CITATION: Christie et al. v. Elia et al., 2022 ONSC 1287
COURT FILE NO.: CV-15-0674
DATE: 2022-02-28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jim Christie, Martin Bain, Karl Walsh, Andrew McKay and Francis Chantiam

Plaintiffs

and:

Curtis Elia, Martin McNamara, Kimberly Tait, Sandra Barendregt and the Ontario Provincial Police Association

Defendants

BEFORE: The Hon. Justice M. L. Lack

COUNSEL: Kenneth Alexander, Counsel for the Plaintiffs

Deepshikha Dutt and Matthew Bradley, Counsel for the Defendants

HEARD: Virtually November 19, 2021, due to Covid-19 restrictions

ENDORSEMENT

[1] The defendants seek an order dismissing the underlying defamation action against them. The motion is brought under rule 21.01(1)(a) and (b) and rule 38.08(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] The plaintiffs' position is that it is improper for the defendants to have moved conjunctively under rule 21.01 and rule 38.08. Their reasoning is that no evidence is permitted, without leave, on a motion under rule 21.01(1)(a). No evidence is permitted on a motion under rule 21.01(1)(b). Evidence is permitted on a motion under rule 38.08 and the defendants have filed evidence.

[3] There is no issue that on a motion under rule 21.01 (absent leave to file evidence in connection with rule 21.01(1)(a)), a judge simply examines the pleading. If a document is incorporated by reference into the pleading and forms an integral part of the factual matrix of the statement of claim, it may properly be considered as forming part of the pleading and a judge may refer to it on a motion to strike.[1]

[4] I do not agree with the position of the plaintiffs. It is not uncommon for motions to be brought conjunctively. The defendants assert that they do not rely on any evidence on their rule 21.01 motion. They do not ask the court to look anywhere beyond the amended statement of claim and the response to demand for particulars, all of which are properly before the court on a rule 21.01 motion.[2] I will consider the rule 21.01 motion, taking into account those documents, as well as the reply to the statement of defence (to the extent that the reply expands on the allegations in the amended statement of claim), and the demand for particulars (to the extent that it assists me in understanding the response to it), and nothing else.

Rule 21.01 Motion

The Plaintiffs' Claim

[5] On June 12, 2015, the plaintiffs issued a notice of action claiming $5 million in damages for defamation, libel, negligence, breach of duty of good faith, tortious civil conspiracy and unlawful interference with economic relations, and claiming $1 million for restitutionary, special and punitive damages. On December 8, 2015, the plaintiffs served a statement of claim. On April 20, 2016, the plaintiffs served an amended statement of claim in which they proceeded only on the issues of defamation and libel.

[6] The plaintiffs were all associated in some way with the defendant Ontario Provincial Police Association, as were the personal defendants. Broadly speaking, the alleged defamatory statements have to do with allegations that the plaintiffs were involved in defrauding the members of the Association.

[7] In the amended statement of claim, the plaintiffs allege that on March 13, 2015, the National Post and Toronto Star newspapers published statements, which defamed them. The published statements are attached as schedules to the amended statement of claim. The plaintiffs plead that the sole known source of the alleged defamatory statements was an Information To Obtain ("ITO"). The ITO was a document prepared by and sworn to by an RCMP officer. It was filed with the Ontario Court of Justice to obtain a search warrant and other orders in the

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[1] *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at paras. 17 and 29.
[2] *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2005 Can LII 19660 at paras. 89-91 (ON CA).

context of a criminal investigation against the plaintiffs. The plaintiffs allege that the ITO was prepared based on "witness statements" provided to the RCMP by the personal defendants.

[8] In the amended statement of claim, the plaintiffs allege that the ITO was made available to the newspapers and the defendants knew or ought to have known that the statements would be published and cause damage to the plaintiffs. It is implied that the defendants distributed the ITO to third parties or alternatively that they made the statements with the intention that they would be repeated by others.

[9] The plaintiffs plead that they are unaware of which specific sworn statements made by the defendants the RCMP relied on. They are also unaware of which defendants made the defamatory statements. They state that full particulars and dissemination of the defendants' statements are unknown to them and will be provided prior to trial.

