

CITATION: Boni v. Gary Jonas Computing Ltd., 2025 ONSC 3295
COURT FILE NO.: CV-18-598339
DATE: 2025 06 03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PAOLO BONI, *Plaintiff*

- and -

GARY JONAS COMPUTING LTD., *Defendant*

BEFORE: Associate Justice Todd Robinson

COUNSEL: D. Chitz and M. Crampton, *for the plaintiff*

A. Goldenberg and D. Poliwoda, *for the defendant*

H. Wafaei, *for the non-parties, Lake Capital and JL Albright Ventures*

HEARD: February 4, 2025 (by teleconference)

ENDORSEMENT
(Settling Order of Retired Associate Judge)

[1] The parties dispute the form of order from now-retired Graham A.J.'s decision on the plaintiff's motion for leave to examine the non-parties, Lake Capital and JL Albright Ventures, and to compel a further and better affidavit of documents from the defendant (2022 ONSC 4304). The parties previously agreed on the form and content of an order, but the registrar declined to sign it citing concerns over whether the agreed language accorded with Graham A.J.'s written reasons for decision. Given my colleague's retirement, I was assigned to settle the order.

[2] For various reasons, but through no fault of the parties, my decision on settling the order has been unfortunately delayed.

[3] After Graham A.J. heard and decided the plaintiff's motion, no formal order was ever taken out. The litigation has now proceeded through an unsuccessful mediation, delivery of a further and better affidavit of documents by the defendant, examinations for discovery, and answers to undertakings. The plaintiff sought this appointment to have the order settled in a revised form from that previously agreed by the parties. The current version proposed by the plaintiff was prepared to address the registrar's concerns. The defendant maintains that the form of order as previously agreed and submitted to the registrar ought to be signed.

[4] There is no dispute that I have jurisdiction to settle the order by reason of Graham A.J.'s retirement in September 2023. Subrule 59.04(15) of the *Rules of Civil Procedure*, RRO 1990,

Reg 194 (the “*Rules*”) expressly provides that if an associate judge ceases to hold office after making an order but before it is signed, another associate judge or a judge may settle and sign it.

[5] As noted in *Cunningham v. RBC Dominion Securities Limited*, 2023 ONSC 4316 at paras. 9-10, my role in settling an order that I did not make is two-fold. First, I am to review the competing drafts of the order to determine whether the competing formal orders correspond with the decision as rendered in the reasons for decision. Second, where an issue has been adjudicated, I must ensure that the order does not vary the decision made on that issue.

[6] Graham A.J. heard the plaintiff’s motion on May 3, 2022. His reasons for decision were released on July 22, 2022. My colleague held that, in his view, Lake Capital and JL Albright Ventures fell within the scope of persons subject to examination under subrule 31.03(8) of the *Rules* (para. 59) and that, based on record before him, their respective principals should be examined for discovery in addition to a representative of the defendant for a total of 10 hours between all three representatives (para. 69). Graham A.J. further held that Lake Capital and JL Albright Ventures “plausibly have relevant documents in their possession” that the defendant did not have and that the defendant must “serve a further and better affidavit of documents disclosing any such documents and indicating in which non-party’s possession they are” (para. 70). Graham A.J. also provided direction on the scope of documents to be included with specific reference to the evidence filed on the motion (para. 70). He further ordered that any issues with respect to the scope and completeness of production by the defendant and the non-parties be explored at examinations for discovery, with any production motions deferred until after the examinations (para. 71)

[7] In advance of the hearing before me, the plaintiff submitted a 168-page brief, including schedules, and the defendant submitted an 89-page brief, including schedules. Both briefs are essentially short facta on settling the order, with lengthy appendices. I am not convinced that the volume of materials submitted was required, let alone the extent of submissions made.

[8] There is no legal requirement that a formal order be signed, issued, and entered in accordance with a decision before that decision comes into full force and effect: *Patra Ironworks & Railings v Laurin General Contractor*, 2017 ONSC 1690 at para. 16. Rule 59.01 of the *Rules* provides that an order is effective from the date on which it is made, unless it provides otherwise. Subrule 59.03(1) states that a form of draft order “may” be prepared.

[9] As noted above, counsel for the parties discussed and ultimately agreed on the form of order that the defendant asks me to sign. Following the registrar’s response, the plaintiff resiled from the parties’ agreement on form and content of that version of the draft order. The core dispute between the parties is essentially what Graham A.J. intended by his decision and his jurisdiction or authority to grant certain production relief that the plaintiff says was required and has not been done. Since the parties are no longer *ad idem* on those issues, they have been unable to agree on language for an order.

[10] The registrar had three concerns with the draft order submitted: (i) the email chain granting signing authority on behalf of all parties was not included; (ii) para. 2 of the draft order did not match the wording of para. 70 of Graham A.J.’s reasons; and (iii) the draft order included an

amount for costs of the motion that was not awarded by Graham A.J., without indicating that costs of the motion had been resolved on consent.

[11] I agree with the registrar's substantive concerns about the language in para. 2 and costs in para. 4 of the draft order. The parties did not use Graham A.J.'s language and he did not award any costs in his reasons. It appears to me that the parties discussed and agreed on what they understood Graham A.J. to have intended and thereafter prepared the order to implement their agreed understanding. That is reflected in the plaintiff's submissions. Those submissions acknowledge that the plaintiff's lawyers believed that the original draft order was understood and intended by both parties to reflect the decision and the defendant's obligations under it, despite not tracking the language of Graham A.J.'s reasons.

[12] It is not open to parties to themselves decide what a judge or an associate judge intended by a decision and thereafter take out a form of order with language in accordance with that agreement. A formal order is intended to describe the result already reached by the court. It is to contain the operative language used in an endorsement or reasons for decision. Accordingly, the process of settling an order is not an opportunity to re-argue points already decided, to vary relief granted, or to raise new matters or new requests for relief: *1000425140 Ontario Inc. v. 1000176653 Ontario Inc.*, 2024 ONSC 319 at para. 4; *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 5130 at para. 3.

