**CITATION:** Way v. Schembri, 2023 ONSC 5425
**COURT FILE NO.:** CV-11-42 and CV-457-12
**DATE:** 2023/09/26

**SUPERIOR COURT OF JUSTICE-ONTARIO**



**RE:** AL WAY, KINGSLEY FINANCIAL INC. and TRIUMPH FINANCIAL HOLDINGS INC., Plaintiffs

-and-

GORDON SCHEMBRI, SCHEMBRI FINANCIAL LIMITED, 41 COLUMBIA INC., KING & COLUMBIA INC., 69 COLUMBIA ST. INC., 5 RITTENHOUSE INC., THE BLOCK INC., THE BLOCK I INC., and THE BLOCK II INC., Defendants

**BEFORE:** Gibson J.

**COUNSEL**: Jonathan Lisus, Andrew Winton and Niklas Holmberg, for the Plaintiffs

James Wortzman, for the Defendants

**HEARD**: May 15, 2023

## ENDORSEMENT

### *Overview*

[1] These complex, protracted, contentious and document-intensive actions have been joined together on consent. By direction of the Regional Senior Justice Central South Region, I have been appointed to hear all motions for both proceedings pursuant to Rule 37.15. At the request of the Parties, I heard two long motions together:

***a.*** The Plaintiffs' motion pursuant to their Notice of Motion dated July 20, 2021, for a further and better affidavit of documents (the "Production Motion"); and

***b.*** The Defendants' motion pursuant to their Notice of Motion dated July 20, 2021, to bifurcate the action in which the Way Parties are plaintiffs and to postpone production of documents (the "Bifurcation Motion").

***Summary of Facts***

[2] Al Way ("Way") and Gordon Schembri ("Schembri") are real estate developers. In 2007, they entered into a Joint Venture Agreement (through their respective numbered companies) to develop a project at 345 King Street, Waterloo, Ontario.

[3] Shortly after entering into the Joint Venture, Way and Schembri formed a corporation, Triumph Financial Holdings Inc. ("Triumph"), to pursue certain other development opportunities in Waterloo, London and Oshawa (the "Triumph Projects"). Way and Schembri entered into a Shareholders Agreement in April 2008 setting out the terms of how the Triumph Projects would be developed and to govern the conduct of the affairs of Triumph.

[4] Article 13 of the Shareholders Agreement requires Schembri to present Way with all real estate development opportunities that Schembri acquired within the Regional Municipality of Waterloo and to give Way a right of first refusal to pursue those projects through Triumph (the "ROFR Clause").

[5] Shortly after the Shareholders Agreement was executed and development on the Triumph Projects commenced, Way and Schembri's business relationship deteriorated. The relationship between the two men has become acrimonious and they have engaged in sustained litigation since 2010.

[6] In February 2010, Schembri commenced an action (the "Schembri Action"), in which he alleges, among other things, that Way negligently mismanaged the development and accounting of the Joint Venture. Schembri claims over $30 million in connection with the joint venture project and the Triumph Lands.

[7] In May 2012, Way commenced an action (the "Way Action"), in which he alleges, among other things, that Schembri breached the ROFR Clause in connection with several real estate development projects Schembri pursued in Waterloo Region.

[8] In 2014, the parties consented to an order that the actions be tried together. In 2018, the parties consented to an order that the actions share common discoveries.

[9] Each side makes a wide variety of allegations against the other side, all alleging improper conduct of one type or another.

[10] By Notice of Motion dated May 11, 2017, Schembri moved for summary judgment seeking dismissal of the Way Action on the basis that the ROFR Clause is an unenforceable restrictive covenant and of no force and effect.

[11] On September 17, 2018, Schembri was cross-examined in connection with his motion for judgment. Schembri was asked by Way's former counsel to produce documents respecting the various development projects at issue in the Way Action (the "Lands"). Schembri's counsel on examination stated that "if we're not successful on this motion, then we'll be delivering a supplementary affidavit of documents and you'll have whatever rights you want to examine Mr. Schembri further on those points."

[12] The Schembri Defendants brought a motion for summary judgment or, in the alternative, bifurcation. Partial summary judgment was granted by Sloan J. in reasons for decision dated February 1, 2019, and the action was dismissed in its entirety. Justice Sloan found the non-competition clause to be unenforceable as, *inter alia*, it was ambiguous, it was an agreement to agree, and was an unreasonable restrictive covenant. He did not deal with the issue of bifurcation since the action was dismissed.

[13] The Court of Appeal for Ontario set aside the summary judgment on November 2, 2020, (*Way v. Schembri*, 2020 ONCA 691) finding that it was not appropriate to order a partial summary judgment. It directed that the Way Action proceed to trial with the Schembri Action.