[10] The plaintiffs plead that the statements were false and were made with malice and intent to injure them.

[11] The plaintiffs plead that particulars of their damages are unknown.

[12] On August 5, 2016, the defendants delivered their statement of defence. On September 1, 2016, the plaintiffs served the defendants with a reply to the statement of defence. In it, the plaintiffs state that the ITO was provided to the National Post and the Toronto Star by the defendants with the intention that the defamatory statements would be published on a wide scale.

[13] About January 17, 2017, the defendants served the plaintiffs with a demand for particulars. What is demanded includes particulars regarding when and how the ITO was made available to the Toronto Star and National Post, and when and how each defendant played a role in creating and authoring the impugned statements, as alleged.

[14] On March 3, 2017, the plaintiffs responded to the demand for particulars. The plaintiffs state that when and how the ITO was made available to the Toronto Star and National Post is unknown to them. The plaintiffs do not provide any particulars about when and how each defendant played a role in creating and authoring the defamatory statements.

Position of the Defendants

[15] The position of the defendants is that it is plain and obvious that the plaintiffs' action is legally untenable. The plaintiffs have pleaded that the defendants made defamatory statements referred to solely in the ITO, sworn by an RCMP officer. They allege that the ITO was then printed in the Toronto Star and National Post.

The ITO is an affidavit that the RCMP filed with the Ontario Court of Justice to obtain a search warrant against the plaintiffs during an ongoing criminal investigation. The case law is clear that an ITO and witness statements in furtherance of the ITO are protected by absolute privilege.

The Position of the Plaintiffs

[16] The position of the plaintiffs is that the motion under rule 21.01 should be dismissed. The defendants have not brought the motion promptly, as required by rule 21.02. Second, it is not plain and obvious the action cannot succeed. The defence of absolute privilege does not arise. The statement of claim raises a strong cause of action. The defendants were not using the ITO in the ordinary course of the administration of justice. If there are any deficiencies in the statement of claim, leave to amend should be granted.

The Governing Principles

[17] The relevant provisions of rule 21.01 and rule 21.02 follow:

> **21.01** (1) A party may move before a judge,
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> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
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> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
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> and the judge may make an order or grant judgment accordingly.
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> (2) No evidence is admissible on a motion,
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> (a) under clause (1) (a), except with leave of a judge or on consent of the parties;
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> (b) under clause (1) (b).
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> **21.02** A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs.

[18] The case law establishes that a claim will only be struck under rule 21.01 if it is plain and obvious that there is no reasonable prospect it can succeed.[3] The motion judge must assume that the allegations of fact in the statement of claim are true unless they are patently ridiculous or incapable of proof. The motion judge must also read the statement of claim as generously as possible, with a view to accommodating any inadequacies in the pleading.[4]

Requirements of a Claim for Defamation

[19] Defamation is libel in the form of published words or images. In *Grant v. Torstar Corp.*[5], at para. 28, the Supreme Court set out the elements required to prove defamation:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[20] Once these three elements are established the libel is complete. The words are presumed to be untrue, and the plaintiff is presumed to have suffered damage. The plaintiff is not required to show that the defendant intended to do harm. The tort is one of strict liability. If the elements of the tort are established, the onus then shifts to the defendant in order to escape liability.

[21] There are recognized defences in defamation actions. Both statements of opinion and statements of fact may attract the defence of privilege. Whether the privilege is absolute or qualified depends on the occasion on which the statements were made.

Absolute Privilege

[22] Anything said or written in Parliament, in court or in a complaint to a regulatory body is subject to absolute privilege. If the pleaded statements are protected by absolute privilege, they cannot be defamatory because they are cloaked with

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[3] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980; 1990 CanLII 90; *Guergis v. Novak*, 2013 ONCA 449 at para. 34.
[4] *Frank v. Legate,* 2015 ONCA 631 at para. 36.
[5] *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640.

immunity, regardless of whether they were written or spoken maliciously, without justification or excuse, or negligently.[6] They are not actionable.

