Case Name:

Cossette v. Gojit (Brampton) Inc.

Between
Marie-Louise Cossette and 1460930 Ontario Limited carrying on business as AZ Tractor Transport, and Gojit (Brampton) Inc.

[2005] O.J. No. 3513

[2005] O.T.C. 731

16 C.P.C. (6th) 330

141 A.C.W.S. (3d) 921

2005 CarswellOnt 3787

Court File No. 02-CV-233411CM1

Ontario Superior Court of Justice

Master R. Dash

Heard: August 18, 2005.
Judgment: August 22, 2005.

(58 paras.)

Civil procedure -- Actions -- Case management -- Motion by defendant for dismissal of action dismissed despite plaintiffs' breaches of production obligations and court orders -- Defendant attended settlement conference despite outstanding production and discovery issues -- All productions and discovery to be completed in case managed actions before settlement conference -- Ontario Rules of Civil Procedure, Rule 77.14(2).

Civil procedure - Pretrial procedures -- Pre-trial or settlement conference -- Attendance at settlement conference by defendant despite outstanding production was not a bar to motion for dismissal of action based on plaintiffs' breaches of court orders and production obligations -- Action not dis-

missed due to defendant's failure to seek adjournment rather than set date for settlement conference and trial.

Civil procedure -- Disposition without trial -- Dismissal of action -- Failure to comply with court orders -- Failure to fulfil undertakings -- Prejudice to defendant -- Action not dismissed despite breaches of court orders and production obligations by plaintiffs -- Outstanding production issues related mainly to loss of income claim which was struck out.

Motion by defendant for dismissal of plaintiffs' action due to plaintiffs' breaches of court orders, failure to attend examinations for discovery and failure to comply with production obligations -- Plaintiff Cossette sought damages resulting from slip and fall accident -- Action was case managed -- Cossette failed to attend first examination for discovery and refused to answer questions at subsequent examination respecting her losses and those of her company -- Dates for settlement conference and trial were set although there were outstanding production issues, undertakings and examinations -- Defendant brought motion to dismiss action before Master -- Although Master determined that plaintiffs' affidavit of documents was patently deficient and that plaintiffs lack of conscientious endeavour to answer undertakings was apparent, action was not dismissed as plaintiffs' breaches were not yet sufficiently egregious to warrant dismissal -- Cossette delivered better affidavit of documents but failed to include substantial loss of income documents and certain medical records -- No affidavit of documents was ever delivered by corporate plaintiff, despite Master's order to do so -- Cossette failed to re-attend for completion of her discovery examination -- Motion dismissed -- Loss of income claim was struck out -- Defendant would be prejudiced if required to go to trial and defend claim for loss of income without documentation of Cossette's pre-accident and post-accident earnings -- Plaintiffs failed to comply with Master's order by not filing affidavit of documents for corporate plaintiff -- Plaintiffs continued to undermine defendant's rights to full production and discovery Rule 77.14(2) prohibiting further productions after settlement conference did not apply to present motion, as motion was not for further discovery but for dismissal of action -- Defendant should have sought an adjournment and not set trial date while undertakings and production were still outstanding -- As all outstanding undertakings and production issues dealt with loss of income claim, that claim was dismissed.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 1.05, Rule 30.02(1), Rule 30.02(2), Rule 30.03(2)(a), Rule 30.08(2), Rule 34.15(1), Rule 37.13(1), Rule 60.12, Rule 77, Rule 77.11(1)(e), Rule 77.14, Rule 77.14(2)

Workplace Safety and Insurance Act 1997, S.O. 1997, c. 16, s. 28(1)

Counsel:

Stefano Tripodi, Agent for Wayne P. Cipollone (Solicitor for Plaintiffs.)

Martin Forget, for the defendant.

ENDORSEMENT

1 **MASTER R. DASH** (endorsement):-- This is a motion by the defendant to dismiss the action based on breaches by the plaintiffs of a number of orders of the court, their failure to attend a continuing examination for discovery and a failure to comply with their production obligations under the Rules. The plaintiffs resist the motion primarily because it is a "production motion in disguise" and prohibited after a settlement conference pursuant to rule 77.14(2).

THE ACTION

2 This action, commenced on July 26, 2002, arises out of a slip and fall accident that occurred on January 16, 2002. The plaintiff Cossette is a truck driver and pleads she was an officer, director and employee of the corporate plaintiff ("AZ"). She claims in addition to general damages, that she has "suffered a loss of income and her ability to earn a livelihood has been impaired" or in the alternative AZ has, as a result of Cossette's injuries, suffered a reduction in income and increased costs to replace her. Clearly the defendant requires full financial and corporate documentation, both pre and post accident, not only to defend against these claims, but also in support of its contention, as pleaded in paragraph 5 of the statement of defence, that the action is barred by section 28(1) of the Workplace Safety and Insurance Act 1997, S.O. 1997 c. 16 ("WSIA") because this was an accident in the course of Cossette's employment and both AZ and the defendant are Schedule I employers under the WSIA.

