CITATION: American Environmental Container Corp. v. Kennedy, 2024 ONSC 2941
COURT FILE NO.: 08-CV-352127PD3
DATE: 20240528

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AMERICAN ENVIRONMENTAL CONTAINER CORP., SAN JUAN PRODUCTS, INC. and KIJO LEASING ULC., Plaintiffs

– and –

PAUL KENNEDY, LEANNE KENNEDY, DARREN GREEN, SAN JUAN PRODUCTS (CANADA) LTD., SJP ENTERPRISES (CANADA) LTD., SJP ENTERPRISES INC., AECC/SAN JUAN, OASIS FIBERGLASS POOLS INC., BACKYARD OASIS, 2001530 ONTARIO INC., O/A SOUTHERN COMFORT and SAN JUAN ENTERPRISES (CANADA) INC., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Avrum Slodovnick*, for the Plaintiffs

Rohit Kumar and Tina Kaye, for the Defendants, Paul Kennedy and Leanne Kennedy

HEARD: May 23, 2024

MOTION TO SET ASIDE JUDGMENT

[1] This is a motion pursuant to Rule 59.06(2) brought by two of the Defendants, Paul Kennedy and Leanne Kennedy (the "Kennedys"), to set aside the judgment of Perell J. rendered nearly 11 years ago – on October 28, 2013.

[2] The Kennedys' request poses a simple question in its starkest form: when is enough enough?

I. Identifying the relevant issues

[3] The Plaintiffs are American manufacturers of pre-fabricated swimming pools. The Defendants are, or were, their Canadian marketers, distributors, and managers of their network of dealers in Canada. The history of litigation between these and related parties is extensive. The dispute partly involved ownership of a property in Marysville, Ontario acquired for the purpose of

establishing a Canadian manufacturing facility; but more pertinent to the matter before me is that the original litigation involved a dispute over the state of accounts between the two sides.

[4] At its core, therefore, the litigation was really an accounting battle. Justice Strathy summed it up in his reasons for decision in a 2009 motion by the Plaintiffs, "there is no question that an accounting will be required and the only question before me on this issue how, and when the accounting should take place": *American Environmental v. Kennedy*, File No. 08-CV-352127PD3, August 14, 2009 (oral reasons for decision, unreported), at 9.

[5] Justice Strathy ordered full financial disclosure by the Defendants, including all books and records pertaining to the Canadian operation. But since the Defendants never produced the books and records as ordered, the accounting, which Justice Strathy determined should be done by an independent forensic accountant, never took place.

[6] Justice Frank, in a subsequent motion by the Plaintiffs to strike the Statement of Defense for non-compliance with Justice Strathy's Order, laid the fault for the non-disclosure entirely at the feet of the Defendants. She pointed out that the only financial disclosure made by the Defendants pursuant to Justice Strathy's Order was a self-serving one of a limited number of records in support of their own claim for reimbursement of expenses by the Plaintiffs: *American Environmental v. Kennedy*, 2013 ONSC 4188, at para. 20(e).

[7] A number of months after release of Justice Strathy's reasons, but before the parties attended before him to settle the terms of his Order, the Defendants' employee, Trent Badger, wrote to the court stating that the financial books and records had been stolen from the Defendants' premises in Marysville, Ontario. Mr. Badger intimated that the "Marysville Theft", as the Defendants refer to it in their materials, was perpetrated by the Plaintiffs themselves. Justice Frank observed in her reasons for decision, however, that that Justice Strathy took no notice of that story in fashioning his Order.

[8] When the matter came before Justice Frank in May-June 2013, she wrote a scathing set of reasons. She harshly criticized the Defendants' non-compliance, the positions they had taken, and, ultimately, the credibility of almost everything they said in the case. With respect to the Defendants' excuse for non-compliance with Justice Strathy's production Order, she expressly rejected the theft explanation: "I do not accept the Defendants' claim that the Plaintiffs took all business records including the computer hard drives on which the data was stored": *Ibid.*, at para. 20. She concluded, at para. 21, that the entire position had been fabricated by the Defendants:

> In my view, based on the evidence before me, the allegation that the Defendants cannot produce any records predating December 2009 is simply a concocted excuse designed to enable the defendants to avoid compliance with Strathy J.'s order.

[9] As is evident, Justice Frank had little time for the Defendants' maneuverings. In fact, she began her discussion of the appropriate remedy by indicating, at para. 28, that. "[t]he Defendants' conduct in the litigation apart from the outright disregard for the orders of this court does not

encourage me to exercise my discretion in their favour." She went on to note that they had failed to comply with their undertakings and that they had, putting the matter diplomatically, "given incorrect evidence on cross-examination": *Ibid*.

[10] Nevertheless, Justice Frank decided to give the Defendants one last chance. She explained that, egregious as it was, she did not want the Defendants' misconduct, to "preclude their being given an opportunity to correct their response to the Order of Strathy J., so that the issues can be determined on their merits": *Ibid*., at para. 34.

