COURT OF APPEAL FOR ONTARIO

CITATION: Rimon v. CBC Dragon Inc., 2024 ONCA 128
DATE: 20240223
DOCKET: COA-23-CV-0452

van Rensburg, Roberts and Gomery JJ.A.

BETWEEN

Ezekiel Rimon, EMTI Management Inc., Mytam Holding Ltd.,
and The Planning Management Group Limited

Plaintiffs (Respondents)

and

CBC Dragon Inc.*, Charles Chan*, KBIJ Corporation*, Derek Lee,
Sun and Partners Professional Corporation,
An-Dak Trading Company Ltd.*, and An Yuan Lin*

Defendants (Appellants*)

Vusumzi Msi, for the appellants

Jasdeep Bal and Sara Maadanisani, for the respondents

Heard: February 13, 2024

On appeal from the order of Justice Peter J. Osborne of the Superior Court of Justice, dated March 23, 2023, with reasons reported at 2023 ONSC 3701.

Gomery J.A.:

[1] The appellants appeal the motion judge's order striking their statement of defence and counterclaim based on their failure to answer undertakings, produce relevant documents, and abide by successive court orders.

Background

[2] The respondents began this action in May 2020. They allege that they were induced by misrepresentations to advance $1,135,904.93 to the appellants to purchase property for a subdivision development in Toronto. They contend that the appellants used the money advanced for purposes other than those for which they were intended and that it has disappeared without explanation. The respondents seek damages, an accounting, and equitable and declaratory relief. The appellants deny the allegations and have delivered a defence and counterclaim.

[3] In September 2020, the respondents brought a motion seeking interlocutory relief, including a certificate of pending litigation and an order to produce particulars of banking transactions. The appellant Charles Chan was cross-examined on his affidavit opposing the motion in October 2020. During the cross-examination, he gave undertakings to provide information and records relating to the transactions.

[4] When the appellants failed to comply with the Chan undertakings, the respondents brought a motion to compel them to do so. The motion was originally returnable in December 2020, but was adjourned by Cavanagh J. on consent, subject to the appellants' commitment to provide the answers by a revised deadline. That deadline was missed and the answers to undertakings were not provided.

[5] The respondents did not obtain a certificate of pending litigation, one of the orders originally sought in their September 2020 motion, when this issue was adjudicated by Dunphy J. in June 2021. Dunphy J. nevertheless declined to award costs to the appellants on the motion, saying he was not impressed with Mr. Chan's "stonewalling efforts" and "obstructive behaviour".

[6] In January 2022, the respondents brought a motion to compel the appellants to comply with the terms of the December 2020 consent order. On January 28, 2022, McEwen J. issued a further consent order. It required the appellants to provide particulars of 192 banking transactions and to answer all outstanding undertakings from Mr. Chan's October 2022 cross-examination, by no later than March 31, 2022.

[7] Although some answers and records were produced by the appellants following this order, a significant number of undertakings and documents unquestionably remained outstanding. This prompted the respondents to bring their motion to strike the statement of defence and counterclaim. The motion was originally returnable before Kimmel J. on October 3, 2022, but was adjourned, at the appellants' request, to give them additional time to comply with their production obligations. Kimmel J. stated that she was not impressed by the appellants' "lack of compliance, or any demonstrated efforts to comply". She noted that "[t]here comes a time when parties who are repeatedly delinquent in complying with their obligations under the *Rules of Civil Procedure* and Court orders will be given no

more chances by the court." In her view, the appellants had "almost reached that point", but she decided to give them "one more chance". She adjourned the hearing of the motion to strike to a new date, peremptory to the appellants, and ordered them to produce the transaction records and missing answers to undertakings by no later than October 31, 2022.

[8] The appellants failed to fully comply with Kimmel J.'s order, and the motion was returned before the motion judge in March 2023.

The motion judge's decision

[9] The motion judge reviewed the history of the case. He found that the appellants had failed to comply meaningfully with the orders of Cavanagh J., McEwen J., and Kimmel J., and remained in material default at the time of the hearing before him. He characterized the appellants' non-compliance as "clear and unequivocal".

