

Citation: *3309715 NS LTD v Southeastern Mutual Insurance Company*, 2026 NBKB 12

Court File No.: MC-67-2021

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

BETWEEN:

3309715 NS LTD., a body corporate

PLAINTIFF (Respondent on the Motion)

- and -

**SOUTHEASTERN MUTUAL INSURANCE
COMPANY, a body corporate**

DEFENDANT (Applicant on the Motion)

DECISION

BEFORE: Justice Maya Hamou

DATE OF HEARING: July 24, 2025

DATE OF DECISION: January 23, 2026

APPEARANCES: Yanis Khiari, counsel appearing on behalf of 3309715 NS LTD., a body corporate
Hélène L. Beaulieu, K.C., counsel appearing on behalf of Southeastern Mutual Insurance Company
Nicholas Bartolacci, counsel appearing on behalf of Clear Claim Adjusters Inc. and Claim Restore

OVERVIEW

1. In this Motion, the Defendant seeks a dismissal of the Plaintiff's action for failure to comply with the *Rules of Court* and for failure to comply with an Order of the Court. Alternatively, should the Court decline to dismiss the Plaintiff's action, the Defendant seeks security for costs.
2. The Defendant further seeks a finding of contempt of Court against the Plaintiff, K² Property Management, Clear Claim Adjusters Inc. and Claim Restore, and seeks the production of relevant information and documents in their possession.
3. The Defendant, in its fourth Amended Notice of Motion, also seeks leave of the Court to file an Amended Statement of Defence. The Plaintiff consented to the filing of an Amended Statement of Defence at the hearing. Additionally, the Defendant seeks further discovery of the Plaintiff and discovery of Clear Claim Adjusters Inc. and Claim Restore. At the hearing, only the Plaintiff consented to further discovery while.
4. Finally, the Defendant seeks solicitor-client costs on the Motion.

Factual Background

5. The underlying litigation between the Plaintiff and the Defendant originates from a disputed insurance claim. The insurance claim involves water damage to an apartment building located at 476 Robinson Street in Moncton, New Brunswick.
6. In January of 2020, an employee of the building's property management company, K² Property Management, reported water damage to Claim Restore. The Plaintiff asserts the water damage and subsequent mould found in units 3 and 5 of the property were caused by ice damming. Initially, the Defendant evaluated the water damage as arising from wind-driven rain and informed the Plaintiff the loss would be covered under the insurance policy.

Disputed Issues

7. The Plaintiff started repairs and received quotes a month before reporting the claim to the insurer near the end of February 2020. Thus, according to the Defendant, hampering its ability to assess the cause of the water damage. In May of 2020, the Defendant retained an expert and concluded the water damage was the result of a pre-existing condition relating to internal

humidity and pre-existing maintenance issues; not the result of water infiltration, which is an insured peril.

8. The Plaintiff claims \$42,000 of demolition work was completed based on the Defendant's initial position confirming the peril was insured. The Defendant suggests that amount was inflated and that the work was not limited to units 3 and 5 of the property.
9. The Plaintiff's proof of loss statement included a claim for \$184,581.96 for building costs and \$28,000 for loss of rental income. The Defendant seeks details of the repair work performed, the expenses paid and incurred as a result, as well as proof of the expenditures rather than relying on estimates provided by Claim Restore.
10. Another relevant piece of information raised by the Defendant pertains to the ownership of the property. The Plaintiff purchased the property in May of 2019 and sold the property in July of 2021 for close to \$200,000 above the purchase price. At discovery, the Plaintiff could not recall the actual amounts paid for repairs to the property and the Defendant sought information from the Plaintiff on capital gains from the sale of the property to establish the costs and expenses incurred and claimed for the property. To date, this information remains unavailable.

Court Order and Compliance with Court Order

11. Following a hearing held on September 25, 2024, and a five-page Order issued November 4, 2024 ("the Order") by the Court, the Plaintiff was directed to provide certain answers to undertakings, documents, or information to the Defendant. The specific terms of the Order follow.
 1. Pursuant Rule 33.12(b) of the *Rules of Court* that the Plaintiff deliver to the Defendant answers to undertakings 2, 3, 4, 5, 6, 8, 9, 11, 14, 15, 16, 18, 21, 24, 30, 31, 32, 33, 34, 35, 37, 38, 44 and 45 which were provided by the Plaintiff at Examinations for Discovery conducted July 26, 2022, and August 11, 2022, and are set out in Schedule A – List of Outstanding Undertakings, on or before 30 days from the date of this Order.
 2. With respect to Item 1 of this Order, where the information or documents sought in the outstanding undertakings are not in the knowledge or possession of the Plaintiff, the Plaintiff must disclose to the Defendant the best efforts made to obtain the information or documents.
 3. Pursuant to Rules 31.02(1), 31.03, 31.03(2), 31.03(3), 31.03(4) of the *Rules of Court*, that the Plaintiff produce an updated Affidavit of Documents, and disclose to the Defendant the following information

and documents, or disclose to the Defendant the best efforts made to obtain the information and documents:

- a. Plaintiff's Revenue Canada documents setting out the capital gains on the sale of the property at 476 Robinson Street, Moncton, New Brunswick, including any reference to expenses incurred for the renovation and repair of the property.
 - b. Agreement signed between the Plaintiff and K² Property Management and/or ClearClaim Adjusters Inc. as it relates to the property at 476 Robinson Street, Moncton, New Brunswick.
 - c. Copies of Leases at 476 Robinson Street, Moncton, New Brunswick.
4. Pursuant to Rule 32.09(1) of the *Rules of Court*, that the rectification of an answer provided at Discovery be provided by Matthew Brannon.
 5. Pursuant to Rule 59 of the *Rules of Court*, the Plaintiff shall pay costs of \$2,000 to the Defendant.