[11] Justice Frank considered that she was extending the Defendants what she considered to be an extraordinary indulgence under the circumstances. She therefore provided in her disposition of the motion, at para. 36(f), for a short window in which the Defendants could make the required financial disclosure: "After four weeks of the date of this endorsement, the plaintiffs may move for an order striking the defendants' pleading without notice to the defendants if the plaintiffs are not satisfied with the defendants' compliance with their disclosure obligations."

[12] The issues, of course, were never determined on their merits because the production of financial records ordered by both Justices Strathy and Frank was never forthcoming. The Plaintiffs waited a number of months, and then, as authorized, moved without notice before Justice Frank to strike the defense.

[13] Between Justice Frank's hearing of the initial motion on May 30, 2013 (decision rendered June 7, 2013) and her final decision striking the defense on September 18, 2013, an event occurred that the Kennedys now characterize as crucial to the case for re-visiting the entire action. It will be recalled that between Justice Strathy's decision admonishing the Defendants to produce their books and records and his settling of the Order, Mr. Bridger had written to His Honour on behalf of the Defendants announcing what Justice Frank later called the "concocted excuse" that the books and records had all been stolen. This time around, on June 7, 2013 – the very day on which Justice Frank rendered her decision criticizing the Defendants' non-production of financial records but – Mr. Bridger wrote a note to the Plaintiffs' counsel, and forwarded a copy to the court, announcing, in essence, 'Eureka!', the books and records had all been found.

[14] In the present motion, the Kennedys contend that Mr. Bridger's June 7, 2013 note changed everything – not because they had actually found the allegedly stolen records as he had informed the court, but because, they now say, they had not. In their factum, at para. 44(a)), the Kennedys' counsel posit that Mr. Bridger is guilty of "misrepresenting to Plaintiffs' counsel and the Court that the Defendants had located the Records."

[15] It is the Kennedys' submission, at para. 44, that by engaging in this unauthorized misrepresentation, "Bridger ultimately sabotaged the legal position of the Defendants." Counsel for the Kennedys go on to argue, at para. 65(a), that this crucial misrepresentation, unbeknownst to the Defendants at the time, "ultimately led to Justice Frank striking the Defendants' defence." They specifically contend, at para. 36, that in striking out the Statement of Defense, "Her Honour relied on Bridger's misrepresentation in his email dated June 7, 2013 to Plaintiffs' counsel and/or

his correspondence to the Court on June 7, 2013 and June 13, 2013, that the Defendants were in possession of substantially all of the Records."

[16] The matter came back before Justice Frank on September 18, 2013. She observed that Justice Strathy's and her Orders had still not been complied with and that no further disclosure had come from the Defendants. In her endorsement, a copy of which is in the record before me, Her Honour acknowledged having been advised that the Defendants had found the books and records, but that was largely irrelevant since she specifically reminded herself and the reader that she never believed the records were stolen in the first place.

[17] In fact, she impugned the Defendants' maneuverings in the starkest possible terms, stating that they had "deliberately misled the Court": *AECC v. Kennedy*, September 18, 2013 (unreported), at 1. Her endorsement is written in a voice of obvious exasperation with the Defendants' non-compliance: "I acknowledge that counsel for the Plaintiffs was correct when, on the hearing of the original motion before me, he submitted that there was nothing to be gained by giving the Defendants more time to comply with the disclosure order": *Ibid.*, at 2.

[18] The final step in the chronology of the within action took place on October 28, 2013, when, on motion by the Plaintiffs, Justice Perell granted default judgment. Counsel for the Kennedys submit that in appearing before Justice Perell and obtaining this judgment, the Plaintiffs did not make full and frank disclosure as they were obliged to do. This material non-disclosure, they submit, is grounds for setting the judgment aside: *Ross v Phillips*, 2021 ONSC 1496.

[19] Specifically, it is the Kennedys' position, as set out at para. 40 of their counsels' factum, that the judgment was premised on "the unfairness to the Defendants inflicted by Bridger."

[20] In addition, the Kennedys submit that the quantum of damages assessed by Justice Perell is faulty. They state that the calculation was based on an incomplete and misleading "running ledger" of accounts produced by the Plaintiffs. It is their view that even if it is found that the matter was properly before Justice Perell for judgment – which, of course, they deny – the accounting that Justice Perell engaged in must be re-visited so that the accounts between the parties can be correctly assessed.

[21] The Kennedys make a number of specific accounting points in this regard. Their lawyers argue, at para. 39(a) to (e) of their factum, that the running ledger submitted by the Plaintiffs omitted numerous payments made by the Defendants to the Plaintiffs both in Canada and offshore; in fact, they contend that it included "many line items designated as unpaid" that for which "a payment had actually been received." They seek a detailed re-evaluation of the damages, this time taking into account numerous payments made by the Defendants over the years – particularly prior to Justice Strathy's ruling in 2009 – which did not find their way into the evidence on which Justice Perell based his decision.