[10] At the hearing before the motion judge, the appellants proposed a further adjournment along with a new timetable, a proposed costs award in the respondents' favour, and a term permitting the respondents to obtain an *ex parte* motion to strike the defence and counterclaim if the appellants again defaulted on their production obligations and failed to remedy any noted deficiencies within a seven-day cure period. They did not suggest that they were not obliged to deliver

the outstanding answers and records they had been ordered to produce in earlier court orders.

[11] The motion judge rejected the appellants' proposal. Based on the history of the litigation, he had no confidence that they would comply with any further timetable ordered.

[12] Applying the principles and factors set out in *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310, the motion judge found that the appellants had not provided any reasonable explanation for their non-compliance to date and there was no evidence that their failure to comply was inadvertent or based on a lack of understanding of their obligations. Given the relevance of the transaction records to the central issue of "what happened to the money", he concluded that the appellants' non-compliance was not "immaterial or minimal and clearly ha[d] an impact on the ability of the court to do justice in this particular case." He observed that, given finite court resources, failure to comply with disclosure obligations impacts not only the just and expeditious determination of this case, but other pending matters.

[13] The motion judge concluded that striking the appellants' statement of defence and counterclaim, without leave to amend, was an appropriate and proportionate remedy in the circumstances.

Analysis

[14] On an appeal of a judge's discretionary decision, this court will intervene only where the discretion has been exercised on a wrong principle of law or a clear error has been made. An appellate court should defer to the findings of fact made by a motion judge unless they disregarded or failed to appreciate relevant evidence: *Bottan v. Vroom*, 2002 CanLII 41691 (Ont. C.A.), at para. 13. This general rule applies where an appellate court reviews a judge's decision to strike a pleading: *Aslezova v. Khanine*, 2023 ONCA 153, at para. 14.

[15] The appellants raise five grounds of appeal. In my view, none of them reveals any error of law or reversible error by the motion judge.

[16] First, the appellants contend that the Chan undertakings were made solely on behalf of Mr. Chan, CBC Dragon Inc. and KBIJ Inc., and that the motion judge's order unjustifiably "sweeps up" An-Dak Trading Company and its principal An Yuan Lin (the "Lin Defendants"). The 2020 and 2022 disclosure orders were directed against all the appellants, and the appellants at no point prior to this appeal took the position that the Lin Defendants were not bound by them. It would in fact be strange if the Lin Defendants were exempt from the orders compelling production of transaction records, since the statement of claim alleges that some of the funds advanced by the respondents were transferred to them.

[17] Second, the appellants argue that an inability to complete an undertaking is not a “fatal omission”, and that the motion judge unfairly failed to consider the efforts that the appellants had made to answer the Chan undertakings. This argument amounts to an attack on the motion judge’s assessment of the evidence and the weight he gave to various factors relevant to the exercise of his discretion. It does not point to an error that would justify intervention by this court.

[18] Third, the appellants contend that the motion judge did not consider whether the appellants’ failure to comply with their production obligations meaningfully prejudiced the respondents. I do not agree. The motion judge found that the appellants’ failure to respect their obligations to answer undertakings and to comply with court-ordered timetables to produce records had prejudiced the respondents:

> I am satisfied in the present case that the conduct of the Defendants has increased the costs of the non-defaulting parties, the Plaintiffs, particularly when I consider the costs of the successive motions, the preparation of the extensive (and helpful) charts of the outstanding undertakings and relevant transactions, the cross-examination of the principal Defendant, Chan, and the repeated and continued efforts to follow-up on these defaults over a two-year period.
>
> For the same reasons, it is obvious to me that the failure by the Defendants to comply with their obligations has delayed the final adjudication of the case on its merits, again taking into account the amount of money in dispute. While the amount (approximately $1.1 million) is material, it is apparent to me that the costs of litigating this dispute will soon represent, if they have not already,

> a proportion of the amount in dispute that cannot be dismissed as being immaterial.

[19] Fourth, the appellants argue that the motion judge erred by not accepting Mr. Chan's evidence that he had not understood what he was undertaking to do at the October 2020 cross-examination, and that he had now realized that some of the records sought could not, in fact, be produced. They further contend that striking a pleading is not a remedy available for the failure to answer undertakings, citing *Newlove v. Moderco Inc.*, 2002 CanLII 34748 (Ont. S.C.).