12. Following a review of the evidence on this Motion, the Court reaches the following conclusions:

- a. Items 1 and 2 were largely fulfilled by February 24, 2025. While some portions of those undertakings and follow-ups to incomplete answers remain, the Plaintiff's consent to further discovery should allow the Defendant to address any gaps in the answers provided. The Plaintiff acknowledged the undertaking relating to production of information on capital gains for the sale of the property was not yet fulfilled, as the Plaintiff awaits answers from his accountant.
- b. Item 3 was fulfilled on July 23, 2025 (the day prior to the hearing of the Motion), and the Affidavit of Documents was added to the Record on Motion at the hearing.
- c. Item 4 was partially fulfilled. While the underlying information may have been sent to Counsel for the Defendant, a rectification by Affidavit under Rule 32.09(2)(b) of the *Rules of Court* was not provided.
- d. Item 5 was partially fulfilled on February 24, 2025, with interest remaining to be paid at the time of the hearing.

13. The Court agrees with the Plaintiff's submission in one regard; the undertakings, which the Defendant states are unfulfilled, are in fact follow-up questions to undertakings requested by Counsel for the Defendant. That said, the follow-up questions flowed from inadequate or incomplete answers to undertakings by the Plaintiff.

14. In addition, the Court ordered K² Property Management, Claim Restore, and Clear Claim Adjusters Inc. to provide certain documents or information under Rule 31.11 of the *Rules of Court*. The non-parties to the litigation, K² Property Management, Claim Restore, and Clear Claim Adjusters Inc., were provided with notice of the original Motion and did not attend the hearing. An Order was issued against them. As required by the terms of the Order, the Defendant served K² Property Management, Claim Restore and Clear Claim Adjusters Inc. with the Order. The elements of the Order required K² Property Management, Claim Restore, and Clear Claim Adjusters Inc. to provide certain information and documents to the Defendant. The specific terms imposed upon K² Property Management, Claim Restore, and Clear Claim Adjusters Inc. by the Order follow.
- a. K² Property Management provide copies of leases for the tenants at 476 Robinson Street, Moncton, New Brunswick.
 - b. K² Property Management provide information and/or documents as it relates to undertakings 2, 3, 4, 6, 8, 21, 24 and 44, as set out in Schedule A – List of Outstanding Undertakings.
 - c. Claim Restore and Clear Claim Adjusters Inc. provide a copy of any agreement signed between the Plaintiff or K² Property Management and Claim Restore and/or Clear Claim Adjusters Inc. as it relates to 476 Robinson Street, Moncton, New Brunswick.
 - d. Claim Restore and Clear Claim Adjusters Inc. provide information and/or documents as it relates to undertakings 9, 14, 15, 24, 30, 31, 32, 33, 34, 35, 37 and 38, as set out in Schedule A – List of Outstanding Undertakings.
15. A review of the Record on Motion shows, through the Affidavit of Rémi Doiron sworn February 24, 2025, on behalf of Claim Restore and Clear Claim Adjusters Inc., that Claim Restore and Clear Claim Adjusters Inc., provided some answers to the undertakings. However, Claim Restore and Clear Claim Adjusters Inc. did not provide relevant documents as required by item 2(d) of the Order.
16. K² Property Management was unresponsive to the Order.
17. Generally, as it pertains to the determination of compliance with the Order, while the Notice of Motion was amended on three occasions to add further relief sought, the Notice of Motion was not amended to reflect the answers progressively received. The Court was required to rely on the submissions of Counsel and its own review of the extensive fifth Amended Record on Motion to reach the above noted factual determinations.

Hearing Adjournment

18. The Motion was initially scheduled to proceed to a full-day hearing on February 28, 2025, however, after briefly hearing from the parties, the matter was adjourned. First, the Plaintiff filed procedurally deficient Affidavits four days before the hearing and sent a large volume of relevant documents the hearing the day before it was set to proceed. Secondly, the Affidavit of Rémi Doiron, filed on behalf of Claim Restore and Clear Claims Adjusters Inc., was sent to Counsel for the Defendant three days before the hearing. More specifically:
- a. On February 24, 2025, the Plaintiff filed an Affidavit sworn electronically. While the Clerk's Office refused to accept the Affidavit for filing, as it did not contain an original signature, the Court, on February 28, 2025, deemed the Affidavit affirmed by video technology to be admissible. Since the February 2025 hearing, and prior to the hearing on July 24, 2025, the Chief Justice of the Court of King's Bench reissued a practice directive permitting and outlining the requirements for remote commissioning of affidavits.
 - b. On February 25, 2025, Counsel for the Defendant received the Affidavit of Rémi Doiron filed on behalf of Claim Restore and Clear Claim Adjusters Inc.
 - c. In the afternoon of February 27, 2025, the day before the original hearing date, the Plaintiff sent Counsel for the Defendant an electronic copy of the Affidavit of Documents and related documents. Production of the Affidavit of Documents formed part of the items required as part of the Court Order dated November 4, 2024.
19. The procedural deficiencies and delays in these filings from the Plaintiff led the Defendant to reluctantly request an adjournment to consider the evidence arising from the newly filed materials. Counsel for the Defendant was prepared to proceed with the Motion hearing, however, understandably, the voluminous late disclosure made it impossible for Defendant's Counsel to competently represent her client's interests at the hearing.
20. Counsel for the Plaintiff explained to the Court some of the struggles with his firm's management that led to the delays and deficiencies. The firm experienced some turnover, with two lawyers and a legal assistant recently leaving the firm.
21. As a result of these submissions, the Court granted the adjournment sought by the parties.