[23] The doctrine of absolute privilege extends broadly to "any communications which take place during, incidental to, and in the processing and furtherance of judicial or quasi-judicial proceedings."[7] This is because it is essential to the integrity of the justice system that persons involved in judicial proceedings be able to discharge their duties freely without fear of civil action for what they say in the course of the proceedings.[8]

Qualified Privilege

[24] Qualified privilege applies when there is a "duty, legal, social or moral, to publish the matter complained of to persons with a corresponding duty or interest to receive it."[9] However, unlike absolute privilege, qualified privilege will be defeated if the dominant motive for publishing the statement is actual or express malice.

The Applicability of Rule 21.01

[25] Whether absolute privilege applies is a legal question, which is properly the subject of a rule 21.01 motion. If it applies, it is impossible, as a matter of law, for a plaintiff to succeed. On the other hand, when qualified privilege is in issue and the statement of claim contains allegations of malice, which are predominantly factual issues, mixed questions of law and fact arise, which are not the proper subject for a rule 21.01 motion.

Application

[26] The plaintiffs submit that evidence will be required to determine whether absolute privilege applies to the alleged defamatory statements, and therefore the motion should be dismissed.

[27] They say that the facts in the present case are analogous to those in *Hill v. Church of Scientology of Toronto*[10], where the statements were found not to be protected by privilege. In *Hill*, the defendants were found not to be acting in the ordinary course of the administration of justice, when the defamatory statements were read from the courthouse steps to the press, the day before the motion for contempt was issued.

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[6] *1522491 Ontario Inc. v Stewart et al.*, 2010 ONSC 727 (Ont. Div. Ct.).
[7] *Cook v. Milborne*, 2018 ONSC 419 at para. 19.
[8] *Amato v. Welsh*, 2013 ONCA 258 at para. 37.
[9] *Pressler v. Lethbridge and Westcom TV Group Ltd.*, 2000 BCCA 639.
[10] [1995] 2 S.C.R. 1130.

[28] In the present case, the plaintiffs argue that the defendants provided the ITO to the newspapers and that they did so prior to the ITO being unsealed by the court.

[29] *Hill* did not deal with absolute privilege. It dealt with qualified privilege. The legal effect of a defence of qualified privilege is to rebut the interference, which normally arises from the publication of defamatory words – that they were communicated with malice. But qualified privilege can be defeated if the dominant motive for publication was actual or express malice. Malice was found in *Hill*. The interference was not defeated. There was malice, in fact. The plaintiff prevailed.

[30] It is important not to conflate malice, with the issue of whether absolute privilege applies. Absolute privilege provides a complete defence, even if a defendant published the statements with malice. It is critical in a consideration of whether absolute privilege applies to remember that it is the occasion on which the words were communicated, not the words, that dictates whether absolute privilege applies.

[31] In the present case, the statement of claim does not identify any facts supporting "malice or intent to injure". Moreover, the difficulty for the plaintiffs is that their allegations about the occasion – that the defendants provided the ITO to the newspapers and prior to the court unsealing the ITO – first appeared in the affidavit of Andrew McKay sworn on August 12, 2021, served by the plaintiffs for use on this motion. His affidavit is inadmissible on this motion under rule 21.01, as the plaintiffs themselves point out. In any event, those allegations are contradicted by the plaintiffs' pleadings and their particulars.

[32] To be clear, at para. 21 of the amended statement of claim, the plaintiffs admit having no knowledge "of the publication and dissemination of the Defendants' Statements." The plaintiffs do not even allege which defendant made defamatory statements or which words a defendant uttered, contrary to the requirements imposed by the common law for pleading defamation: See *Lysko v. Braley*, 2006 CanLII 11846 (ON CA) at paras. 91-92.

[33] The newspaper articles, as published, attached to the amended statement of claim as Schedules A and B form part of that pleading. Each was published on March 13, 2015, after the ITO was made publicly available. Each states it is based on the ITO and refers to the ITO having been unsealed. As well, when the defendants demanded particulars regarding "when and how the ITO was made available to the Toronto Star and National Post", the plaintiffs admitted that this is unknown to

them. The plaintiffs are bound by their pleadings and these particulars are part of the pleadings.[11]

[34] The occasion in the present case, as pleaded in the amended statement of claim, was the making of statements to the RCMP, which became part of the ITO, sworn by an officer and put before the court on an application for a search warrant and other orders and ultimately reported in the newspapers.

