result from a failure to re-open this matter, I must consider the two-prong test which I set out above from *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, *supra*. While I am prepared to admit that had these affidavits been filed on the original motion, the consideration of the balance of convenience would have been made more difficult, I do not believe that I would "probably" have reached a different conclusion with respect to that issue. I am still of the view that the restriction on the defendant's operating hours constitutes a lesser inconvenience than a continuing violation of the site plan and the potential for harm to the other tenants of the Plaza that would arise from permitting the defendant to continue to operate on a 24 hour basis. On this latter point, I do consider the proposal which now emanates from the defendant, that it would arrange for off-site and valet parking to avoid a breach of the site plan, as properly being covered by the colloquialism "too little, too late". In any event, even that proposal fails to address the problems and concerns which the other tenants and the plaintiff have generally regarding the impact of permitting a 24 hour operation in the Plaza.

13 In terms of the second prong of the test, that is, whether the evidence could have been obtained with reasonable diligence, it is clear to me that it could have been. Indeed, it is clear

to me that the reason that these affidavits are now forthcoming from the defendant is the direct consequence of the criticisms which were levelled against the defendant in my reasons. While the defendant suggests that his former counsel never asked for this information (a fact which I am told the defendant's former counsel disputes), it seems to me that such a contention is not a reason to relieve against the reasonable diligence requirement. Otherwise, it would altogether become too easy for parties to gain "a second shot" at their desired relief simply by changing counsel and then claiming that the first counsel failed to address some issue that was fatal to their first attempt. I agree with Madam Justice Lax (and with Mr. Justice Wilkins whom she quotes) when she said in *DeGroote v. Canadian Imperial Bank of Commerce*, *supra*, at para. 14:

> Unquestionably, there is prejudice to the defendants in this case. There is a long history to this litigation. The defendants properly brought a motion before the court under Rule 20 of the *Rules of Civil Procedure*. The plaintiffs resisted the hearing of the motion and were unsuccessful in that effort. They were also unsuccessful on the merits of the motion. It is no passing coincidence that it was only after reasons for judgment were released that the plaintiffs sought to re-open the judgment. As was aptly stated by Wilkins J. in *Strategic*, supra, at p. 421:
>
> > After the trial is complete and judgment is rendered, it is always a simple matter, utilizing hindsight, to go about reconstructing a better method of presenting the case when one finds oneself in the sorry position of loser.

14 Therefore, notwithstanding the very able submissions of Mr. Boswell, I have concluded that the defendant's motion for a rehearing must be dismissed.

Motion for a stay

15 The defendant also moves for a stay pending its motion for leave to appeal. I am told that the motion for leave to appeal is scheduled to be heard on Monday next.

16 The principle to be applied to granting a stay is set out in *Ogden Entertainment Services v. Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440* (1998), 38 O.R. (3d) 448 (Ont. C.A.) where Robins J.A. said, at p. 450:

> In determining whether a stay should be granted, regard must be had to the judgment under appeal and a strong case in favour of a stay must be made out. The court must proceed on the assumption that the judgment is correct and that the relief ordered was properly granted. The court is not engaged in a determination of the merits of the appeal on a stay application.

17 I noted in my reasons on the original motion that the site plan precludes parking between 12:00 a.m. and 7:00 a.m. I have already found that there would be irreparable harm occasioned to the plaintiff if the injunction was not granted and it follows from that that there would be irreparable harm to the plaintiff if the injunction were stayed. I have also found that any damage that may be occasioned to the defendant from the injunction is quantifiable and is covered by the undertaking as to damages. For all of these reasons, I am not persuaded that a stay of the order should be granted in the circumstances of this case. This, of course, does not preclude a judge of the Divisional Court granting a stay if leave to appeal is granted if he or she is considers that a stay is then warranted. I understand a stay is part of the relief being sought by the defendant on its motion to the Divisional Court.

Contempt motion

18 Regarding the plaintiff's motion for a finding of contempt, counsel for the defendant again fairly conceded that the evidence put forward by the plaintiff establishes a breach of the order by the defendant in respect of the sign advertising that the restaurant was open 24 hours and in respect of the evidence of the private investigator regarding the events of January 16/17, 2001. However, counsel for the defendant contends that there is no other evidence which could establish any other breach beyond a reasonable doubt. As well, the defendant has now filed an affidavit which says that, at least from January 17, 2001, the defendant has been complying with the order.