Preliminary Issues

22. The Defendant filed the fifth Amended Record on Motion including nearly 2,000 pages of material and the Fourth Amended Notice of Motion for the hearing scheduled to proceed on July 24, 2025. Further procedural issues were raised by the Defendant at the outset of this hearing.

Remote Commissioning of Affidavits

23. First, the original Affidavit of Documents filed by the Plaintiff did not comply with the Court's practice directive requiring a certificate of solicitor for the remote commissioning of affidavits. Counsel for the Plaintiff prepared and provided the Court with the Affidavit of Documents including a Certificate of Solicitor at the hearing on July 24, 2025. These documents were included in the Record on Motion.

Identification of Exhibits in an Affidavit

24. Second, the Affidavit of Matthew Brannon did not comply with Rule 4.05(3) of the *Rules of Court*, requiring that exhibits to an affidavit be identified by the person before whom the affidavit is sworn and attached to the affidavit. While not in full compliance with Rule 4.05(3) of the *Rules of Court*, each page was initialled by the affiant, and Counsel for the Plaintiff identified the first page of each exhibit in the Record on Motion.

Relationship Between Parties

25. Third, Counsel for the Defendant raised concerns with the Plaintiff, Clear Claim Adjusters Inc. and Claim Restore being represented by the same law firm. Clear Claim Adjusters Inc. and Claim Restore are not parties to the action. However, these parties are subject to the request for third party production and are subject to the Court Order of November 4, 2024.

26. Claim Restore is a property restoration company specializing in damage mitigation, restoration and construction. Clear Claim Adjusters Inc. is an independent adjusting firm specializing in insurance claim management on behalf of policy holders, focussing on assessing damages and compiling documentation to negotiate with insurers.

27. In terms of the link between the parties, Jonathan Frenette is a shareholder and director of Claim Restore while Rémi Doiron is President of Claim Restore. Rémi Doiron is also Vice-

President, a shareholder and director of Clear Claim Adjusters Inc. while Jonathan Frenette is a Licensed Public Adjustor with Clear Claim Adjusters Inc. The Defendant suggests Jonathan Frenette is also President of Clear Claim Adjusters.

28. For clarity, Clear Claim Adjusters Inc. and Claim Restore were represented by another law firm for the hearing which took place on February 28, 2025, and by the same law firm as the Plaintiff, albeit a different lawyer at the hearing of July 24, 2025.
29. At the February 28, 2025, hearing, Counsel for the Plaintiff confirmed that Clear Claim Adjusters Inc. and Claim Restore were not a party to the litigation. At the July 24, 2025, hearing, Counsel for the Plaintiff assured the Court that appropriate privacy measures were in place within the law firm to protect the separate interests of the parties.
30. The Defendant's grievance with the same law firm representing both the Plaintiff and Clear Claim Adjusters Inc. and Claim Restore focusses on a service contract between the Plaintiff and Clear Claim Adjusters Inc. The contract provides the "insured(s) retains Clear Claim Adjusters Inc. to advise and assist in the measurement and documentation of the insured(s) loss, and to present Insured(s) claim to the Insurer(s) for the loss and damages from the peril(s) having occurred on March 12th, 2020, that was sustained by the Insured(s) property located at 476 Robinson Street, Moncton NB." Further, the contract provides that Clear Claim Adjusters Inc. was to be paid "25% (HST included) of any and all settlement above the 'base offer'" and that "in the event Clear Claim Adjusters Inc. cannot settle the claim with the insurer(s), Clear Claim Adjusters Inc. reserves the right to hire a law firm of its choice and pay the fees associated in pursuit of a judgment or settlement against the insurer on behalf of the insured."
31. The Defendant is concerned with the conflict of interest arising from Claim Restore invoicing for work recovered by Clear Claim Adjusters Inc. on behalf of the Plaintiff and for which Clear Claim Adjusters Inc. has a financial interest. The relationship between the parties suggests a lack of objectivity.
32. Notwithstanding raising this issue, Counsel for the Defendant insisted on proceeding considering the delays already incurred in the hearing of the Motion.

Summary Chart

33. The Plaintiff objected to the Court's consideration of a 25-page chart prepared by the Defendant. At the February 28, 2025, hearing, the Court requested that both parties prepare

a chart outlining the components of the November 4, 2024, Court Order with page references from the Record on Motion identifying instances of compliance with undertakings and identifying efforts taken by the Plaintiff to answer undertakings.