[22] Finally, the Kennedys see the within action as inextricably linked to the substance and the progress of another claim, still ongoing, commenced in 2014. That action, Court File No. CV-14-

508355, is brought by the Plaintiffs against the Defendants, the Kennedys' son, and a number of other corporations: (the "2014 Action"). The Plaintiffs allege, at para. 12 of their pleading in the 2014 Action, that the Kennedys therein have sought to render themselves judgment proof by, among other things, putting assets on their teenage son's name and using tactics designed "to frustrate or defeat the orders of the court and the claims of creditors…"

[23] Linking the present motion with the 2014 Action, counsel for the Kennedys says in their factum, at para. 3, that "The Kennedy Defendants originally brought this motion by Notice of Motion dated May 28, 2015, after discovering in the course of the 2014 Action that their legal representative in the 2008 Action, Trent Bridger ('Bridger'), had sabotaged their defence in collusion with the Plaintiffs." In other words, the contention is that Mr. Bridger's conduct in sending a memo to Justice Frank claiming that the Defendants had found the books and records was first revealed to the Kennedys two years later during the course of a different lawsuit.

[24] In essence, the Kennedys argue that since this important revelation about Mr. Bridger occurred in the process of litigating the 2014 Action, any delay in the present motion must be understood in the context of the slow progress of the 2014 Action. It is their view that the timing of the motion herein is entirely understandable when compared with the unnecessarily long delay by the Plaintiffs in prosecuting the 2014 Action.

[25] To summarize, the three areas raised by the Kennedys that are germane to this motion are: a) the alleged misrepresentation and undermining of the Defendants' case by their representative, Trent Bridger; b) the delay in bringing this motion explained by the reciprocal delay of the Plaintiffs in the 2014 Action against the Kennedys and their son; and c) the faulty record of moneys owing by the Defendants that was before Justice Perell leading to errors in the quantum of damages awarded to the Plaintiffs. Each of these will be addressed in turn.

II. The Defendants' representative

[26] Up to and including the motion before Justice Strathy, the Defendants were represented by the Torkin Maines firm as counsel. In June 2010, Torkin Maines was removed from the record and the Defendants became self-represented. In the present motion, the Kennedys have new counsel.

[27] In his affidavit, Paul Kennedy states that Mr. Bridger held himself out as a paralegal to represent the Defendants once their original counsel went off record, but that a review of the Law Society's records reveals that he was never registered as one. That, however, does not exactly accord with the documentation before me or, for that matter, with the balance of information provided by Mr. Kennedy himself. Mr. Bridger was not a mystery man whose background and qualifications were not properly understood by the Defendants; rather, Mr. Kennedy deposed, Mr. Bridger was a lifelong friend of the Defendant, Darren Green. He was already an employee of a company belonging to Mr. Green and Mr. Kennedy, not in a legal representative or paralegal capacity.

[28] Mr. Bridger's non-law profession status comes through clearly in his own words. In his correspondence dated July 8, 2010 introducing himself to Justice Strathy, Mr. Bridger identified himself not as legal counsel or a paralegal, but as a "consultant and project manager" working for the Kennedys and Mr. Green.

[29] Mr. Kennedy deposes in his affidavit of May 28, 2015 that Mr. Bridger "was informally appointed as our counsel in August 2012, as can be seen from the endorsement of the Honourable Justice Morgan dated August 24, 2012." But my endorsement says no such thing. On that date, I presided in motions court and adjourned the matter due to the court file not having arrived in time from storage. My endorsement, a copy of which is in the record, shows that Mr. Kennedy appeared before me in person. He represented himself: *American Environmental Container Corp. v. Kennedy*, Court File No. CV-08-352127, August 24, 2012 (unreported).

[30] My endorsement also shows that Mr. Bridger appeared that day as well, but not for the Kennedys or their co-Defendant, Mr. Green. Rather, I allowed him to speak to the adjournment on behalf of the Defendant, SJP Enterprises Inc. because, as I stated in para. 4 of my endorsement, "one of the corporate Defendants has until now been spoken for by Mr. Bridger."

[31] I went on to specify that the corporation "has been unrepresented until now (except informally by Mr. Bridger, with the Plaintiffs' indulgence and with permission of he court on previous motions and today)": *Ibid.*, at para. 8. In that same paragraph I made it clear that while the Defendants were at liberty to bring a motion to appoint Mr. Bridger as representative of the corporate Defendant, no such motion had been brought.

[32] A slightly different configuration of appearances is recorded on Justice Frank's reasons for decision of June 7, 2013. Justice Frank notes underneath the title of proceedings that the Plaintiffs' current counsel, Mr. Slodovnick, was in court for the Plaintiffs. Underneath that reference, she records: "Paul Kennedy and Darren Green, in person, for themselves and the corporate Defendants for the purpose of this motion". In addition, Her Honour indicated, in footnote 1 of her reasons, that "[f]or the purposes of this motion, with the indulgence of the Plaintiffs, I permitted Trent Bridger, an officer of SJP Enterprises Inc., to make submissions on behalf of the corporate Defendants as he has done on previous court attendances."