[35] In *311165 BC Ltd. v. Attorney General of Canada*[12], the British Columbia Court of Appeal affirmed a decision to strike all parts of the plaintiff's defamation claim based upon allegations of inaccurate and misleading information provided to the media in the form of an ITO. The Court of Appeal referred to the law as stated in "numerous cases cited by the judge (and in many others stretching back centuries)" and wrote at para. 43:

> As the judge indicated in his judgment, the law is very clearly to the effect that a statement made in evidence before a judicial body cannot found a cause of action. A person is absolutely immune from civil liability for evidence given in court.

[36] Absolute privilege also extends to witness statements made in aid of the preparation of the ITO. The purpose of the absolute privilege is to ensure that those involved in the administration of justice, including litigants, witnesses, advocates, and judges, can speak freely without fear of an action in defamation. In *Ayangma v. NAV Canada*[13], the P.E.I. Court of Appeal summarized the broad protection afforded to witness statements under the doctrine of absolute privilege:

> [T]he defence of absolute privilege has been found to be applicable to statements made by a witness even before the actual proceeding commenced. As pointed out in *The Law of Defamation in Canada*, 2nd ed. (Carswell) at p. 624 absolute privilege has been extended to affidavits and statements signed by witnesses outside the courtroom, regardless of whether they are ever filed in the courtroom at trial.

[37] I find that the filing of the ITO with the judge of the Ontario Court of Justice and its use on the application for a search warrant and court orders was an occasion to which absolute privilege applies. Any statements made in the ITO, or any statements of witnesses referred to in the ITO are not actionable. The plaintiffs' action cannot succeed.

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[11] Janssen-Ortho Inc. v. Amgen Canada Inc., 2005 CanLII 19660 at paras. 89-91 (ON CA).

[12] 2017 BCCA 196 at paras. 42-47: leave to appeal denied SCC, 37694, 2018-01-11.

[13] 2001 PESCAD 1 (CanLII), 203 DLR (4th) 717 at para. 45.

[38] The plaintiffs submit that nevertheless the defendants' motion should be dismissed because they failed to comply with rule 21.02, which provides that a motion under rule 21.01 shall be brought promptly. The action was commenced in 2015. I agree that this motion was not brought promptly.

[39] The plaintiffs have referred me to several cases where motions under rule 21.01 have been dismissed because of delay in bringing them[14]. But in those cases, there was no prospect of the actions being dismissed in their entirety, if there had been no delay.

[40] Here, if I do not grant the motion because of delay, the absurd result will be to permit the plaintiffs to proceed to trial on a claim that on the law has no prospect of success. In the circumstances of this case, I chose to adopt a restrictive reading of rule 21.02. I will take the rule into consideration on the question of costs.

Conclusion

[41] For these reasons, the plaintiffs' amended statement of claim is struck under rule 20.01(1)(b), without leave to amend. Amendments cannot cure an action for defamation relating to a statement protected by absolute privilege. The plaintiffs' action is dismissed. My conclusion disposes of the defendants' rule 20.01 motion and the plaintiffs' action.

Rule 30.08(2) Motion

[42] The defendants also seek an order under rule 30.08(2) dismissing the plaintiffs' action. That motion was fully argued, and I will address it, in case I am wrong in my ruling on the rule 20.01 motion.

[43] The timelines are relevant to this motion, so I will set them out again here. The alleged tort took place March 13, 2015. On June 12, 2015, the plaintiffs issued a notice of action. On December 8, 2015, they served the statement of claim and on April 20, 2016, the amended statement of claim. On August 5, 2016, the defendants delivered their statement of defence. On September 1, 2016, the plaintiffs delivered a reply. About January 17, 2017, the defendants served a demand for particulars. On March 3, 2017, the plaintiffs responded to the demand for particulars. Thereafter, the plaintiffs did not take any steps in the litigation for three and a half years.