34. At the time of the February 28, 2025, hearing, the Record on Motion included over 1,500 pages of materials. The Court could not be expected to parse through the Record on Motion to confirm compliance with the various elements of the November 4, 2024, Court Order. The Defendant produced a chart and thoroughly addressed the various components of the chart in its arguments.
35. The Plaintiff did not produce a chart and, despite receiving the Defendant's chart weeks before the hearing, did not address the Defendant's chart or the accuracy of the summary information contained in the Defendant's chart.
36. It is important to note that at the time of filing of the Motion by the Defendant, a month after the issuance and service of the Order on the parties, no undertakings listed in the Order were answered, no documents or information were provided, and no costs were paid by either the Plaintiff, Clear Claim Adjusters Inc., Claim Restore or K² Property Management.

ISSUES

37. Should the Court dismiss the action for failure to comply with the *Rules of Court* and failure to comply with the Court Order dated November 4, 2024?
38. Should the Court order a stay of proceeding or order the Plaintiff to pay security for costs?
39. Should the Court find the Plaintiff in contempt of Court and impose sanctions?
40. Should the Court find Clear Claim Adjusters Inc., Claim Restore or K² Property Management, who are not parties to the action, in contempt of Court and impose sanctions?
41. Should the Court order the production of relevant documents in the possession and control of Clear Claim Adjusters Inc. and Claim Restore?
42. Should the Court permit further discovery of the third parties under Rule 32.10 of the *Rules of Court*?
43. Is the Defendant entitled to costs on this Motion?

ANALYSIS

Dismissal of Action for Failure to Comply with *Rules of Court* and Court Order

44. The Defendant seeks a dismissal of the Plaintiff's action based on the following reasons outlined in its Motion:
- a. Failing to comply with the Order of November 4, 2024, pursuant to Rule 2.04 of the *Rules of Court* and the Court's inherent jurisdiction.
 - b. Failing to file and serve an updated Affidavit of Documents within 30 days of the Order pursuant to Rule 31.08(2)(b) of the *Rules of Court* and in accordance with the terms of the Order.
 - c. Failing to answer undertakings within 30 days of the Order under Rule 33.12(b) of the *Rules of Court* and in accordance with the terms of the Order.
 - d. Failing to provide relevant documents within 30 days of the Order pursuant to Rules 31.02(1), 31.03(2), 31.03(3) and 31.03(4) of the *Rules of Court* and in accordance with the terms of the Order.
 - e. Failing to answer questions pursuant to Rule 32.06 of the *Rules of Court*.
45. In the alternative, the Defendant seeks direction on the management or progress of the action pursuant to Rules 2.02 and 2.04 of the *Rules of Court*.
46. The Defendant acknowledges that a dismissal of the action is a situation of last resort but asserts that in this case, fairness and equity warrant the dismissal of the case.
47. The Defendant argues that the Plaintiff failed to produce essential information within its possession and control and that it also failed to abide by the *Rules of Court* and the Order of the Court. The Defendant relies on *Tozer v Southeastern Mutual Fire Insurance Company*, 2003 NBQB 293, to argue the Court has inherent jurisdiction to dismiss an action for failure to comply with an order issued by the Court. It should be noted that in *Tozer*, it is the client who failed to comply with the order despite the numerous attempts of counsel to ensure compliance. Further, in *Tozer*, the failure to comply with the order in a timely fashion caused the destruction of important documents.
48. The Defendant suggests that the Plaintiff's failure to comply with undertakings in this case has led to an inability to obtain key information going to the heart of the dispute between the parties.

49. The Plaintiff was required, as part of the undertakings it provided the Defendant, to make inquiries with K² Property Management for information and documents. Those inquiries were not made in a timely fashion after the examinations for discovery.
50. K² Property Management was the property management company for 476 Robinson Street during the relevant period of time and, as suggested by the Plaintiff, appears to no longer be in operation.
51. The Defendant, unable to obtain the information from the Plaintiff sought a motion for production directly from K² Property Management. The Order required K² Property Management to provide information and documents relating to a series of undertakings provided by the Plaintiff and dating back to July and August of 2022 (undertakings 2, 3, 4, 6, 8, 21, 24 and 44). In addition, the November 4, 2024, Court Order required K² Property Management to provide certain documents and information. The inability to obtain this information has deprived the Defendant of key information, namely:
- a. Lease agreements, including the names of tenants (information relevant to quantification of the claim and potential witnesses); and
 - b. Reports of prior mould issues in some of the apartments (information relevant to causation and scope of damages).
52. The question of quantification of the loss remains an element to be proven by the Plaintiff. In the absence of evidence, the loss will not be established, and the Plaintiff will be unable to recover the alleged loss. However, the question of causation is different; the failure to produce evidence which may disprove causation will have a significant impact on the Defendant's ability to present its case. Several references in the Record on Motion point to prior incidents of water infiltration and the presence of mould.
53. The inability to obtain this information will significantly prejudice the Defendant and in this case the Plaintiff's failure to move the file forward has contributed to the problem. However, K² Property Management is responsible for this non-production; the Plaintiff cannot bear the consequences for a non-compliant unrelated third party.
54. The Defendant also relied on *New Brunswick (Minister of Health and Community Services) v S.L. et al.*, 1997 CanLII 23764 (NBQB) at paragraph 21 where the Court recognized that the passage of time may constitute prejudice.