[33] In other words, Justice Frank, like myself at the adjournment, allowed Mr. Bridger, a non-lawyer (and non-paralegal), and an employee of the corporate Defendants, to play a role for the convenience of the one motion only. But he was never on his own, and was never acknowledged as speaking for the Kennedys or anyone else other than as indicated in the various endorsements. Far from being the central actor in this drama, Mr. Bridger is, literally, a footnote.

[34] As Plaintiffs' counsel points out, unlike the picture painted in the present motion of Mr. Bridger having taken control of the Defendants' entire participation in the action, Mr. Kennedy was present and an active participant at every turn. It was Mr. Kennedy that swore the relevant affidavits, including the affidavits and provided the relevant evidence on which both Justices

Strathy and Frank relied, and it was Mr. Kennedy who was in control of the defense with some assistance by Mr. Badger who, for convenience, spoke for the otherwise unrepresented company.

[35] The one endorsement I can find in which Trent Badger is listed as representative of all of the Defendants is Justice Frank's costs endorsement of August 7, 2013: *American Environmental Container Corp. v. Kennedy*, 2013 ONSC 5162. I am uncertain as to how or why that came about. But one thing I am certain of is that Mr. Bridger was not on a frolic of his own in making the Defendants' cost submissions. Justice Frank makes this abundantly clear in articulating her reasons for fixing costs: "Paul Kennedy states, in his costs submissions, that he and Leanne Kennedy, his wife, are salaried employees of Leisure Pools Canada…": *Ibid*., at para. 10.

[36] Thus, while Mr. Bridger is listed in this endorsement as representative, it was Mr. Kennedy who put forward the Defendants' position on costs. He was, according to Justice Frank, and much like everywhere else in the record, personally in control of the submissions made on behalf of himself and his spouse – the moving parties here. I can find no instance in this voluminous record which suggests that Mr. Bridger acted other than under Mr. Kennedy's supervision and in coordination with the Kennedys' position.

[37] That includes Mr. Badger's impugned communications of June 7, 2013, where he supposedly undermined the Defendants' position in the action. A copy of Mr. Badger's 'Eureka!" memo is in the record. There he stated that the previous week's hearing before Justice Frank had inspired him to look again for all of the Defendants' books and records – the entirety of which, it will be recalled, was missing and for which the Plaintiffs were accused of having stolen – and he had located them in an attic. That was, apparently, the one place no one had previously thought to look.

[38] Mr. Bridger's memo, which the Kennedys now characterize as false a betrayal of their position, was copied to Paul Kennedy. That, of course, makes sense, since Mr. Bridger was Mr. Kennedy's (and Mr. Green's) employee and he was writing in that capacity. Mr. Kennedy was in on the 'new discovery' from the moment it happened. In writing his memo stating that the financial records had been found in the attic, Mr. Bridger was not on a frolic of his own. The memo shows that Mr. Kennedy did just discover Mr. Bridger's communication two years later in the course of the 2014 Action.

[39] There is nothing in the record that indicates that Mr. Kennedy did not adopt Mr. Badger's memo as his own. In fact, barely two months after Mr. Bridger's memo, Mr. Kennedy had Mr. Bridger present Mr. Kennedy's cost submissions to Justice Frank. That seems rather unlikely if it were true that Mr. Kennedy had just read some bit of startlingly false news which Mr. Bridger had written to the Plaintiffs about and then forwarded to the court. Whether what Mr. Bridger wrote on June 7, 2013 was true or false, it appears from the record that it was Mr. Kennedy's truth or falsehood as well, and not Mr. Bridger's alone.

[40] That said, the content of Mr. Bridger's memo is nothing but suspicions. It seems all too convenient to 'lose' the financial records just before Justice Strathy rules, and to 'find' them again just before Justice Frank rules. And, with all due respect, finding an active business' financial records in an old, dusty attic could almost be taken from a 'B' movie script.

[41] But, as indicated above, the one thing I am not suspicious of is that any of this was done behind Mr. Kennedy's back. Every time Mr. Badger appears, including on the June 7, 2013 memo, Mr. Kennedy appears right alongside of him. I am told that Mr. Bridger has now vanished without a trace, and so could not be summonsed to give evidence in the present motion – another development that occurs more frequently in fiction than reality. Plaintiffs' counsel advises that they have over the years tried hiring an investigator to look into his whereabouts, but have come up with nothing. Given that Mr. Bridger was described as Mr. Green's childhood friend, one might think that the Kennedys would have better luck via contacts with Mr. Bridger's family, but the evidence they have provided does not enlighten me on that.