[44] The plaintiffs stood trial for fraud in criminal court from September 9, 2019, to November 27, 2019, when they were acquitted.

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[14] *Fleet Street Financial Corp. v. Levinson* (2003), 31 C.P.C. (5th) 145 (Ont. S. C.); *Reid Heritage Homes v. City of Guelph*, 2014 ONSC 4425; *Moynihan v. Rowe,* 2018 ONSC 502.

[45] On September 3, 2020, the plaintiffs served a notice of change of solicitor. The plaintiffs say their counsel enclosed a draft discovery plan and draft timetable with his correspondence, but the defendants say there were no enclosures, and none was produced before me.

[46] The five-year deadline for administrative dismissal was approaching. On September 15, 2020, the plaintiffs served a motion for an extension. They did not serve a factum or draft order, contrary to the Notice to the Profession dated July 27, 2020, and rule 37.12.1(4)(b), or a proposed timetable. Boswell J. heard the motion on September 30, 2020 and converted it to a status hearing and dismissed the plaintiffs' motion with costs. The action was not dismissed since Ontario Regulation 73/20 had extended the time for dismissal by six months until December 11, 2020.

[47] On October 14, 2020, counsel for the plaintiffs proposed an exchange of affidavits of documents by the end of October, and examinations of all defendants between November 16 and 23, 2020. The plaintiffs failed to provide an affidavit of documents by the end of October. Counsel for the defendants suggested that the plaintiffs' timetable was unrealistic and reminded them of their option to bring a second motion for an extension of time. The plaintiffs did not bring the motion.

[48] On November 24, 2020, the plaintiffs delivered a trial record, incomplete since it omitted documents required by rule 48.03. It omitted the libel notice, the notice of action, the statement of claim, the notice of intent to defend, the reply, the demand for particulars, the response to the demand for particulars and the notice of change of solicitor.

[49] The plaintiffs took no further steps until they were served with the present motion on April 29, 2021.

[50] On May 28, 2021, the plaintiffs delivered an amended trial record. On June 1, 2021, the plaintiffs served an affidavit of documents. On July 16, 2021, the plaintiffs requested a pretrial, which the defendants opposed because the hearing of this motion was pending.

Position of the Defendants

[51] The defendants take the position that the plaintiffs' affidavit of documents is deficient in numerous ways and should be viewed against the defendants' failure to make any reasonable efforts to comply with their disclosure obligations or particularize their claim in approximately seven years. In all the circumstances of this case, the court should exercise its discretion under rule 30.08(2)(b) and dismiss the action.

The Position of the Plaintiffs

[52] The plaintiffs' position is that they have served their affidavit of documents and the defendants have provided no basis for saying it is deficient. The defendants have refused to be examined. The plaintiffs are not in breach of any court order. The delay in this case has not occasioned any prejudice to the defendants. The motion under rule 30.08(2)(b) should be dismissed.

Misstatement in the Plaintiffs' Material

[53] This is a convenient point to note that in the amended affidavit dated August 12, 2021, filed on this motion, one of the plaintiffs, Andrew McKay, swore at paragraph 7, 9(a) and 13 that the defendants had not served their affidavit of documents. This was repeated and relied on throughout the plaintiffs' factum. This was not true. The defendants, in fact, served their affidavit of documents on August 10, 2021, shortly after receiving the Plaintiff's.

The Governing Principles

[54] Rule 30.08(2) provides:

> 30.08 (2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may,
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> (a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;
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> (b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and
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> (c) make such other order as is just.

[55] In *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310 at paras. 49-53, the Ontario Court of Appeal set out the principles guiding the striking out of pleadings for breach of production obligations under rule 30.08(2)(b):

> [50] First … striking out a pleading under r. 30.08(2)(b) is not restricted to "last resort" situations, in the sense that it must be preceded by a party breaching a series of earlier orders that compelled better disclosure or production. Some cases have granted the remedy where previous orders were breached: (citations omitted). In others, no prior order had been made: (citations omitted). However, courts usually want

to ensure that a party has a reasonable opportunity to cure its non-compliance before striking out its pleading: (citation omitted).