55. The Plaintiff relied on *Michaud v Robertson*, 2003 NBQB 288 and *Spencer v King and Mockler*, 1989 CanLII 8020 (NBQB) (overturned on appeal, 1990 CanLII 3894 (NBCA), cases where the Court dismissed actions for delay.
56. In the current case, Counsel for the Plaintiff “missed” the Order in his inbox, uncovering it one month later, and his client had difficulty assembling the required documents in a timely fashion. This is not a case where the Defendant is requesting that the Court dismiss the action for delay, this is a case requesting that the Court dismiss the action due to a failure to comply with an Order of the Court. By all indications, save and except for one undertaking relating to production of information on capital gains for the sale of the property, answers to undertakings were produced, or at the least attempts to produce them were made.
57. Further, the Court is satisfied that the dismissal of the action is not warranted. However, the Plaintiff’s blatant disregard for the timelines imposed in the Order and the need for Defendant’s Counsel to bring a Motion for compliance with the Order remain a serious concern for the Court. Court orders must be followed and the failure to comply with court orders carry significant consequences. The consequences in the current matter, however, are more aptly addressed by costs rather than dismissal of the action.
58. While the Court declines to issue a dismissal in this case, a case management order is required to keep the matter moving forward. As such, the Court convenes a monthly case management conference call with the parties, until the Court deems it no longer necessary. The parties will keep the Court apprised of efforts to move the matter forward to trial.

Stay of Proceedings and Security for Costs

59. As an alternative remedy to the dismissal of the action, the Defendant seeks a stay of the proceedings, under subsection 26(7) of the *Judicature Act*, RSNB 1973, c J-2 until the costs are paid, and further seeks security for costs under Rule 58.01 of the *Rules of Court*.
60. The Defendant seeks a stay of proceedings pending the payment of \$3,000 in costs by the Plaintiff. Costs were ordered to be paid by the Plaintiff to the Defendant in two prior Motions. The first was a Motion for production of an Affidavit of Documents in which costs of \$1,000 were awarded to the Defendant. The second was a Motion seeking answers to undertakings and seeking third party production leading to the Order of November 4, 2024, in which costs of \$2,000 were awarded to the Defendant.

61. The Defendant argues the Plaintiff has no assets in New Brunswick and that the three Motions were brought to move the matter forward and obtain the production of documents and information required to do so. The Defendant is concerned costs will be difficult to recover if the Plaintiff is unsuccessful on the merits of the action and seeks \$20,000 in security for costs.
62. The Defendant relies on Rule 58.01 of the *Rules of Court*, which provides that security for costs may be ordered in certain circumstances.

58.01 Where Available

A plaintiff may be ordered to furnish security for costs where it appears that

- (a) he is ordinarily resident out of New Brunswick,
- (b) the defendant has a judgment or order against the plaintiff for costs in another action, and those costs remain unpaid in whole or in part,
- (c) he is a nominal plaintiff, and there is reason to believe that he has not sufficient assets in New Brunswick to pay the costs of the defendant if ordered to do so,
- (d) it is an association as defined in Rule 9.01 or is a corporation and there is reason to believe that it has not sufficient assets in New Brunswick to pay the costs of the defendant if ordered to do so, or
- (e) the defendant is entitled by a statute to security for costs.

63. The remedy set out in Rule 58 is discretionary. The New Brunswick Court of Appeal stated in *Williamson et al. v Gillis et al.*, 2011 NBCA 53, that even when all criteria set out in the Rule are present, a judge remains vested with the discretion to decide whether or not to order a plaintiff to provide security for costs (see paragraphs 4 and 5). Further, the Court is to balance the competing interests of the Plaintiff and the Defendant.

[19] [...] On the one hand, the Court does not want to bar the plaintiff's action, and, on the other, it wants to prevent a defendant from being deprived of costs if the action is dismissed. In balancing these competing interests, it is not surprising that the merits of the defence feature among the various factors a judge must weigh. The question is whether the defendant seeking security for costs must depose to having a valid defence or whether an inference of a serious triable issue, drawn from the facts or from the pleadings, is sufficient.

64. On February 24, 2025, a few days before the hearing, the Plaintiff paid the Defendant the outstanding \$3,000 in costs. However, the Plaintiff did not pay interest applicable under Rule

60.08 of the *Rules of Court*; interest which totals \$213. As such, the Defendant maintains that costs remain owing. Plaintiff's Counsel advised the Court that the interest on the costs will be paid and would have been paid prior to the Motion if brought to their attention. On this point, Counsel for the Defendant referenced correspondence in the Record on Motion sent by email on December 9, 2024, in which the issue of the interest was raised. Counsel for the Plaintiff acknowledged the email was "missed" but asserted the interest would be paid in accordance with the *Rules of Court*. At the time of issuance of this decision, the Court is unaware whether the interest has been paid.

65. While the Court accepts that the Plaintiff is an extra-provincial corporation without assets in New Brunswick, it remains that the Plaintiff paid the outstanding costs awards, albeit "very late" and not "fully". In determining whether to award security for costs, the Court must assess the merits of the action, which is difficult in the context of the within Motion which focusses on procedural elements rather than the full merits of the action. The Court is not satisfied that a sufficient basis is present to warrant security for costs. Further, the Court is not satisfied of the existence of a legitimate risk of the Defendant being deprived of costs.
66. Therefore, considering the whole of the evidence on this Motion, the request for a stay of proceedings and for security for costs is dismissed.