[42] In any event, nothing about Mr. Bridger's supposed "sabotage" of the Defendants' position, as the Kennedys' counsel put it at para. 44 of their factum, matters in terms of the decisions that followed it. If it was sabotage, it was ineffective sabotage. Footnote 2 of Justice Frank's June 7, 2013 reasons for decision makes it clear that Her Honour paid no attention to the memo that came on the very day she was releasing her judgment:

> [2] I received e-mail correspondence directed to my assistant from Trent Bridger, the spokesperson for the defendants, on the date by which the parties were to advise me whether they had settled. As it was apparent from the first page, which included a copy of an e-mail to counsel for the plaintiffs, that Mr. Bridger was not limiting his communication to advising me of the status of the settlement negotiations, I read no further than the portion of the e-mail addressed to my assistant. Subsequently, Mr. Bridger has sent further correspondence to my assistant. I have not looked at it as so long as my decision was under reserve, I would not consider any communication from either side other than notification of settlement.

[43] As discussed above, Justice Frank's view, both before and after this disclosure by Mr. Bridger that the records had been found, was that it was false news piled on top of false news. In her costs endorsement two months after the Bridger communication, she continued to believe, and expressly stated at para. 11, that the Defendants had "concocted the allegation that the documents that are the subject of the disclosure order were stolen by the plaintiffs".

[44] Again, in her endorsement of September 8, 2013 striking the defense, Justice Frank continued to be of the view that the Defendants had misled the court. She also went on to note, in para. 3 of that endorsement, that despite having now supposedly found the no-longer-stolen records, "the Defendants have not produced a single document since the [May 30, 2013] hearing before me." In other words, Mr. Bridger's memo that the Defendants found the records in the attic was seen as one more concoction, to be added to the concoction that they were ever missing at all.

She therefore concluded on p. 2 of her endorsement that, "[t]hrough their conduct, the Defendants have lost the right to be heard by the court in these proceedings."

[45] Nothing I have heard or read in this motion has regained the Defendants – or the Kennedys along – that right.

[46] As a coda to their procedural argument, the Kennedys claim that they did not act pursuant to Justice Frank's Order, or bother correcting what they characterize as the misstatement by Mr. Bridger in his June 7, 2013 memo, because they thought Plaintiffs' counsel had booked a court date for the following November 22, 2013. They claim that they were waiting to make the point at that time.

[47] With all due respect, that is not a cogent explanation. If Mr. Bridger's June 7, 2013 memo was the shocking turn of events that the Kennedys now portray it as, it stands to reason that Mr. Kennedy, who was cc'd on the memo, would respond instantly. At the very least, one would think that when Mr. Kennedy prepared his cost submissions in August 2013, he would make some mention of his employee's alleged misinformation so that the court would be alert to the issue. But he said nothing about it to the court or to the Plaintiffs. The notion that Mr. Kennedy was biding his time until November to address a matter as startling and immediate as that is simply not credible under the circumstances.

[48] Furthermore, as Plaintiffs' counsel points out, on June 7, 2013 there was no November motion date booked. That came later, in anticipation of production actually being made by the Defendants as required in Justice Frank's June 7, 2013 Order. As Plaintiff's counsel self-deprecatingly admits, he was foolish enough to think in the wake of Justice Frank's ruling that the Defendants were finally going to produce their financial records, and he wanted to secure a motion date so that once production was made they could get the action back on track. No one advised the Defendants otherwise.

[49] I short, Mr. Kennedy's after-the-fact identification of the November 22 motion date as the reason for not addressing Mr. Bridger's misstatement as soon as it was made does not make sense. I view it as Mr. Kenendy's attempt to grasp for an explanation when there really is none.

[50] The Kennedys also make several allegations about Mr. Bridger's involvement with the Plaintiffs subsequent to Justice Perell's judgment of November 2013. By way of background, the Plaintiffs discovered sometime in 2013 that the Kennedys had rendered themselves impecunious and had registered the shares in their business on the name of their son, who was still a teenager and a student at the time. In her costs ruling, at paras. 10-11, Justice Frank discussed the Kennedys' assets and financial maneuverings as follows:

> [10] Paul Kennedy states, in his costs submissions, that he and Leanne Kennedy, his wife, are salaried employees of Leisure Pools Canada earning only $630.00 weekly and that neither are owners or directors of the company. What he did not

> say in these submissions is that the company is owned by his son, a full time student. Darran Green relies for his claim of impecuniosity on the statement that he is a status Indian operating a construction business that has suffered three or more consecutive years of loss and that he is divorced so that there is no money "within the matrimonial estate." That is the extent of the evidence of impecuniosity relied on by the defendants.
>
> [11] The defendants' claim of impecuniosity is in the context of their having failed to account for millions of dollars of inventory, of their having concocted the allegation that the documents that are the subject of the disclosure order were stolen by the plaintiffs and of the defendants having breached not only the disclosure order, but a non-dissipation order, as well. It is a claim that I cannot accept in the circumstances.