THE EVENTS PRECEEDING THE MOTION TO DISMISS BEFORE MASTER KELLY

3 The original examinations for discovery set for February 2003 were cancelled when the plaintiffs failed to deliver medical and financial records as requested. The defendant made further requests for proper documentation and served a notice of examination for July 10, 2003. The plaintiffs failed to attend and no explanation therefor has ever been provided. At a case conference on August 7, 2003 Master Kelly ordered that by September 30, 2003 affidavits of documents together with copies of all Schedule A productions be served by September 30, 2003 that examinations for discovery be conducted by November 30, 2003 and undertakings answered by January 15, 2004. Although not part of his endorsement, the defendant has provided evidence that Master Kelly reminded the plaintiffs that clinical notes and records and financial documents were required.

4 On September 29, 2003 the plaintiffs served Cossette's unsworn affidavit of documents but with no medical or financial records. Schedule A consisted of five documents, all corporate search documents of the defendant. The plaintiffs' solicitor took the position he had no obligation to provide medical documentation "not in her possession." By the time of Cossette's examination for discovery on October 21, 2003 the only medical records received were the family doctor's clinical notes and records and financial records had not been produced. She gave undertakings (at question 1070) to make all business records from 1999 to the present available for inspection and to provide authorizations to the defendant to obtain medical records. She refused to answer questions respecting the company's losses, her economic loss and her personal income from 1998 to present. The examination, which proceeded for a full day, was not completed. The plaintiffs claim this was due to oppressive and repetitive questioning, whereas the defendant claims the examination was protracted and incomplete because of unreasonable objections to questions.

5 By the time of the second case conference with Master Kelly on January 20, 2004, the plaintiffs had not answered their undertakings. Master Kelly ordered that the plaintiff's continued examination, followed by defendant's examination, proceed on March 5 and 8, 2004 and be completed by

March 15, 2004 with undertakings to be answered by April 30, 2004. On January 21, 2004 Master Kelly heard the motion arising out of questions the plaintiffs refused to answer. He reserved and on March 1, 2004 ordered the plaintiffs to answer certain questions including questions respecting the losses suffered by AZ, the corporate plaintiff's structure and formation, Cossette's income from 1998 to present, her economic claim and how her ability to earn a livelihood has been impaired.

6 Mr. Forget was unable to attend the examination of the plaintiff on March 5 because of other commitments. The parties agreed to reschedule the examinations to March 11, at which time the defendant was examined. The plaintiff failed to attend, although counsel differ in their understanding whether she was required to attend on that date. It was then agreed she would attend on a later date.

7 Over the next few months, defendant's counsel attempted to obtain the plaintiffs' outstanding documentation. Finally both solicitors agreed that the plaintiff would be examined on August 10, 2004 and a notice of examination was served for the plaintiff to attend Network Court Reporters. Her counsel objected and requested they be conducted at a different court reporter where the original discoveries had been conducted. The plaintiff failed to attend for that reason and a certificate of non-attendance was obtained.

8 Between May and November 2004 the defendant made many request for compliance with outstanding undertakings. The defendant wanted to pick up and copy a box of financial documents, but the plaintiffs' solicitor insisted defendant's counsel inspect them, as well as the boots that the plaintiff was wearing, at the plaintiff's residence.

9 On August 11, 2004 solicitors for both parties attended Trial Scheduling Court and set a date for a settlement conference on July 6, 2005 and a trial to commence September 19, 2005. It appears that neither solicitor advised the List Judge that there were outstanding production issues, undertakings and examinations.

THE MOTION TO DISMISS BEFORE MASTER KELLY

10 The defendant's first motion to dismiss was returnable before Master Kelly on December 13, 2004. It was heard for a half-day but not completed and adjourned to January 26, 2005. Although no endorsement was made, the solicitor for the defendant states that Master Kelly advised plaintiffs' counsel that the affidavit of documents was deficient, that the plaintiff should have produced medical and financial records and that it was objectionable that plaintiffs insist that defendant's solicitor attend at the plaintiff's residence to review the documents and boots. The solicitor for the plaintiffs on the motion assured Master Kelly he would provide the required documentation and suggested the plaintiffs may withdraw the pecuniary loss claim.

11 Between that date and the return date of the motion a sworn affidavit of documents of Ms. Cossette was delivered, but with no new documents. Her solicitor again required the defendant's solicitors to attend the plaintiff's residence to inspect the boots and the documents. On December 21, 2004 Mr. Cipolloni, the solicitor for the plaintiffs, indicated the loss of income claim was modest and he was seeking instructions whether it could be withdrawn. On January 26, 2005 Master Kelly heard the balance of argument and released his decision on March 30, 2005.