Contempt of Court and Sanctions

Plaintiff

67. The Defendant requests the Court find the Plaintiff in contempt of Court under Rules 76.01 and 76.03 of the *Rules of Court*. As a penalty for the contempt, the Defendant requests the Court order costs on the Motion on a solicitor-client basis or the payment of a fine.
68. A finding of civil contempt requires a consideration of three elements established beyond a reasonable doubt: (1) the order alleged to have been breached must state clearly and unequivocally what should and should not be done, (2) the party alleged to have breached the order must have had actual knowledge of it and, (3) the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (*Carey v Laiken*, 2015 SCC 17 at paragraphs 32 to 35).

[32] Civil contempt has three elements which must be established beyond a reasonable doubt: *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 2006 CanLII 81792 (ON CA), 82 O.R. (3d) 686 (C.A.), at para. 27; *College of Optometrists*, at para. 71; *Bhatnager v. Canada*

(*Minister of Employment and Immigration*), 1990 CanLII 120 (SCC), [1990] 2 S.C.R. 217, at pp. 224-25; *Jackson v. Honey*, 2009 BCCA 112, 267 B.C.A.C. 210, at paras. 12-13; *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35, at paras. 17 and 32; *Godin v. Godin*, 2012 NSCA 54, 317 N.S.R. (2d) 204, at para. 47; *Soper v. Gaudet*, 2011 NSCA 11, 298 N.S.R. (2d) 303, at para. 23. These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases: *Bell ExpressVu*, at para. 22; *Chiang*, at paras. 10-11.

[33] The first element is that the order alleged to have been breached “must state clearly and unequivocally what should and should not be done”: *Prescott-Russell*, at para. 27; *Bell ExpressVu*, at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.*, 2004 CanLII 32262 (Ont. S.C.J.), at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: *Pro Swing*, at para. 24; *Bell ExpressVu*, at para. 22. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21.

[34] The second element is that the party alleged to have breached the order must have had actual knowledge of it: *Bhatnager*, at p. 226; *College of Optometrists*, at para. 71. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine (*ibid.*).

[35] Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Sheppard v. Sheppard (1976)*, 1976 CanLII 710 (ON CA), 12 O.R. (2d) 4 (C.A.), at p. 8. The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily.

69. As set out in *PCO Services Corporation v Extermination Sanitation Nord-Est Inc.*, 2010 NBQB 186, the Court must consider the nature of the non-compliance and the conduct of the offender.

27. The penalty for contempt must take into account the nature of the non-compliance and the conduct of the offender. The penalty must be fitting in order to deter the offender and the public at large from disobeying orders of the Court so as to maintain the integrity, authority and respect for the administration of justice.

70. In this case, as previously mentioned, the Plaintiff failed to comply with the Order of the Court within the timelines prescribed in the November 4, 2024, Court Order. Their failure to comply included a failure to provide the Defendant with answers to undertakings or best efforts to answer undertakings, production of an Affidavit of Documents, rectification of an answer, and

costs. The Order contains no ambiguity, and the parties had all the background information required to comply with the Order.

71. Counsel for the Plaintiff claims the Order was only noticed in his inbox on December 7, 2024, and that he contacted Counsel for the Defendant on December 17, 2024, seeking an extension to comply with the Order. It is only after the filing of the Motion for contempt, on December 6, 2024, that the Plaintiff claims to have become aware of the Order. Answers to undertakings were only provided by the Plaintiff after this date.
72. The Court is not satisfied beyond a reasonable doubt that the Plaintiff was aware of the Order issued on November 4, 2024, within the 30 day timeline provided for in the Order and is not satisfied beyond a reasonable doubt that the Plaintiff intentionally breached the Order of November 4, 2024. In the absence of this element, a finding of contempt cannot be sustained against the Plaintiff.

Third Parties

73. The Defendant requests the Court find the third parties, K² Property Management, Clear Claim Adjusters Inc. and Claim Restore in contempt of Court under Rules 76.01 and 76.03 of the *Rules of Court*. As a penalty for the contempt, the Defendant requests that the Court order costs on the Motion on a solicitor-client basis or the payment of a fine.
74. For clarity, these parties are not parties to the action. Their participation in the matter arose from a Motion for third party production brought by the Defendant. K² Property Management, Clear Claim Adjusters Inc. and Claim Restore were all served with the Motion for third party production. That Motion outlined the alleged inadequacies of the information provided by them to the Plaintiff. K² Property Management, Clear Claim Adjusters Inc. and Claim Restore did not attend the hearing of the Motion for third party production, however all the information was available to them.
75. Considering the test set out in *Carey v Laiken* for a finding of civil contempt, the Court is satisfied that Clear Claim Adjusters Inc., Claim Restore and K² Property Management were served with the Order of the Court on November 13, 2024, and the Court is further satisfied that Clear Claims Adjusters Inc. and Claim Restore provided the Court with answers two months after being served with the Court Order and after receipt of the within Motion. The Court acknowledges that in many regards, the answers provided by Clear Claims Adjusters

Inc. and Claim Restore are very similar to the answers previously provided by the Plaintiff. However deficient, answers were provided by Clear Claims Adjusters Inc. and Claim Restore.