[51] Since the issue before her was costs, it was not necessary for Justice Frank to go any farther in her conclusions about the Kennedys' financial situation. But she came as close as possible to concluding that the Kennedys were committing, if not an outright fraud on creditors, a very cunning and suspect set of financial manipulations.

[52] Armed with the information that the Kenendys' assets were for the most part in their son's hands, or corporate hands separate from their own, the Plaintiffs commenced the 2014 Action as a means of enforcing Justice Perell's judgment. That litigation commenced with a successful motion by the Plaintiffs for a Meriva injunction, Norwich Order, and certificate of pending litigation on a certain property ostensibly owned by Paul Kenndy's father: *American Environmental Container Corp. v. Kennedy*, 2014 ONSC 4438. In that ruling, Justice Goldstein observed that the 2014 Action claimed that the Defendants were engaged in "a scheme to prevent execution of Justice Perell's order", that there was in that respect "a strong prima facie case on the merits", and that "there [was] a genuine risk of disappearance of the assets: *Ibid*., at paras. 2-3.

[53] None of this had anything to do with Mr. Bridger or the allegations against him. He had ceased working for the Defendants at some point. In 2014 or 2015, unrelated to any ongoing going litigation, Mr. Bridger apparently approached the Plaintiffs to inquire about the possibility of being a salesperson for their pools. Plaintiffs' counsel elaborates that Mr. Bridger was obviously knowledgeable about the market for swimming pools in Canada, and that the Plaintiffs agreed that they would pay him a fee for any of their pools he sold. Mr. Bridger apparently sold two swimming pools manufactured by the Plaintiffs, earned his sales fee, and that was the entire extent of any business relationship between him and the Plaintiffs.

[54] In addition, in 2015 Plaintiffs' counsel examined Mr. Bridger under oath about what he knew about the Defendants' financial manipulations described by Justices Frank and Goldstein. The Kennedys describe this as a secret collusion between Mr. Bridger and the Plaintiffs, but there was nothing secret about it. The examination was done on the record, with a court reporter present, and a transcript made available for use in the 2014 Action. There is no evidence that Mr. Bridger derived any benefit from the examination or that the Plaintiffs engaged in it for any improper

purpose. I see nothing but smoke and mirrors in the allegation that an examination on the record is an instance of behind-the-scene collusion.

[55] Likewise, the Kennedys allege that Mr. Bridger gave the Plaintiffs a laptop belonging to the Kennedys and thereby conveyed to the Plaintiffs confidential information that should not have been in his or their possession. Again, there is no evidence other than Mr. Kennedy's accusatory statement. It would appear that anything that Mr. Bridger had on a computer that belonged to the Kennedys was returned to them. I do not know of anything that has been used in any of the proceedings in this matter, including this motion, that suggests that the Plaintiffs had or took advantage of any information that did not belong to them or that was improperly acquired.

[56] As noted by Justice Copeland in a Divisional Court ruling in the 2014 Action, that action represents an attempt to enforce the 2013 judgment in the within action, and is itself "based on misconduct, conspiracy, and fraud on the part of the defendants": *American Environmental Container v. Kennedy*, 2022 ONSC 1353, at para. 40. The continuing allegations about Mr. Bridger's supposed assistance to the Plaintiffs appear to me to be an attempt not to defend but to distract from those issues.

[57] There are no grounds for concluding that the default judgment of Justice Perell was wrongfully obtained. Likewise, there are no grounds for concluding that the Order on which it was based – the striking of the defense Order of Justice Frank - was wrongfully obtained. Similarly, there are no grounds for concluding that the production Order issued by Justice Strathy, on which Justice Frank's Order was based, was wrongfully obtained. The Plaintiffs acted within their rights at each step.

III. Delay in the present motion

[58] This motion to set aside judgment Perell was commenced on May 28, 2015, some 19 months after Justice Perell issued the judgment. The Notice of Motion describes what was discovered by the Kennedys to prompt the motion, at p. 6:

> (aa) The Plaintiffs were able to secure the Judgment for the following reasons:
>
> (i) In the spring of 2013, Bridger advised Justice Frank that the Defendants could produce certain accounting documents dated prior to December 2009, despite knowing that the original Defendants could not comply because the accounting documents in question had been stolen by the Plaintiffs during the Marysville Theft;
>
> (ii) As a result of Bridger advising the Court that the Original Defendants could produce certain accounting documents that they could not in fact produce, this led to the Original Defendants being in breach of the 2009 Strathy Order and the Order of the Honourable

> Justice Frank dated June 17, 2013 (the 'June 2013 Frank Order') to produce the accounting documents at issue…

[59] Accordingly, not only was the motion brought on the basis of facts already found by the Court to have been "concocted", but it was brought two years after the Kennedys knew those facts. As discussed above, Bridger's May 30, 2013 appearance before Justice Frank was a joint appearance with Mr. Kennedy, and the June 7, 2013 memo in which Bridger "advised Justice Frank that the Defendants could produce certain accounting documents" was itself copied to Mr. Kennedy. He knew of Bridger's communications immediately, as they occurred in real time. This is not an explanation of the delay in bringing the present motion.