[51] Second, a court should consider a number of common sense factors when deciding whether to strike out a pleading under r. 30.08(2): (i) whether the party's failure is deliberate or inadvertent; (ii) whether the failure is clear and unequivocal; (iii) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly; (iv) whether the substance of the default is material or minimal; (v) the extent to which the party remains in default at the time of the request to strike out its pleading; and (vi) the impact of the default on the ability of the court to do justice in the particular case: (citation omitted).

[52] Third, although a court may also consider the merits of a party's claim or defence, as it does under r. 60.12 dealing with the failure to comply with an interlocutory order, this factor may play only a limited role where breaches of production obligations are alleged as one would reasonably expect a party with a strong claim or defence to comply promptly with its disclosure and production obligations.

[53] Finally, a court must consider whether an order to strike out a pleading would constitute a proportional remedy that is consistent with the recent calls of the Supreme Court of Canada to alter the Canadian litigation culture.

Application

[56] There clearly was default on the part of the plaintiffs in delivering their affidavit of documents, a few days shy of six years after they served the statement of claim. They did so only after being served with this motion. I find that the affidavit of documents they finally served is as "woefully inadequate" as the defendants insist. It has the following numerous deficiencies, which the defendants outlined:

(a) In it, the plaintiffs provide no documents to particularize their damages, despite their undertaking in the response to the demand for particulars;

(b) They provide no document relating to their alleged loss of income as pleaded at paras. 2 and 37 of the amended statement of claim;

(c) They provide no documents to establish that the alleged defamatory statements brought them into hatred, ridicule, and contempt, as pleaded at para. 2 of the amended statement of claim;

(d) They provide no particulars of the publication and dissemination of the alleged defamatory statements as undertaken at para. 27 of the amended statement of claim and in the response to the defendant's demand for particulars;

(e) They provide no documents to establish that the alleged defamatory statements are untrue, "truth" being an affirmative defence pleaded at paras. 3 and 32 of the statement of defence;

(f) They provide no documents relating to the impact of the alleged defamatory statements;

(g) They provide no documents relevant to the allegation that their investments in the Bahamas and Cayman Islands were made with the approval of the Association's Board of Directors, as pleaded at para. 4 of the reply to the statement of defence;

(h) They provide no document relevant to their allegation that the specific way they made investments was approved by the Association, as pleaded at para. 5 of the reply to the statement of defence;

(i) They provide no documents to show that PIN Consulting Group Inc. was incorporated with the approval of the Association, as pleaded at para. 6 of the reply to the statement of defence;

(j) They provide no documents to show that the Association approved the use of their unused vacation as pleaded at para. 7 of the reply;

(k) They provide no documents to establish that the defendants provided the ITO to the National Post or Toronto Star as pleaded at para. 8 of the reply;

(l) They provided an incomplete copy of the ITO at tab 7 Schedule A; and

(m) At Schedule "C" to the affidavit of documents, they state that they once had in their possession, control or power a "Fax confirmation sheet dated March 6, 2015 from OPPA headquarters to Barrie Newspaper". The defendants say no such document exists because no such fax was ever sent.

[57] The plaintiffs' affidavit of documents is seriously deficient in disclosing documents very material to their claim. It must be viewed in the context of an amended statement of claim, which is deficient in stating which defendants made which defamatory statement; how the statements were disseminated; what facts support malice; and what the impact and damages are. The reply to demand for particulars does not particularize these matters. Since then, nothing further has been provided about these matters. The plaintiffs do not acknowledge that there is

any defect or default in the affidavit of documents, or otherwise in disclosure. This does not bode well for a cure to the defects.

[58] When the deficiencies in the affidavit of documents are considered against the background of what has taken place in this litigation, I draw the inference that the failure to make proper documentary disclosure is deliberate, clear, and unequivocal.