[14] Following the Court of Appeal's decision, Way renewed his request for production of documents relating to the Lands. Schembri postponed his response to the request pending his application for leave to appeal to the Supreme Court of Canada. The Supreme Court of Canada dismissed Schembri's application for leave on April 15, 2021.

[15] Way's counsel again requested that Schembri produce the outstanding documents. Instead of producing the documents, counsel for Schembri stated that Schembri would be seeking to bifurcate the Way Action and therefore the "productions relating to damages will not be produced at this time".

[16] Way advised that the documents do not solely relate to damages and, in any event, Way did not consent to bifurcation.

[17] The Production Motion and the Bifurcation Motion were heard together before me.



***Positions of the Parties***

*Defendants (Schembri Parties)*

[18] With regard to the Bifurcation Motion, the position of the Defendants is that the liability issues in this case are simple. The parties have opposing positions on whether Way was aware of Schembri pursuing the properties at issue for the purpose of developing student housing, and whether Way expressed that he was not interested. Schembri says that the productions sought by Way relate only to damages, and that Way's request for any and all documents relating to the purchase and development of Schembri's properties will not assist in determining whether Article 13 (the ROFR Clause) is enforceable, and whether Way breached the JVA and the Shareholder's Agreement. Therefore, Schembri submits, the issues of liability are clearly separate from the issue of damages. Severing the liability and damages issues, he contends, would save a significant amount of time and resources.

[19] With regard to the Production Motion, Schembri says that the Plaintiffs are seeking an overly broad production of documents which would take the Defendants a significant amount of time and resources to put together and produce, and that such voluminous productions would not be proportional and would cause further delays. He urges the application of a "parsimonious proportionality principle", a phrase used by Perell J. in *Ontario v. Rothmans Inc*., 2011 ONSC 2504. Schembri asserts that the scope of production sought by Way is abusive and tactical, and meant to forestall progress in the litigation.

*Plaintiffs (Way Parties)*

[20] With regard to the Bifurcation Motion, the position of the Plaintiffs is that case management has no application in Kitchener, that I am bound by *stare decisis* to dismiss the Bifurcation Motion, and that I should dismiss the request for delayed production as an attempt to bifurcate the action by

other means. Way insists that Schembri does not meet the unique circumstances in which delayed productions may be ordered, which include the requirement to prove serious prejudice.

[21] With regard to the Production Motion, the Plaintiffs insist that the document sought are relevant and important to prosecute and defend the two actions. Counsel for the Plaintiffs submit that the Defendants, in urging a restricted scope of production, are "inviting me to make the same mistake that Justice Sloan made, that is, to make a decision on the merits outside the trial process," and that the Defendants are in essence seeking to re-argue their motion for summary judgment.

[22] Further, Way submits that the production requested is required and proportionate.

***Issues***

[23] The issues before me in this matter are:

1. Does the Court have discretion to order bifurcation?
2. If so, should the Court order bifurcation?
3. Should the Court order delayed production of documents pursuant to Rule 30.04(8) and 31.06(6)? and,
4. Should the Court order Schembri to produce a further and better affidavit of documents?

***Law and Analysis***

*Issue 1: Discretion to Order Bifurcation*

[24] In this case, I have been assigned by the Regional Senior Justice Central South Region on June 30, 2022, to hear motions under Rule 37.15. There is no Rule 77 Case Management in Central South Region.

[25] This was made clear by the Regional Senior Justice in his letter to counsel dated June 30, 2022:

> The Rules of Civil Procedure do not provide for case management in the Central South Region. However, as the Regional Senior Judge, I may appoint judges to hear motions under Rule 37.15.

[26] Rule 77.02(1) provides that this rule applies to actions and applications commenced in or transferred to one of city of Ottawa, city of Toronto or county of Essex, and assigned to case management by an order under these rules (a conjunctive requirement). That is not so here, even if the action was commenced in Toronto. It has been transferred from (not to) Toronto, and it has not been assigned to case management under the Rules because the Rules do not provide for case management in the Central South Region, and no order to do so has been made.

[27] The scope of authority of a judge appointed under Rule 37.15 to hear all motions is more circumscribed than that of a case management judge. The judge may give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding. But the ambit of the judge's authority is not as broad.

[28] The court's discretion to order a bifurcation of issues is found at Rule 6.1.01, which states:

> 6.1.01 With consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

[29] The Plaintiffs in this case do not consent to bifurcation.

[30] In *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 ONCA 788, the Court of Appeal for Ontario held at para. 39 that given the language in Rule 6.1.01, the court's discretion in ordering a bifurcation of issues is predicated upon the consent of the party.