12 In his reasons Master Kelly noted that the plaintiffs' counsel throughout had resisted the provision of a proper sworn affidavit of documents, the draft affidavit of documents finally served on September 29, 2003 was "patently deficient, almost laughable" and the sworn affidavit of docu-

ments of January 18, 2005 was identical, notwithstanding that the plaintiffs' counsel was by then in possession of other relevant documents. He determined that the plaintiffs' position that medical records need not be listed in the affidavit of documents was "untenable", stating that the clinical notes and records and hospital records were within plaintiff's power to obtain and that they should have obtained them "from the get-go" and listed them in Schedule A. He determined that the sworn affidavit of documents was "patently false" and served with knowledge that it did not list relevant documents. He found that the plaintiffs' "lack of conscientious endeavour" to answer undertakings was apparent and "with seeming disregard for deadlines twice established by court order" and that undertakings drifted in slowly in response to consistent prodding by the defendant's solicitor. He said the plaintiff's position that defendant's counsel attend at her home to examine the boots and records was "objectionable" and they should be made available at the office of plaintiffs' counsel. He said the plaintiffs' position that they need not summarize the contents of a box of relevant financial records in Schedule A was "wrong." He decided that the plaintiff's failure to attend the examination for discovery on August 11 because they were at a different court reporter's office was "suspect." Although plaintiffs' counsel had advised in December that he might be withdrawing the pecuniary loss claim, such instructions had still not been received.

13 Notwithstanding all of the above, Master Kelly concluded the action should not be dismissed as a result of these breaches as they were not "yet" as egregious as those in various cited authorities. He determined that the plaintiff's re-attendance at discovery should now occur "with dispatch, so as to preserve the trial date" set for September. He ordered, inter alia, that:

1. "Each" plaintiff shall provide a further and better affidavit of documents by April 22, 2005, listing in Schedule A all non-privileged documents in their possession or control, including the documents in the box of financial records;
2. The plaintiff shall re-attend to complete her discovery and answer her undertakings and refusals as ordered and proper follow up questions on or before May 27, 2005 on 10 days notice;
3. Unless there is an agreement with respect to the loss of income claim that renders the production of financial records unnecessary, those records shall be listed in Schedule A and be made available for inspection at the offices of plaintiffs' solicitors not less than 14 days before the examination for discovery and to provide copies of any requested documents at defendant's expense;
4. Defendant's counsel could inspect the boots prior to examination for discovery at plaintiffs' solicitors' office.

14 Plaintiffs' counsel then made additional written submissions to Master Kelly (without copying to defendant's counsel) to "clarify" his rulings respecting listing documents, the requirement that each plaintiff swear an affidavit of documents and the accuracy of undertakings. He questioned whether the plaintiff's re-attendance would "accomplish" anything that could not be done in writing, but acknowledged he had undertaken to do so if requested. He alleged that defendant's counsel conducted the earlier examination with "vexatious and oppressive" questioning. Master Kelly in a further endorsement on May 5, 2005 stated that his earlier ruling did not need clarification and that defendant's counsel "is simply challenging the rulings."

15 Master Kelly's final endorsement in this action, following his retirement from the bench, was to issue his costs ruling on June 6, 2005. He stated that "proper documentary disclosure prior to re-attendance is so fundamental as to require no further elaboration." He held that the plaintiff's position that the motion was unnecessary and that any difficulty arose because of failures by the defendant's counsel was without merit. He ordered costs of $1500 to the defendant in any event of the cause and not forthwith because of the approaching trial date.

16 In my view the decision of Master Kelly was lenient in the extreme, both with respect to the motion to dismiss and with respect to costs, particularly given the criticisms expressed in his reasons. Master Kelly gave the plaintiffs a last chance to comply with their production obligations and to re-attend for examination. I must ask whether the plaintiffs have taken to heart the message delivered loud and clear by Master Kelly or whether they have, by their behaviour, forfeited the right to pursue this action.

EVENTS BETWEEN THE FIRST MOTION TO DISMISS AND THE CURRENT MOTION

17 On April 25, 2005 the plaintiff Cossette delivered a sworn further and better affidavit of documents but failed to include substantial loss of income documents, including pre-accident records, financial statements of AZ and tax returns, as well as certain clinical notes and records. No affidavit of documents of the corporate plaintiff was delivered although Master Kelly ordered that "each" plaintiff deliver one.

18 The continuing examination for discovery of the plaintiff was arranged for May 17, 2005 on consent and a notice of examination sent. On May 16, Mr. Forget, the solicitor for the defendant was called to a summary judgment motion in Newmarket that had been scheduled for later in the week. By letter of May 16, Mr. Cipollone agreed to reschedule but stated his client was not available until May 25. He did NOT take a position at that time that unless the plaintiff was examined by May 27 in accordance with the order of Master Kelly the defendant could not conduct the examination. This would have restricted the examination to one of three dates: August 25, 26 or 27. On May 26 Mr. Cipollone asked if Mr. Forget would prefer to do written interrogatories. Again there was no suggestion the plaintiff would not attend for oral examination. Mr. Forget did not agree to examination in writing and suggested dates in July. Further, on May 27 Mr. Cipollone refused to produce the plaintiffs' further documents until the defendant prepaid photocopy charges of $103.25, an unnecessary request given Master Kelly's order that the defendant pay for same and lack of any suggestion that the defendant's solicitors ever reneged on paying agreed costs.

19 On June 10, 2005, for the first time, plaintiffs' counsel took the position that Master Kelly's order required re-attendance by May 27, 2005, "failing which it was not to take place." Master Kelly never made such order, although he had determined that the examination take place "with dispatch, so as to preserve the trial date." On June 21 Mr. Forget correctly indicated that Master Kelly did not order that the examination would not take place if not conducted by May 27, and he again suggested dates in July.