76. The Court is satisfied that K² Property Management was served with the Order and failed to comply with the Order. K² Property Management did not comply with the Order and did not provide its position on the Motion. Further, no specific information pertaining to K² Property Management's operational status was provided to the Court other than a suggestion by Plaintiff's Counsel that K² Property Management is no longer operating. The Defendant conducted searches of the bankruptcy registries but found no information linked to K² Property Management. As such, the Court concludes that K² Property Management is in contempt of the Court's Order.
77. A contempt order may be made against a non-party and against a corporation (Rules 76.07 and 76.08 of the *Rules of Court*).
78. The consequences of a finding of contempt are outlined in Rule 76.06 of the *Rules of Court*.

76.06 Contempt Order

(1) If the court finds a person guilty of contempt, it may make any order it considers necessary, including an order that

- (a) he be imprisoned upon such terms as may be just,
- (b) he be imprisoned if he fails to comply with a term or condition of the order,
- (c) he pay a fine,
- (d) he give security for good behaviour,
- (e) he do or refrain from doing any act,
- (f) he pay costs and expenses as may be just,
- (g) he comply with any other order which the court considers necessary, and
- (h) a sheriff take possession of any of the property of the person in contempt and collect the rents, profits and income therefrom and hold the property until the person complies with the terms of the order.

(2) The court may modify or suspend the execution of a Contempt Order for such period or on such terms and conditions as may be just.

(3) Unless the court orders otherwise, a copy of the Contempt Order and any order modifying or suspending it shall be served forthwith by the applicant on any person affected by it.

(4) When a person who has been detained in custody or whose property has been taken pursuant to a Contempt Order continues to disobey the terms of the order, the court may make a further order upon such terms as may be just.

(5) Where a person against whom a Contempt Order has been issued cannot be found, the court may, on motion without notice, issue a Contempt Order against the property of the person and the sheriff may execute the order in the absence of the person.

79. The Court finds that a \$10,000 costs award payable to the Defendant is an appropriate sanction for the contempt, particularly considering K² Property Management's involvement in this matter.

80. With respect to Clear Claim Adjusters Inc. and Claim Restore, their Counsel suggests the Order provides no timeline to produce documents or information and provides no obligation to provide a record of efforts to obtain information or documents. Both of these requirements were present in the portion of the Order that pertains to the Plaintiff but were absent from the portion that pertains to Clear Claim Adjusters Inc. and Claim Restore.

81. To circle back, the Order was served on Clear Claim Adjusters Inc. and Claim Restore on November 13, 2024, and the Affidavit of Rémi Doiron dated February 24, 2025, outlines the documents provided to the Defendant and the efforts made to locate other documents. While there is no timeline outlined in the Order, the Court does find it odd that compliance with the Order occurred on February 5, 2025, and February 21, 2025, followed by an Affidavit sworn February 21, 2025, mere days prior to when the Defendant's Motion was originally scheduled to be heard on February 28, 2025. There is no indication as to the reason for the delay in the response and its coincidence with the timing of the hearing of the Defendant's Motion.

82. Based on the above comments, the Court declines to find Clear Claim Adjusters Inc. and Claim Restore in contempt. The Court is not satisfied beyond a reasonable doubt that Clear Claim Adjusters Inc. and Claim Restore are in contempt.

Production of Documents from Third Parties

83. The Defendant seeks production of relevant documents in the possession and control of Clear Claims Adjusters Inc. and Claim Restore. Specifically, the Defendant seeks production of all

emails in the possession and control of Claim Restore and Clear Claim Adjusters Inc. which were exchanged or copied on between Matthew Brannon (the Plaintiff), Matthew Brannon's father, Jonathan Frenette, Rémi Doiron, Bayne Campbell and K² Property Management pertaining to 476 Robinson Street. The Defendant maintains this item was comprised in undertaking 24 set out in the Order. Undertaking 24 required the Plaintiff "to request from K² Property Management, all email exchanges with Matthew Brannon, Matthew Brannon's father, Jonathan Frenette, Rémi Doiron and Bayne Campbell pertaining to 476 Robinson."

84. The Order, arising from the Motion for third party production, required Claim Restore and Clear Claim Adjusters Inc. to provide information and/or documents as it relates to undertakings 9, 14, 15, 24, 30, 31, 32, 33, 34, 35, 37 and 38, as set out in Schedule A – List of Outstanding Undertakings. Implicit in this portion of the Order is for Claim Restore and Clear Claim Adjusters Inc. to provide emails involving these parties within their possession to the Defendant.
85. Claim Restore and Clear Claim Adjusters Inc. provided the following answer on February 5, 2025: "Request was made with no response, K² Property Management is in bankruptcy." Claim Restore and Clear Claim Adjusters Inc.'s narrow and limited reading of the Order warrants a further direction to produce relevant documents in the possession and control of Clear Claims Adjusters Inc. and Claim Restore which relate to the undertakings set out in the Order.
86. It is important to remember that the request for these documents arose from an incident at discovery, where, in attempting to answer a question, Matthew Brannon located an email on his phone which had not been previously disclosed as part of the Affidavit of Documents. The email in question from Kevin Everill of K² Property Management to Matthew Brannon and others from early February 2020 states the following:

I had Puroclean in today and they are coming back in tomorrow to do some more analysis. In the meantime they wanted me to find out who you are insured by?

Through conversation the estimate should be 80-100k in repairs. We may be able to get it covered if we can pursued (*sic*) them the damage was caused by an ice dam.!

Clearly there is an issue with the installation on the metal siding but we may be able to get it covered.