[20] Given the history of the litigation, it was open to the motion judge to reject Mr. Chan's evidence that he only belatedly realized that he could not answer some of the undertakings given. This explanation for the appellants' non-compliance was entirely new and, as noted by the motion judge, stood "in complete contrast to the position [the appellants] [had] maintained throughout over the last period of approximately two years, to the effect that they understood exactly what was required and were working diligently on it, but simply required more time." The motion judge further observed that the appellants had not, as one would have expected, "put forward any evidence of good faith efforts and due diligence to obtain, for example, documents from third parties such as banks or other financial institutions."

[21] *Newlove* does not stand for the proposition that striking a pleading is never a remedy available for a failure to answer undertakings. Rules 30.08(1) and (2) of

the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 give the court wide discretion to impose remedies where a party fails to disclose or produce a document or serve an affidavit of documents as required by the *Rules* or by a court order. Rule 30.08(2) specifically contemplates an order to strike a pleading, and both Rules empower the court to make any order "as is just". At para. 21 of *Newlove*, Wein J. held that dismissal of an action should be granted only exceptionally but that "the matter of the scope of the remedy is one within the discretion of the Court, to be determined in the context of the particular case."

[22] *Newlove* concerned a motion at the outset of trial seeking to dismiss an action for the plaintiff's failure to comply with undertakings or in the alternative to preclude the plaintiff from relying on certain documents at trial. There was no prior court order. In this case, the appellants' conduct includes not only a failure to answer undertakings but to comply with multiple court orders. Rule 60.12(b) explicitly provides that the court may strike out a party's defence where a party fails to comply with an interlocutory order.

[23] Finally, the appellants contend that striking their defence and counterclaim sanctioned them disproportionately. They argue that the motion judge failed to distinguish the circumstances of this case from those in *Falcon Lumber*. *Falcon Lumber* dealt with a defendant's failure to list or produce relevant documents in their affidavit of documents, whereas the demand for production in this case stems from a cross-examination prior to the discovery process.

[24] The motion judge was alive to the particular facts of this case. He nonetheless found that Brown J.A.'s observation in *Falcon Lumber* about the fundamental importance of documentary production in any action is "particularly apt here, where the documents that are the subject of the outstanding production requests, and multiple court orders, go to the very heart of the issues in this action on the merits." This led him to conclude that the *Falcon Lumber* analysis applied:

> While the action was "front-end loaded" in the sense that a significant motion was brought early on, the Defendants have still had a very significant period of time to produce the relevant documents as they were, given the terms of the adjournment of the motion as originally ordered by Cavanagh, J., clearly aware of their obligations, there were successive orders directing them to comply with their obligations, and yet they have still not done so.

[25] I cannot fault this reasoning. The *Rules* are intended to ensure that parties to civil suits disclose all relevant information in a timely manner at all stages of a proceeding. A party's failure to comply with their disclosure obligations increases the costs of litigation and frustrates the opposing party's ability to move the proceeding forward. The *Falcon Lumber* principles apply even more forcibly when a party fails to disclose records when repeatedly ordered by the court to do so within a specific deadline. In such a case, the defaulting party does not simply delay or prevent an adjudication on the merits but undermines the court's authority.

[26] The motion judge applied the correct principles of law and evaluated the record before determining that the order sought by the respondents was just.

As observed in *Falcon Lumber*, at para. 73, citing *Starland Contracting Inc. v. 1581518 Ontario Ltd.*, 252 O.A.C. 19 (Div. Ct.), at para. 26:

> The authority to dismiss proceedings for repeated failure to comply with court orders and flagrant disregard for the court process is an essential management tool. A case management judge or master who has a continuous connection with an action, the parties and their counsel is well-positioned to monitor the conduct of the participants throughout the proceedings, and to determine whether anyone is deliberately stalling, showing bad faith or abusing the process of the court when deadlines are missed and defaults occur under procedural orders.

[27] I agree that the appellants' failure to comply with the successive orders of the court to disclose critical records and information, including a final "last chance" order, opened the door to the exceptional discretionary order made here.

[28] I would dismiss the appeal, with costs of $12,500 to the respondents.

Released: February 23, 2024 "K.M.v.R."

"S. Gomery J.A."
"I agree. K. van Rensburg J.A."
"I agree. L.B. Roberts J.A."