20 In the interim, on June 24, 2005, Mr. Forget attended at Mr. Cipollone's office to review the financial documents. He had asked that the documents be listed and bound. At that time he was given a red accordion folder to review containing various business records. They were not in any way labelled, organized or explained in the context of the loss of income claim. They were not all listed in Schedule A as Master Kelly had ordered on March 30, 2005. Further, most documents related to year 2002 and contrary to Master Kelly's order of March 1, 2004 did not include financial

documents from 1998 to date. There were no tax returns, financial statements or various invoices, receipts, logs, journals and other banking and business records to support a loss of income claim. On June 30, 2005 Mr. Forget sent Mr. Cipollone a long list of financial documents that he required, as well as various clinical notes and records. For the first time, in his letter of June 30 Mr. Forget indicated that since he had been unable to complete his examination of the plaintiff the defendant would not be in a position to proceed to trial in September. He indicated he would ask the pre-trial judge to strike it from the trial list, to order compliance with Master Kelly's order and to set a time-table for examinations and further productions.

21 The settlement conference proceeded on July 6, 2005 before Pitt J. who declined to strike the fixed trial date or deal with the production and examination issues. Although no endorsement was made, the solicitor for the defendant avers this was because Pitt J. did not have sufficient material before him and in any event because the current motion before me had been scheduled. I am told he admonished plaintiff's counsel to provide the required documents.

22 On July 14 Mr. Cipollone reminded Mr. Forget that there was to be no documentary discovery after the settlement conference. He suggested the rationale for this rule was to end parties' attempts to use further production demands as an excuse to adjourn fix trial dates. He stated that even though the plaintiff had no obligation to re-attend, she would however do so if Mr. Forget gave his "written assurance that under no circumstances would this be used to adjourn the Fixed Trial date." On July 22 Mr. Forgot indicated he was not prepared to give that assurance. He stated he was entitled to the further examination to canvass issues arising out of the new productions. The dialogue concluded with Mr. Cipollone's letter of July 25 reminding that his client was under order to re-attend before May 27 and he was sorry they could not come to terms with respect to "an extension of time."

23 As of this date the plaintiff has not re-attended for the completion of her examination. She has not produced the pre-2002 financial documentation as ordered, or other relevant financial documents such as financial statements or tax returns. Her counsel was unable to give any assurance if or when she would ever do so.

ANALYSIS: THE COMPETING PRINCIPLES

24 This motion involves two competing principles. On one hand a plaintiff who continuously and repeatedly breaches court orders and ignores production obligations under the rules should not, in appropriate circumstances, be allowed to continue with her action. On the other hand, a defendant should not be allowed to set a trial date and to attend a settlement conference when he has not completed his discovery of the plaintiff and then seek to enforce further production and discovery, thereby putting the fixed trial date in jeopardy.

(a) Dismissal of Action for Breaches of Court Orders and Production Obligations

25 A party must disclose "every document relating to any matter in issue in an action that is or has been in the possession, control or power" of the party (rule 30.02(1)), must produce them for inspection unless privileged (rule 30.02(2)) and shall list them in Schedule A to his affidavit of documents (rule 30.03(2)(a)). Under rule 30.06 the court may order a further and better affidavit of documents and order production of relevant documents that have not been produced. Rule 30.08(2) provides that where a party fails to produce a document in compliance with these rules or to comply with a production order of the court the court may dismiss the action or make such other order as is just. Where a person fails to attend for his examination for discovery or to answer proper questions

(which includes failure to answer undertakings) or to produce a document that he or she is required to produce the court may dismiss the party's proceeding or make such other order as is just (rule 34.15(1)). Finally, rule 60.12 provides that "where a party fails to comply with an interlocutory order, the court may ... dismiss the party's proceeding ... or make such other order as is just."

26 In Cardoso v. Cardoso, [1998] O.J. No. 841, the plaintiff had failed to fulfill disclosure obligations. Kiteley J. indicated that a defendant has rights to full disclosure and she dismissed the action where those rights had been undermined and resisted by the plaintiff.

27 In Madonia v. Mulder, [2001] O.J. No. 1326, affirmed [2002] O.J. No. 487 Master Albert struck a statement of defence where the defendant had failed to comply with undertakings and to locate and produce documents, despite a court order that they do so. She held:

> Where a party's right to full disclosure has been undermined and resisted by the opposite party, then the pleading of the party in breach may be struck out ...
>
> Pursuant to rules 34.15(1) and 60.12 the court has jurisdiction to strike the defence of a party who has failed to answer proper questions, or who has failed to comply with an interlocutory order. Striking a defence is an extreme remedy and should be applied only in the most serious of cases. The court must consider whether the conduct of the defendant has been so egregious as to warrant such a remedy.