[31] Schembri submits that I am not bound by *Duggan* because I have case management powers under Rule 77.02(4). I do not agree. In hearing these motions, I am exercising the authority of a Rule 37.15 judge, not a case management judge under Rule 77. *Stare decisis* applies. I consider that I am bound by the direction given in *Duggan*.

[32] A Rule 37.15 judge appointed by a Regional Senior Justice to hear motions is not free to

ignore appellate jurisprudence. Case Management under Rule 77 does not apply in the Central South Region. This action is not being case managed under Rule 77. In any event, Rule 77 does not authorize a case management judge to ignore binding appellate authority interpreting the rules. Contrary to the submission of the Defendants in this case, my purported powers as a case management judge are not outside of and do not "trump" the ruling of the Court of Appeal in *Duggan.*

[33] I find that, absent consent of both parties, which is not present in this matter, I have no authority to order a bifurcation of issues.

*Second Issue: Exercise of Discretion*

[34] Given this, the second issue does not arise.

*Third Issue: Delayed Production of Documents*

[35] The third issue, Schembri's request for delayed production under Rule 30.04(8), and 31.06(6), is an attempt to bifurcate the action by other means. It does not meet the unique circumstances in which delayed productions may be ordered, which includes the requirement to prove serious prejudice.

[36] The Plaintiffs have a *prima facie* right to the production of relevant documents. In order to justify a departure from this general rule, the Defendants must demonstrate that the threshold issue in Way's contract claim- liability- is clearly severable from the consequential issue of damages, and that the Defendants would suffer serious prejudice as a result of the immediate production of the documents. Neither of these criteria are met in this instance.

[37] I agree with the position of the Plaintiffs that the documents that Way seeks are relevant to the terms Schembri actually applied when he developed the lands in issue. They show what a commercially reasonable actor would do absent the right of first refusal, and are thus probative of Schembri's alleged breach of contract and duty of good faith. They will permit a comparison of what Schembri actually did with what he says he would have done if he had complied with his contractual obligation. They are therefore relevant and necessary to determine liability.

[38] Moreover, the documents may potentially be relevant to Way's defence to Schembri's

allegations that Way negligently mismanaged other joint venture projects.

[39] Further, Schembri has not demonstrated serious prejudice would result from the document production. He asserts that if Way obtains all the documents requested, he will gain a competitive advantage over Schembri. There is no evidence in the record that Way and Schembri currently compete for the same real estate projects. Serious prejudice related to commercially sensitive documents requires evidence that production of documents will disrupt the moving party's business relationships or harm their competitive position in the market: *Bilich v. Buck*, [2008] O.J. No. 2706 at para. 19 (ONSC). Factors that may lead to serious prejudice include the disclosure of secret processes, special advantages pertaining to the particular competitor in the market, or know-how that cannot commonly be acquired and known by competitors: *Holbrook v. FX Displays Packaging Logistics Inc.*, 2017 ONSC 4757 at para. 21. None of these factors are present here.

[40] As stated by the Court in *Unwin v. Crothers*, (2005), 76 O.R. (3d) 453 (ONSC) at para. 72:

> The type of serious prejudice that the Rules contemplate as a justification for divided production or discovery is not the mere inconvenience of having to produce voluminous documents, or even that the disclosure of information to the plaintiff would be detrimental to the defendants in an ordinary commercial competitive situation.

[41] I find that the Defendants have not demonstrated serious prejudice in this instance.

[42] Moreover, as submitted by the Plaintiffs, any prejudice is further mitigated by the deemed undertaking rule in Rule 30.1.01. As a party to this action, Way and his counsel are deemed to undertake not to use any of the evidence or information produced in this proceeding for purposes other than this proceeding. This provides Schembri with additional protection against any potential misuse of the information.

[43] Schembri asserts that the requests are disproportionate. Proportionality is a concept that considers, among other things, the importance and complexity of the issues and the value of the amount in dispute. As Way's counsel points out, between the two actions, the parties are seeking approximately $65 million in damages. There has been extensive discovery.

[44] Schembri has not adduced evidence beyond a bald broad assertion concerning the time and expense required to produce the documents. The party seeking to limit production of documents that are otherwise relevant bears the onus to adduce cogent evidence addressing the factors in Rule 29.2.03. Without such evidence, the Court cannot assess the applicability of the factors: *Seelster v. HMTQ and OLG,* 2015 ONSC 908 at para. 110. This pertains in this case to Schembri's arguments with respect to proportionality.

*Issue 4: Further and Better Affidavit of Documents*

[45] Parties to an action must disclose every document relevant to any matter in issue in the proceeding: Rule 30.02(1). The Court may order service of a further and better affidavit of documents where it is satisfied that a relevant document may have been omitted from the party's affidavit of documents: Rule 30.06(b).