[13] There are a variety of ways under the *Rules* for parties to address ambiguities or concerns with an order made by a judge or associate judge. In my view, any ambiguity in a decision is generally best clarified either by addressing it directly with the judge or associate judge who decided the issue (subject to them being *functus officio*) or by way of appeal.

[14] In this case, Graham A.J. was not *functus officio* and did not retire for well over a year after rendering his decision. The parties (and the defendant in particular) had two clear options to address any concerns over the intended scope of production being ordered: (i) request clarification directly from my colleague either by letter written on consent of the parties in compliance with rule 1.09 of the *Rules* or by seeking a case conference or other hearing before him to raise the concerns; or (ii) appeal the decision. Neither happened here.

[15] To be clear, parties are generally free to negotiate and agree to vary a court-ordered obligation, subject to the terms of the order. However, any agreement on how an order should be interpreted or how an order should be implemented does not change the order that was made. It would, at best, give rise to a new consent order to vary the prior order.

[16] In this case, the plaintiff submits that I need not get into issues about what the parties may or may not have agreed (mistakenly or otherwise) with respect to the form of order, or whether there has been any variation of the order by agreement of the parties. The plaintiff submits that my objective is to sign a form of order that sets out the intention of the decision. That is generally an accurate statement, with one exception.

[17] In my view, to settle the form of order, I need not consider or decide what Graham A.J. intended. I thereby need not address the defendant's arguments that Graham A.J. may have

exceeded his jurisdiction, lacked legal authority to make the order that he made, or that the order made may not be capable of being carried out (for example, as the defendant argues, ordering production of documents that are not within the defendant's control). The decision was not appealed. Graham A.J. was not asked to clarify what he intended. I am in no position to revisit or decide what he did intend or what ought to have been ordered. It would be an inappropriate for me to do so. I am obliged to settle the formal order in accordance with the reasons for decision as written.

[18] I accordingly decline to consider whether there is any merit to the defendant's arguments that using the language from the decision is, in effect, ordering something contrary to established case law or that I should presume that the court cannot have intended that which cannot be done. It is not within the ambit of settling an order under rule 59.04 for me to determine if Graham A.J. did either, whether intentionally or inadvertently. Similarly, it is not within the ambit of settling the order to decide if Graham A.J. believed he was ordering production of documents in the "control or power" (albeit not possession) of the defendant. There was ample time for the parties to seek clarification directly from my former colleague prior to his retirement.

[19] If the plaintiff maintains his position that the defendant has not complied with the order and seeks any relief as a result, then nothing in this endorsement precludes the parties from making submissions on the impact of either their discussions or, as argued by the defendant, agreement over the scope of required production. This hearing was simply not the proper forum to argue the effect of the order and its enforceability, whether there was any enforceable agreement on varying it, or how the order should be implemented.

[20] For these reasons, I have generally preferred the draft order submitted by the plaintiff. It more closely tracks the operative language in Graham A.J.'s reasons for decision. In my view, though, it nevertheless requires some revision for clarity with respect to the language in para. 70 of the reasons and the schedules being incorporated by reference. Specifically, both sides have agreed that Exhibit C to Paolo Boni's reply affidavit sworn February 25, 2022 should be appended to the order, despite not being specifically referenced in the operative paragraph of the decision. However, it is evidently required to contextualize para. 35 of that affidavit, which is specifically referenced by Graham A.J. and sets out the scope of required production. In my view, the connection between that appended copy of Exhibit C and para. 35 of the reply affidavit needs to be clearer.

[21] I have accordingly signed the form of draft order as submitted by the plaintiff, as amended electronically prior to signing.

[22] The plaintiff seeks \$3,500 in costs of this settling process. In support of its position on costs, the plaintiff points to *Kode Contracting Ltd. v. BK Industrial Power Inc.*, 2021 ONSC 87, at para. 63, in which Leach J. warned that unreasonably failing to approve a proposed draft order, and thereby putting the opposite party to additional expense, may result in cost consequences.

[23] No costs outline was prepared or served prior to the hearing before me. I told the parties that I would provide directions on costs submissions with my endorsement. I have considered whether costs submissions should be entertained, but have decided they should not. This situation

arose entirely from the parties' agreement to and approval of a form of order that did not follow Graham A.J.'s decision and was rightly rejected by the registrar. There is evidently concern with strategic use of the formal order in arguing non-compliance with the order, which is why the form of order was not agreed by the parties and required judicial intervention. In these circumstances, I decline to make any order as to costs, but without prejudice to either party claiming their costs as costs of the action.

[24] As discussed above, the plaintiff seemingly intends to advance an argument that the defendant has not complied with Graham A.J.'s order by failing to obtain, produce, and identify documents in the possession of Lake Capital and JL Albright Ventures. The defendant's position seems to be that the order did not require the defendant to collect any further documents from those non-parties. In addition, quite apart from the dispute over whether the defendant did or did not comply, there is a dispute about whether the plaintiff is even now entitled to move for relief arising from any asserted non-compliance given an existing consent timetable order.

[25] I offered and will remain available to the parties to seek directions on how to deal with the dispute about alleged non-compliance and any other relief that may be sought. Doing so may assist in avoiding unnecessary motions and expense to the parties, as well as ensuring efficient use of court time. If the parties wish, once they have discussed the scope of any outstanding dispute, relief that may be sought, and positions on that relief, a case conference may be arranged through my Assistant Trial Coordinator. However, I am not seized of such issues or any related motions, which may also be brought before any other associate judge.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: June 3, 2025