Master Albert held, "In this case, the defendants have consistently resisted fulfilling their disclosure obligations. Many of the responses provided by the defendants are inadequate and non-responsive." As a result she refused a further opportunity to deliver productions and struck the defence, holding, "Madonia has a right to full disclosure. His rights have been undermined by the conduct of the defendants in this lawsuit." She held that the defendants "have demonstrated a cavalier disregard towards their responsibilities as litigants." She concluded as follows:

> The court has a discretion to strike a defence where appropriate to do so. That discretion should never be exercised lightly. Where a litigant has failed so completely to meet his pre-trial responsibilities as in this case, and where that failure has resulted in actual or potential prejudice to the opposite party, then that litigant has forfeited his right to a day in court.

28 Her decision was upheld by McCombs J. who stated, "Failure to intervene in these circumstances would not only be unfair to the respondents; it would also encourage those who would frustrate the public's right to access to justice, and would quickly undermine public respect and faith in the administration of justice."

29 In Bottan v. Vroom, [2001] O.J. No. 2737, Nordheimer J. held that in appropriate circumstances, a party's actions could be dismissed for "procedural reasons arising from the failure of that party to abide by orders made by the court. If it was the case that the merits of the matter always had to be determined before such remedies could be imposed, there would be little room for the effective application of either of these rules." Nordheimer J. quotes with approval from R. v. Briggs (2001), 53 O.R. (3d) 124 (C.A.): "If this court's rules are to be taken seriously by anybody, they must be enforced", and from Household Trust Co. v. Golden Horse Farms Inc. (1992), 65 B.C.L.R. (2d) 355 (C.A.): "The court if it fails to act becomes but a paper tiger."

30 Finally, in Cheng v. Li, [2005] O.J. No. 1362 in a situation where a party consistently ignored orders to attend examination for discovery and comply with undertakings, I held:

> To have access to our courts, litigants must abide by the rules of civil procedure and comply with orders of the court. When court orders are made, they must be complied with or orders of the court lose their legitimacy: Heu v. Forder Estate, [2004] O.J. No. 705 at p. 5. If a party were permitted to continue without complying with the court's orders, the conduct would go unsanctioned and the court would lose all pretence of control over the party's conduct: Stacey v. Barrie Yacht Club, [2003] O.J. No. 4171 at paragraph 13.

I had this to say about a party who complies only when facing motions to dismiss:

> He has shown a cavalier attitude to orders of the court and to his responsibilities as a litigant. He complies as and when it suits him, typically long after court-imposed deadlines and at the 11th hour when faced with a motion to dismiss. A litigant should not have to bring a series of motions to dismiss in order to advance the litigation and cause the defaulting party to do what has been ordered.

I held in that case that although dismissal was "an extreme remedy to be used as a last resort", there was no remedy more just than a dismissal, particularly as the party had not fully complied as of the date of the motion despite unsubstantiated promises to comply.

31 In this case, the plaintiffs' cavalier attitude toward their responsibility as litigants has been alluded to by Master Kelly's harsh criticism in his endorsement of March 30, 2005. It is clear that the plaintiffs had to be prodded each step of the way to produce relevant documents by letter and court order. Production is still incomplete. Although Master Kelly in my view would have been justified in dismissing the action at that time, he chose to make such other order "as is just" and instead imposed strict terms to compel the plaintiff to comply with their production and discovery requirements.

32 In this case, despite Master Kelly's leniency, the plaintiff has still not complied with orders to produce relevant financial documents. On March 1, 2004 Master Kelly ordered production of financial records from 1998 to date and on March 30, 2005 he ordered financial records were to be included in a further and better affidavit of documents unless counsel reached agreement on loss of income that made their production unnecessary. Although a further and better affidavit of documents was served on April 25, 2005 the affidavit still failed to include all relevant documents relating to the loss of income claim. In particular no pre-accident records, no financial statements and no tax returns were included. Requested payroll records, bank records and journals were not produced. Master Kelly had made it clear that the financial records requested were relevant to the determination of the plaintiff's claim for loss of income, despite argument from plaintiffs' counsel that they were not. Not all relevant clinical notes and records were included. Even in court on the return of this motion, plaintiff's counsel could not tell me where the documents were, when they might be produced or even if they would be produced. No evidence has been proffered to indicate what efforts, if any, the plaintiffs have made to locate and produce the documents. He could not advise me whether the plaintiff still intended to pursue her claim for loss of income.

33 The defendant would be prejudiced in the extreme if required to go to trial and defend a claim for loss of income without documents to test what the plaintiff had been earning pre-accident and what she earned post-accident.

34 Further, unless she answers questions about her relationship to her company and provides relevant corporate and financial documents, the defendant will be unable to determine if it should go to the Workplace Safety and Insurance Board to determine whether the plaintiff's action is barred under the WSIA.

35 On March 30, 2005 Master Kelly held that the plaintiff's "lack of conscientious endeavour" to answer undertakings was apparent. The plaintiff has still not demonstrated to the court a conscientious endeavour to produce her relevant documents.

36 The plaintiffs are further in breach of Master Kelly's order by serving a sworn affidavit of documents only of the plaintiff Cassette. No affidavit of documents of the plaintiff AZ has ever been served, despite Master Kelly's order of March 30, 2005 that "each" plaintiff serve an affidavit of documents.