[46] The discovery process should not be a fishing expedition. The goal of the Court should be to come to the most just, expeditious, and least expensive determination in a proceeding. Regard must be had to the principle of proportionality.

[47] In determining whether to order a party to produce a document, the court shall consider the list of factors in Rule 29.2.03, which addresses proportionality in discovery.

Rule 29.2.03 provides:

> 29.2.03(1) General- In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,
>
> (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
>
> (b) the expense associated with answering the question or producing the document would be unjustified;
>
> (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
>
> (d) requiring the party or other person to answer the question or produce the

document would unduly interfere with the orderly progress of the action; and

(e ) the information or the document is readily available to the party requesting it from another source.

(2) Overall Volume of Documents - In addition to the consideration listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.



[48] It is undisputed that the documents exist. The remaining issue is whether they are relevant to the matters at issue in either of the Way or Schembri actions, and whether the requested production is proportionate.

[49] A document is relevant if it has probative value and is therefore logically connected to or tends to prove or disprove a matter in issue: *Webb v. Jones*, 2011 ONSC 2479 at para. 4.

[50] In response to this motion, after previously undertaking to produce the documents if his summary judgment motion failed, Schembri takes the position that the documents are irrelevant because, if Way had exercised the ROFR Clause, Schembri would have insisted on unreasonable terms for the development of any of the projects on the Lands and made it impossible for Way to pursue the opportunities.

[51] I agree with the submission of the Plaintiffs that Schembri cannot rely on hypothetical breaches of good faith and honest contractual performance of the Shareholders Agreement to avoid production of relevant documents. Moreover, the documents are relevant to issues in the Schembri action, with which the Way action shares common discovery.

[52] The documents sought are probative as to whether projects should have been offered to Way, under the ROFR Clause. The documents are also relevant to Way's defence of the Schembri action, which involves allegations of negligent mismanagement, which will involve determination of a standard of care.

[53] Schembri's concern about disclosing confidential documents to Way because Way remains

one of his competitors is addressed by the deemed undertaking rule, as alluded to above. Further, there is no evidence that Way and Schembri currently compete for the same real estate projects.

[54] As discussed above, an order to bifurcate the Way action under Rule 6.1.01 cannot be granted without Way's consent. Consent is a necessary precondition of such an order and its absence is fatal to Schembri's motion to divide the action into liability and damages phases.

[55] With regard to proportionality, I have considered the factors listed at Rule 29.2.03. This is not a "unicorn" case; rather, it is major complex commercial litigation. Such cases, while complex, are not unusual. Certain realities come with that territory. The amount of time required would not be unreasonable in the broader context of the case and the amounts claimed that are at issue, some $65 million. Viewed through this lens, the expense is not unjustified. Compliance with the request would not cause undue prejudice. It would not interfere with the orderly progress of the action. Indeed, it may well promote it: there is a significant prospect that, absent appropriate discovery before trial, the trial judge might have to order an adjournment at trial to allow further productions. There is no other source from which the documents sought are readily available. And, once again having regard to the context of complex commercial litigation, the request would not require an excessive volume of documents to be produced.

[56] Having regard to these factors, I find that the scope of productions sought by the Plaintiffs is not disproportionate.

[57] The Production Motion will be granted.

***Order***

[58] The Court Orders that:

1. The Defendants' motion for bifurcation of the issues of liability and damages, or in the alternative for postponing production of the documents requested by the Plaintiffs, ("the Bifurcation Motion") is dismissed; and

2. The Plaintiffs' Production Motion is granted. The Defendants shall produce a further and better affidavit of documents disclosing all relevant documents in Schembri's power,

possession and control, and over which no privilege is claimed, relevant to the "Lands" as defined in paragraph 1(a) of the Fresh As Amended Statement of Claim dated June 6, 2014. Without limiting the generality of the foregoing, this is to include any and all relevant documents concerning the acquisition and development of the Lands, including but not limited to: due diligence files, transaction documents, construction documents, and documents concerning the financial performance of any projects developed on the Lands.

***Costs***

[59] The parties are encouraged to agree upon appropriate costs. If the parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs) by email to my judicial assistant at mona.goodwin@ontario.ca and to Kitchener.SCJJA@ontario.ca. The Plaintiffs (Way) may have 14 days from the release of this decision to provide their submissions, with a copy to the Defendants (Schembri); the Defendants a further 14 days to respond; and the Plaintiffs a further 7 days for a reply, if any. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves. If I have not received any response or reply submissions within the specified timeframes after the Plaintiffs' initial submissions, I will consider that the parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

M. Gibson, J.

**Date: September 26, 2023**