[60] Further, to the extent that the Kennedys point to the activities of Bridger subsequent to Justice Perell's judgment, there is, as also discussed above, nothing to those allegations. Bridger's sale of two swimming pools in 2014-15 and his being examined in anticipation of court proceedings that year are not revelations of treachery. Those matters, as depicted in the Kennedys' motion materials, are much ado about very little.

[61] In addition to the 19-month delay in commencing the motion, the Kennedys adjourned the proceedings in 2015 and did not re-start them until this year. That delay is also not adequately explained or justified.

[62] The Kennedys link the delay to the delays for which they hold the Plaintiffs responsible in the 2014 Action. In their factum, at para. 59, the Kennedys' counsel explains the long adjournment of the present motion: "The Plaintiffs did not oppose adjournment of the motion. Following the adjournment, the Plaintiffs took no steps to advance the 2014 Action, nor communicate with the Kennedy Defendants for approximately three years."

[63] The Kennedys go on to contend that they decided to conserve resources by focusing on one case at a time, and that since the Plaintiffs' approach to enforcement was via the 2014 Action, that is where the Kennedys thought to focus their attention. Thus, to the extent that that the adjournment of the present motion went on for a long time, they justify it with reference to what they consider the long delay in the 2014 Action.

[64] For a number of reasons, I do not see the lapse of time in the 2014 Action to be reason to delay the present motion. In the first place, Justice Copeland, sitting as a single judge of Divisional Court, found that the Plaintiffs did not unduly delay the 2014 Action. It had been dismissed for delay by an Associate Justice at a status hearing, but Justice Copeland found that any delay was due to an inadvertent oversight in scheduling mandatory mediation and that there were no grounds for dismissal. Her Honour specifically observed that, with the exception of that oversight, the 2014 Action was ready to be set down for trial in a timely manner: 2022 ONSC 1353, at para. 40.

[65] Secondly, the 2014 Action is subject to the ordinary timeline for all cases under the Rules, with no special impetus to expedite its process beyond the standard timeframe. The present motion, on the other hand, is one in which time is of the essence. As Justice Copeland put it, at paras. 13-

15, 18, the Kennedys "had the obligation to move ahead the motion to set aside the default judgment", but, having not done so, "the lack of interest of the Kennedy defendants in pursuing the default judgment motion became clear."

[66] It is well established that unexplained, or inexplicable delay, can be fatal to an effort to have an order set aside: *Convay v. Robert Hunt Corporation*, 2006 CanLII 23256, at para. 3 (SCJ). Given Justice Copeland's finding that the Kenendys' delay was inordinate and a result not of any pressing matter, but of their own lack of interest, this is an instance where the delay should be considered an impediment to proceeding any further.

[67] That said, I have already concluded that the foundation for the motion – Mr. Bridger's changing of positions which supposedly caused the defense to be struck – is a faulty foundation. Delay adds another layer of fault on top of that, and it may not even be a necessary layer.

[68] As I see it, the Plaintiffs' complaint about the Kennedys' delay in pursuing the present motion is a bit like a complaint by a passenger on the Titanic that the accommodations were not up to standard – that is, it is both justified and need not be said. With the foundation of the motion having collapsed, the unjustified delay in bringing it is noteworthy but almost beside the point.

IV. The quantum of damages

[69] Separate from their reasons for bringing the present motion in the first place, the Kennedys also submit that the calculation of damages engaged in by Justice Perell was faulty. They place the blame for this squarely on the Plaintiffs. In the Kennedys' view, the miscalculations in the judgment are a result of the Plaintiffs' failure to make full and frank disclosure to Justice Perell as they were obliged to do on a without notice proceeding.

[70] The Kennedys' argument in terms of the quantum of the judgment is a complicated one. It is based on errors they contend were buried in a "Running Ledger" that the Plaintiffs presented to Justice Perell when they attended before him to speak to damages on October 8, 2013. The issues identified by the Kennedys are set out at some length at para. 39 of their counsel's factum:

> [39] [T]he Running Ledger grossly overstated the amounts allegedly owing to the Plaintiffs for multiple reasons, including because the Running Ledger:
>
> > (a) failed to account for substantial payments for pools that the Defendants were directed by Kirk to make to his offshore account in Puerto Rico;
> >
> > (b) failed to account for a double accounting system that Kirk advised Paul was set up whereby the treatment of funds remitted to AECC and those that were either sent offshore to Puerto Rico or those that were to remain in Canada for the Canadian Operations were treated differently. In particular, funds remitted to AECC in the U.S. were called "In Great Plains" (i.e. on the books), whereas funds to be kept in Canada were 'Not in Great Plains'