37 With respect to attendance for the continuation of her discovery, the first date set in February 2003 had to be cancelled because the plaintiff had not produced relevant financial or medical documentation. She failed to attend on the second date set, July 10, 2003 and has not offered the court a reason. Finally, after Master Kelly's order of August 7, 2003, she was examined for discovery on October 21, 2003, but the examination was incomplete, in my view, because much financial documentation had not been produced, many undertakings were required and she refused to answer relevant questions. On January 20, 2004 Master Kelly ordered a re-attendance. The plaintiff failed to attend on March 11, 2004, although that may have resulted from a misunderstanding. She then failed to attend on August 10, 2004 over an objection as to which court reporting service would be used. Master Kelly kindly referred to that reason as "suspect", but in my view it was obstructive, unreasonable and in breach of the rules requiring a party to attend upon service of a notice of examination.

38 On March 30, 2005 Master Kelly ordered that the plaintiff re-attend for the continuation of her discovery before May 27, 2005 on 10 days notice. Although Master Kelly was concerned about acting with dispatch to preserve the trial date he did not state that that the defendant had forfeited its right to the examination if it was not conducted within the deadline. The defendant's counsel could not attend on the scheduled date of May 17 because he was legitimately and unexpectedly called to court. The plaintiff's counsel was content to set a new date after May 25 when his client became available. He did not take the position that he would deny the defendant the right to conduct the examination if not conducted by May 27. If he had, defendant's counsel would surely have taken other steps. Instead, on June 10, after the deadline, he dropped the bombshell that in his view the examination had to have been conducted by May 27 to comply with Master Kelly's order. That was clearly incorrect and in my view was a further example of the plaintiff's tactics to avoid her production obligations. The plaintiff then waited until after the settlement conference so that he could raise rule 77.14(2) as a bar to further examination.

39 It was not until July 14 that plaintiffs' counsel agreed to the further examination that had been ordered by Master Kelly, but only if the defendant assured him that would not be used as an excuse to seek an adjournment of the fixed trial date scheduled for September 26, 2005. While I sympathize with plaintiffs' counsel wanting to preserve the trial date because of the waiting times in To-

ronto for new trial dates, the behaviour of plaintiffs' counsel served to promote the opposite effect. Given the failure to produce necessary documents and delaying until July 14 the offer to set a new examination date, it was most unreasonable to demand as a condition that the defendant not seek an adjournment of the trial. It was likely that further undertakings, and possibly another motion may follow the examination unless the plaintiff finally decided to comply with her disclosure obligations without further compulsion. The plaintiff had not abandoned her claim to loss of income and while the defendant must continue to scrap for relevant productions, there could be no guarantee the trial could proceed in September.

40 In my view, the plaintiffs have continued to undermine the defendant's rights to full production and discovery and in doing so have breached a number of court orders. The plaintiffs have continued to maintain a cavalier attitude to their responsibilities as litigants. Although dismissal is an extreme remedy and the discretion must not be exercised lightly, here the plaintiffs have so completely failed to meet their pre-trial responsibilities, which failure has resulted in prejudice to the defendant in defending against a loss of income claim, that the court would be justified in dismissing the action. This is a clear case that the court, if it failed to take decisive measures now, would become but a paper tiger and its orders would lose all sense of legitimacy.

(b) Seeking Further Production and Discovery after a Settlement Conference

41 Counsel for both parties attended at a Trial Scheduling Court on August 11, 2004 and set dates for a settlement conference and for trial. Counsel for both parties attended the settlement conference on the scheduled date of July 6, 2005. On both occasions the defendant was still seeking further production and examination for discovery from the plaintiffs.

42 This is a case managed action governed by Rule 77. As such rule 77.14(2) applies. It provides:

> All examinations, production of documents and motions arising out of examinations and production of documents shall be completed before the settlement conference date.

The plaintiffs suggest that the rationale for requiring all productions and discovery to be complete before the settlement conference is to avoid having to adjourn fixed trial dates. That undoubtedly is one reason, but in my view the rule also exists so that both parties will be aware of all relevant evidence such that the settlement conference can be a meaningful attempt to resolve the action.

43 Further, the settlement conference and trial dates were set at a Trial Scheduling Court. It has been the practice of Judges presiding at Trial Scheduling Courts not to grant a date for a settlement conference or trial unless all productions, examinations and discovery related motions had been completed. As I indicated earlier, it is obvious that neither solicitor advised the List Judge that there were outstanding production issues, undertakings and examinations or a trial date would not have been granted.

44 In Stevens v. Robson, [2001] O.J. No. 1271 a plaintiff chose not to conduct an examination for discovery, and instead demanded further production a year after the defendant served an affidavit of documents. The demand was rejected. The plaintiff did not act immediately to compel the documents and instead attended a Trial Scheduling Court and set a date for a settlement conference and trial. A motion to compel production was heard by Master Polika shortly after the settlement

conference. He held that the motion was not well founded, but even if it had been, it had to be dealt with before the settlement conference because of rule 77.14(2).