19 There is a statement made by Mr. Lo that he did not understand what was meant by the phrase "operating" in the order. I find that assertion very difficult to accept. Mr. Lo had the decision translated to him and had the benefit of the advice of counsel. Further, an order that prohibits a restaurant from operating between certain hours is not a particularly complicated or complex issue to understand. I also note that it appears that Mr. Lo was eventually able to determine what that prohibition means because he also swears to the fact that as of January 17, 2001 the defendant has been abiding by the order and, indeed, the steps set out in his affidavit sworn January 23, 2001 would appear to constitute compliance with the order.

20 Rather, I believe that a fair reading of Mr. Lo's affidavit is that he had outstanding reservations at the time that the order was made, which reservations would be adversely affected by the order, and that he consciously chose to honour those reservations notwithstanding that in so doing he might well breach the terms of the order. In addition, while I accept that Mr. Lo's affidavit does not establish a continuous breach of the order, it clearly establishes that some additional breaches of the order likely occurred in addition to the ones set out in the plaintiff's evidence.

21 There is also a submission in the defendant's factum that there could not be a finding of contempt because the formal order has not been signed and entered. This submission was

not pursued in argument. That seems just as well since I do not believe that the authorities would sustain it, particularly in the case of an injunction. An injunction operates from the time that it is pronounced and no formal order need be taken out in order for a contempt finding to be made — see *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 4 O.R. (2d) 585 (Ont. H.C.); aff'd. (1976), 11 O.R. (2d) 167 (Ont. C.A.).

22 In the end result, I am satisfied beyond a reasonable doubt that the defendant failed to comply with the terms of the order of January 9, 2001 in one or more respects on at least four occasions, namely, January 11, 12, 13 and 17, 2001. I therefore find the defendant in contempt of the order in respect of those occasions.

23 In terms of the sanctions to be applied to the defendant arising from its contempt of the order, the plaintiff sought a number of different remedies. One of the remedies was that the plaintiff be relieved from its undertaking as to damages as a consequence. I do not know of any authority, and none was referred to me by counsel for the plaintiff, in which a party obtaining an injunction was released from their undertaking as to damages as a consequence of the other party's failure to abide by the injunction. While I suppose that there might be circumstances where that relief would be warranted, in my view it would only be so in the rarest of cases and this is not such a case. The plaintiff also sought an award of punitive damages. However, I do not view punitive damages as an appropriate sanction for contempt. Punitive damages are said to be "in the nature of a fine" — see *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129 (S.C.C.) at p. 186. In my view, if a fine is to be applied as a sanction for contempt then it ought to be done so directly and not obliquely through an award of punitive damages. Further, punitive damages would flow to the plaintiff whereas a fine flows to the system. When a party is guilty of contempt, it is not the other party who is principally harmed, it is the system of justice which is first and foremost harmed and it is the system, therefore, to which the penalty should be paid.

24 I consider the appropriate sanction to be applied to the defendant for its contempt is the imposition of a fine. I therefore order the defendant to pay a fine for its contempt of the order of January 9, 2001 in the amount of $2,500.

Costs

25 In my view, the plaintiff is entitled to the costs of both of these motions. While the costs of the motion for a rehearing should be on the normal party and party scale, I believe that, given the inherent nature of the motion for contempt, the costs of that motion should be on a solicitor and client scale, although I am prepared to receive submissions on this latter view. I am also prepared to fix the costs of both motions on receipt of appropriate submissions in that regard unless the parties can agree on the quantum. The plaintiff's submissions are to be filed within 10 days of the release of these reasons and the defendant's response is to

be delivered within 10 days thereafter. No reply is to be filed without leave. I will reiterate my usual request in this regard which is that I would appreciate it if counsel could keep their submissions brief.

Order accordingly.

Footnotes

* Additional reasons given (February 20, 2001), Doc. 00-CV-197213CM (Ont. S.C.J.).

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

v.

AEOLIAN INVESTMENT LTD., et al.

Defendants/Appellants
Divisional Court File No.: 533/77
Court File No: CV-17-11822-00CL

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE PLAINTIFF/RESPONDENT (Motion to Admit Fresh Evidence)

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