[59] Part of the background is that the plaintiffs have made no attempt to supplement their reply to the demand for particulars despite the fact they have had since March 3, 2017 to do so. The background also is that the plaintiffs' action would have been dismissed for delay on June 20, 2020, but for the extension by Ontario Regulation 73/20. As stated, in September 2020, Boswell J. heard the plaintiffs' motion for an extension of time to set the case down for trial. On that motion, the plaintiffs had failed to file a factum, contrary to the rules. Boswell J. noted that the action had been outstanding for five years. Nothing had been done to move the case forward beyond the pleading stage. The only explanation offered was that the plaintiffs were facing criminal charges which were not resolved until November 2019. He found that the plaintiffs failed to explain why nothing could be done to move the case forward while the criminal charges were outstanding, or why nothing was done before charges were laid and then after the charges were dismissed. He also found that the plaintiffs did not address the issue of prejudice at all. He dismissed the motion for an extension of time with costs.[15] Boswell J. did not dismiss the plaintiffs' action under rule 48.14(7) even though he had the authority to do so. The plaintiffs could have had another chance to seek an extension before December 11, 2020.

[60] The plaintiffs did not make another request for an extension on proper evidence. Instead, they approached the defendants with an unrealistic plan to exchange affidavits of documents within two weeks and to examine all five defendants within one month. The plaintiffs then failed to produce an affidavit of documents on their own suggested timeline. The plaintiffs now complain that the defendants are at fault for failing to attend the examinations. I fail to see how the defendants can be faulted for basically declining to forego proper discovery. Having filed a trial record, the plaintiffs are now foreclosed from examining the defendants.

[61] The plaintiffs have had years to comply with their disclosure obligations. They have had time to cure their non-compliance. The failure is without acknowledgement, explanation or offer of remediation.

[62] I have already expressed my view on the merits of the plaintiffs' action, and it would be unfair for me to consider my prior ruling here. However, it is not unfair

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[15] Order of Boswell J. dated September 30, 2020

to observe that one would reasonably expect a party with a strong claim to comply promptly and completely with its disclosure and production obligations and the plaintiffs have not done so.

[63] The non-compliance in this case is particularly prejudicial to the defendants, given the nature of the case. In *Sampson v Scaletta*, 2016 BCSC 2598 at para. 412, the court found that a presumption of prejudice arising from inordinate delay is particularly acute in defamation proceedings where it is "highly desirable that there be conveyed to the trial judge reliable evidence of the ambience of the alleged events". The passage of time deteriorates evidence to the point where it can be of little assistance to the court. Considering the deficiencies in the plaintiffs' affidavit of documents, there is no indication that the plaintiffs have preserved any evidence. It has been almost seven years since the statements at issue allegedly were made and some of the defendants are longer with the defendant Association.

[64] Proportionality must be considered as well. In *Falcon Lumber*, the Court of Appeal reminds that the remedy under rule 30.08(2)(b) should be consistent with the Supreme Court's calls to promote a litigation culture that is "accessible – proportionate, timely and affordable." The plaintiffs have not even to attempted to remedy their affidavit of documents. The plaintiffs' failures have delayed the final adjudication of the case on its merits. If this litigation proceeds, there is no reasonable prospect that it will be resolved in a fair and timely manner. In all the circumstances, the proportionate response is to dismiss the plaintiffs' claim.

Conclusion

[65] For these reasons, I find that the plaintiffs have failed to serve a proper affidavit of documents and it is proportionate and just that the plaintiffs' action be dismissed under rule 30.08(2)(b).

Order

[66] For these reasons, the defendants' motion under rule 20.01(1)(b) is granted. The plaintiffs' amended statement of claim is struck, without leave to amend. The plaintiffs' action is dismissed.

Costs

[67] If the parties are unable to agree on costs, they may make written submissions. First, counsel for the defendants shall deliver submissions within 20 days. Within 20 days of receipt of those submissions, counsel for the plaintiffs shall deliver submissions. Within 5 days of receipt of those submissions, counsel for defendants may deliver a brief reply. All submissions, with proof of service, are

to be filed with the court by sending them to my judicial assistant Karen Hamilton at the Oshawa Courthouse. When the filing of submissions is complete, Ms. Hamilton shall forward them to me.

Justice M. L. Lack

Date: February 28, 2022