45 On appeal, Nordheimer J. considered Master Polika's decision to be correct not only because the documents were of marginal relevance, but also for a number of reasons involving case management and the effect of Rule 77.14(2). Excerpts from his decision outlining these reasons are instructive for this motion and bear quoting at length:

> First, the wording of rule 77.14(2) is clear and it is mandatory. The express requirement of the rule is that the parties shall have completed all discoveries before the settlement conference occurs. The plaintiff ... chose to proceed with the settlement conference knowing that there was an outstanding issue regarding the production of documents from Mr. Robson ...
>
> Second ... the plaintiff agreed to the setting of dates for the trial and the settlement conference knowing that there were discovery issues that were unresolved instead of requesting that the Trial Scheduling Court be adjourned to a time after those issues had been determined.
>
> Third ... the plaintiff did not bring any motion to compel production of the documents until ... more than a year after receipt of Mr. Robson's affidavit of documents, more than four months after the request for the documents had been refused and more than three months after the Trial Scheduling Court appearance ... There is no adequate explanation put forward for why the motion was not brought on early.
>
> Fourth, it is clear to me that if the appeal is allowed and an order is made for production of the documents, the action cannot proceed to trial on the date for which it is set. While counsel for the plaintiff contends that this is not necessarily the case, I consider that result to be self-evident. The consequence will be a further delay in the trial of the action ...
>
> Lastly, it seems to me that if case management is to work effectively, then the timetables set for actions as well as the time limits contained in rule 77 have to be respected. It is not, in my view, acceptable for parties to ignore the provisions and requirements of the Rules and then submit that they are entitled to relief simply because a party may potentially be prejudiced from a failure to grant that relief. To hold otherwise, would permit one party or another to avoid, much too easily, effective management of the case.

46 Although parties should not normally be allowed to seek further production or discovery after a settlement conference, in my view rule 77.14(2) does not apply to the current motion. This is a motion to dismiss the action for breaches of court orders, not a motion for further production and discovery, nor as suggested by plaintiffs' counsel a "production motion in disguise." I point out however that even though this is not a motion for production or discovery, an order for production or discovery may be granted as a term of relief if the motion to dismiss is refused. This authority is found under the court's power under rule 37.13(1) to grant or dismiss a motion "with or without

terms" as well as its power under rule 1.05 when making an order under these rules to "impose such terms and give such directions as are just". The defendant has sought, as an alternative to a dismissal of the action "such further and other relief as this Honourable Court may deem just."

47 If I am wrong, and rule 77.14 applies, then I would grant relief from the strict requirements of the rule in the circumstances of this case. Nordheimer J. in Stevens did not say that the rule was absolute. He stated:

> I am not thereby suggesting that time limits have to be rigidly adhered to or that there are not circumstances where relief from the failure to abide by a time limit in, or requirement of, the Rules is not justified. What I am saying is that there is a heavy onus on the party who seeks such relief to satisfy the court that there is a fair and reasonable excuse for the non-compliance. The plaintiff here has failed to proffer such a fair and reasonable excuse ...

48 Further, if rule 77.14(2) applies, rule 77.11(1)(a) allows the court to "extend or abridge a time prescribed by an order or the rules" and this would include the time in rule 77.14(2) in appropriate circumstances.

49 Clearly it was wrong for the solicitor for the defendant to have set a date for a settlement conference and trial knowing that production issues were outstanding. He should instead have requested an adjournment of the Trial Scheduling Court. The solicitor suggests he agreed to the dates as the trial was 13 months away and the settlement conference 11 months away and he believed he could resolve the outstanding issues before then. In my view that was particularly naïve given the history of plaintiffs' resistance to production. Further, the defendant should have sought an adjournment of the settlement conference, given the plaintiff's stated refusal to allow further discovery. It is not an adequate explanation for the defendant's solicitor to state that he intended to request the pre-trial judge to order further production and discovery. The rule is clear. These issues are to be resolved before, not during a settlement conference.

50 Nonetheless, this case is markedly different from Stevens v. Robson. In Stevens the first attempt to compel production was after the settlement conference. In this case, prior to the Trial Scheduling Court there had already been two case conference orders dealing with production issues, there had already been an examination for discovery of the plaintiff and Master Kelly had already made an order in January 2004 for the plaintiff's re-attendance and for further productions. Given the plaintiffs' continuing resistance, the defendant moved quickly after the Trial Scheduling Court and brought a motion before Master Kelly in December 2004. Unfortunately it could not be competed until January and the judgment was then reserved until March 30, 2005. It was then four months before the settlement conference. The defendant continued to make efforts to compel productions and arrange a discovery date when the May 17 date fell through. Further, the plaintiffs had given undertakings at their examination for discovery in 2003 that have never been satisfied. Undertakings remain an obligation on a party right up until trial. That obligation does not end at a settlement conference. When Master Kelly ordered certain questions refused to be answered, those questions all were then to be treated as if they were undertakings.