(i.e. off the books). In cross-examination, Kirk conceded that accounting entries for funds Not in Great Plains, were done on an ‘excel spreadsheet’, whereas the accounting entries for funds In Great Plains were done within the Plaintiffs’ accounting software.51 Kirk insisted that minimal records be kept with respect to the millions of dollars transferred to his offshore account. Several documents substantiate this double accounting system:

> (i) a spreadsheet prepared by Joe and sent to the Defendants on October 3, 2003, that demonstrates the In Great Plains and Not in Great Plains accounting spanning the period from January 2002 to September 29, 2003;
>
> (ii) a spreadsheet setting out the Not In Great Plains accounting sent to Leanne in January 2005; Several documents substantiate this double accounting system:
>
> (iii) an email from Joe to Kirk dated October 5, 2005, wherein Joe states ‘I have approximately 152 invoices/pools/spas that I am going to remove as sales from great plains totalling $780,275.22 (Z Price).’ In other words, Joe was making $780,275.22 worth of pools disappear from the 2005 year; and
>
> (iv) an email from one of AECC’s accountants to Leanne dated September 7, 2007, enclosing a spreadsheet covering the period from April to September 2007;

(e) the Running Ledger noted ‘cm’ or ‘c’ for many line items designated as unpaid. In cross-examination on the within motion, Kirk acknowledged that the ‘cm’ or ‘c’ notation actually meant that a payment had actually been received. However, this was not reflected in the Running Ledger.

[71] Mr. Kennedy’s 2016 supplementary affidavit attaches spreadsheets showing swimming pool transactions that are supposedly more complete and accurate than what Justice Perell had before him. When I asked Plaintiffs’ counsel about the various errors alleged by the Kennedys’ and the omissions that the Kennedys are apparently able to show, he said that he has no ready answer because there is no ready answer.

[72] Plaintiffs’ counsel went on to point out that Mr. Kennedy appends as exhibits to his affidavit a 9-page spreadsheet and a 42-page spreadsheet. Those exhibits on one hand contain information that, if accurate, Mr. Kenedy would not have if all of the Defendants’ financial records were actually stolen, but on the other hand fall considerably short of containing all of the information Mr. Kennedy would have if he possesses the never-produced financial records. In other words, Mr. Kennedy’s position on quantum of damages could only have a modicum of truth

if the theft story is a lie; and if Mr. Kennedy's theft story, which he continues to stand by today, contains even a modicum of truth, then the figures he presents must be a lie.

[73] As the Plaintiffs see it, it is a bit rich for the Kennedys, having been found to have misled the court, having concocted a story about stolen records, and having refused to make the financial disclosure that they were ordered to make, to now come to court and say that the Plaintiffs, inevitably working with only partial figures due to the Defendants' non-disclosure, got the accounting wrong. Plaintiffs' counsel summarizes the point at para. 68 of his factum, stating that given "the continued failure of the Kennedys to deliver the court-ordered financial documents, there can be no assessment of the merits of the defence on this motion. The court's ability to make that inquiry and assessment are stymied by the Kennedys own breach of court orders..."

[74] What the Kennedys are requesting in terms of their argument on quantum of damages is a wholesale accounting between the Defendants and the Plaintiffs, going back to the inception of the litigation. That kind of all-encompassing accounting would definitely have been necessary to this action as originally litigated. I noted at the outset of these reasons that Justice Strathy stated on August 14, 2009 that "there is no question that an accounting will be required…" Justice Frank, in her unreported endorsement of September 18, 2013, reiterated, at p. 2, that "without an accounting in this action, there can be no determination of the issues." But she then added the *caveat* that, "[a]n accounting cannot be had unless the Defendants substantially comply with the disclosure Order of Strathy J."

[75] The Defendants never made the required disclosure. The Kennedys continue until now to stand by their statement that the financial records were stolen, despite this having been found by the court to have been a lie. At this point, it really does not matter where the truth about the Defendants' financial records lies. The one thing that is certain is that they have never been produced. The Kennedys cannot now, 11 years after judgment, come back and demand an accounting where they never complied with the most essential element of civil litigation – full disclosure. Justice Perell did the best he could without the Defendants' financial records; the Kennedys will have to live with that situation of their own making.

[76] In this respect, Justice Frank was both definitive and prescient in her September 18, 2013 endorsement, at p. 2:

> The Defendants deliberate misconduct precludes a determination of the issues in these actions on the merits. Through their conduct the Defendants have lost the right to be heard by the court in these proceedings.

[77] There are no grounds on which to set aside Justice Perell's judgment of October 28, 2013, including his quantification of damages.

V. Disposition

[78] The Kennedys' motion is dismissed.

[79] The parties may make written submissions on costs. I would ask Plaintiffs' counsel to email brief submissions to my assistant within two weeks of today, and the Kennedys' counsel to email equally brief submissions to my assistant within two weeks thereafter.

Date: May 28, 2024 **Morgan J.**