51 I am satisfied the defendant has met what Nordheimer J. called a heavy onus "to satisfy the court that there is a fair and reasonable excuse for the non-compliance." While I am of the view that the defendant should not have set a trial date at the Trial Scheduling Court, and should have sought an adjournment of the settlement conference, in my view that should not be a bar to the current mo-

tion. The plaintiffs have brought this situation upon themselves by breaching court orders and flouting their production obligations under the Rules. Further, although not decisive, the defendants would be extremely prejudiced if they had to go to trial and defend a claim for loss of income without adequate production of relevant financial documentation which they have been seeking for some time.

52 Finally, as this is a case managed action the court has power under 77.11(1)(e) to "make orders, impose terms, give directions ... as necessary to carry out the purpose of this Rule." One purpose of Rule 77 as set out in rule 77.02 is to ensure that proceedings be brought to a "just determination". A determination cannot be just when one party frustrates the ability to obtain full disclosure on a key issue. The consequences of failing to comply with court orders must in most circumstances trump the consequences of failing to comply with rule 77.14(2).

CONCLUSION: SUCH ORDER AS IS JUST

53 The court would clearly be justified in dismissing this action for failure by the plaintiffs to comply with court orders, with undertakings and with production requirements under the Rules. In my view however almost all of the outstanding undertakings and required productions (with a few exceptions) deal with the loss of income claim. The primary (but not sole) reason for the continued examination for discovery of the plaintiff is with respect to this issue. The plaintiffs have clearly by their refusal to comply with orders and undertakings respecting that issue, and with the trial only one month away, lost the right to litigate any claim for damages for loss of income. That is also the issue that results in extreme prejudice to the defendant in the absence of full production. With that issue off the table for trial, the prejudice is eliminated or at least substantially reduced. In my view, the most just result is to strike those portions of the statement of claim dealing with loss of income. I note in passing that the plaintiffs have stated on several occasions that the loss of income claim was moderate and that they were, in any event, considering a withdrawal of thereof. The court has now made that determination for them.

54 Had the defendant not set a trial date with production and discovery issues outstanding and had the defendant sought and obtained an adjournment of the settlement conference, I would have been more inclined to dismiss the entire action.

55 The plaintiffs are adamant that nothing should be done that will jeopardize the fixed trial date. Only a judge can determine if the trial date should be adjourned. If the plaintiffs co-operate with the order made today, there is a possibility the trial date can be saved, particularly as the loss of income issue is off the table. If an adjournment does become necessary the plaintiffs have mainly themselves to blame.

56 I wish to send a clear message to the plaintiffs that this is absolutely their last chance. I am now case managing this action following the retirement of Master Kelly. If the plaintiffs breach this order in any particular and a further motion is brought before me respecting such breach, the plaintiffs will be at substantial risk of having their entire action dismissed.

57 I also wish to send a message to the defendant. With loss of income now off the table, they clearly no longer need all of the productions that they seek, whether or not it was previously the subject of an undertaking or court order. One purpose of case management is to avoid unnecessary cost and delay. They should avoid both by seeking only such corporate and financial information as they require in order to defend the remaining issues in the action, including the WSIB issue and to restrict their continued examination for discovery to those issues remaining in the action. I also ex-

pect the defendant to move promptly to request the relevant information and set up the continued examination for discovery so as to preserve the fixed trial date if possible.

ORDER

58 The court hereby orders as follows:

1. The motion to dismiss the action is refused, but on terms that follow.
2. Paragraph 8 and that part of paragraph 7 of the statement of claim that reads "has suffered a loss of income and her ability to earn a livelihood has been impaired" are hereby struck out.
3. The defendant shall forthwith advise the solicitor for the plaintiffs of any outstanding productions they require or outstanding undertakings that have a semblance of relevance to the remaining issues in the action.
4. The plaintiffs shall deliver all such relevant non-privileged documents within 7 days of demand. If there is any issue as to relevance or privilege I may be contacted for an emergency case conference by appearance to determine the issue. The defendant shall forthwith reimburse the plaintiffs for all reasonable photocopying costs, but payment shall not be due until after the documents are delivered to the defendant.
5. Within three days of this order the plaintiffs shall request the clinical notes and records of the plaintiff Cossette's rheumatologist and chiropractor, or if a request has already been made to send a further request. Copies of the records shall forthwith be delivered to defendant's solicitors as received. The defendant shall forthwith reimburse the costs paid by the plaintiffs to obtain the records, but payment shall not be due until after the records are delivered to the defendant. By September 5, 2005, if either or both records have not been received, the plaintiffs shall provide to the solicitors for the defendant copies of all letters of request and any response.
6. The plaintiff Cossette shall attend for her continuing examination for discovery no later than September 12, 2005 on three days notice.
7. The plaintiff 1460930 Ontario Limited shall deliver an affidavit of documents and the plaintiff Cossette shall deliver a further and better affidavit of documents at least two days prior to the date set for the examination for discovery. The affidavits may be unsworn initially with sworn copies provided at the examination for discovery. The affidavits must list each and every document produced, including the entire contents of the accordion folder that had been produced for inspection.
8. Brief written submissions as to costs, not to exceed three pages, may be forwarded by the defendant within 7 days and by the plaintiffs within a further 7 days. Any party seeking costs shall also include a Costs Outline and supporting dockets.

MASTER R. DASH

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