87. The Defendant asserts that this email casts serious concerns about causation and as a result the Defendant seeks information relating to this message. In other emails, K² Property Management employees express some suggestions that the property issues may be related to renovations completed at the property prior to its purchase by the Plaintiff.
88. The Court is satisfied that the information sought meets the test for production, which is relevance to a matter in issue (*B & W Contracting v Codys Real Estate Development*, 2002 NBQB 299 at paras 11 to 13, *The Wawanesa Mutual Insurance Company v Wade*, 2015 NBCA 43 at paras 19 and 20). Production is also ordered on the basis that the Plaintiff, who may have had a copy of these documents at one time, admits to his poor record keeping. The Court is satisfied the questions and the information sought by the Defendant is not a witch hunt, it is a search for the truth. The Defendant is seeking answers to causation and seeking proof of actual expenses incurred by the Plaintiff.
89. The Court orders that Claim Restore and Clear Claim Adjusters Inc. produce all emails in their possession and control which were exchanged or copied on between the Plaintiff, Matthew Brannon, Matthew Brannon's father, Jonathan Frenette, Rémi Doiron, Bayne Campbell and K² Property Management pertaining to 476 Robinson Street.

Additional Discovery

90. The Defendant seeks further discovery of the Plaintiff on the further production received under Rule 32.02(1) of the *Rules of Court*. At the hearing, the Plaintiff consented to this request.
91. The Defendant also seeks oral examination for discovery, under Rule 32.10 of the *Rules of Court*, of Jonathan Frenette of Clear Claim Adjusters Inc. and of Rémi Doiron of Claim Restore. The Defendant requests discovery based on the failure to provide relevant and material information in the possession of Clear Claim Adjusters Inc. and Claim Restore and based on their possession of material information pertaining to the claim.
92. Counsel for Clear Claim Adjusters Inc. and Claim Restore indicated to the Court that his clients were prepared to attend discovery if the Motion against them was withdrawn on a without costs basis. This information was communicated to the Defendant's Counsel on July 15, 2025, by email and was, as confirmed by the Defendant's Counsel, missed and not responded to. At the hearing of the Motion, given the legal expenses incurred to attend the hearing, Clear Claim Adjusters Inc. and Claim Restore opposed the request to attend for examinations for

discovery. The Defendant rightly pointed out that resolution of this question prior to the hearing would not have resolved the other issues to be addressed in the Motion.

93. The Court may grant leave to examine any person under Rule 32.10 of the *Rules of Court* where the Court is satisfied that the person has information relevant to a material issue in the action, where the party bringing the motion has not been able to obtain the information sought, and where it would be unfair to require the party bringing the motion to proceed to trial without discovery.

32.10 Discovery Where Leave Is Required

(1) The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action.

(2) An order under paragraph (1) shall not be made unless the court is satisfied that

(a) the party making the motion has been unable to obtain the information from other persons whom he is entitled to examine for discovery, or from the person he seeks to examine;

(b) it would be unfair to require the party making the motion to proceed to trial without having the opportunity of examining the person; and

(c) the examination will not

(i) unduly delay the commencement of the trial of the action,

(ii) entail unreasonable expense for other parties, or

(iii) result in unfairness to the person whom the party making the motion seeks to examine.

94. As discussed in the previous sections of this decision, Clear Claim Adjusters Inc. and Claim Restore provided documents and information arising from the Order. However, both refused to answer follow-up questions arising from some of the information provided. It is clear from the discovery transcripts that Clear Claim Adjusters Inc. and Claim Restore were involved with the Plaintiff in the investigation of damages and remediation efforts at the property. On several occasions, Matthew Brannon attempted to answer questions at the examination for discovery and simply referred to Clear Claim Adjusters Inc. or Claim Restore given their involvement in the matter. It is on this basis, and based on the information sought, that the Court deems it appropriate to allow discovery of Clear Claim Adjusters Inc. and Claim Restore. Additionally,

the Court, in assessing the fairness aspect of ordering these parties to attend discovery, considers the financial interests of Clear Claim Adjusters Inc. and of Claim Restore in this matter. The Court is satisfied, in the circumstances of this case, that it would be unfair to require the Defendant to proceed to trial without access to the information sought.

95. Recognizing the Plaintiff has consented to further discovery under Rule 32.02(1) of the *Rules of Court*, the Court orders the oral examination for discovery, under Rule 32.10 of the *Rules of Court*, of Jonathan Frenette of Clear Claim Adjusters Inc. and of Rémi Doiron of Claim Restore.

Costs

96. The Defendant seeks solicitor-client costs on the Motion. The Defendant argues the disregard of the Court Order and the adjournments required based on the Plaintiff and third parties' conduct warrant the payment of solicitor-client costs.
97. Solicitor-client costs are the exception, not the norm. The Court has broad discretion in terms of costs awards (Rules 59.01, 59.03 and 59.08 of the *Rules of Court*).
98. The Court declines to award solicitor-client costs, however, it recognizes that the filing of this Motion was necessary due to the disregard of the Plaintiff towards the prior Order of the Court. The Court directs the payment of costs on the Motion considering the volume and extent of preparation and submissions prepared by the Defendant, the complexity of the Motion, and the conduct of the Plaintiff, of Clear Claim Adjusters Inc., of Claim Restore and of K² Property Management.
99. The Court directs Clear Claim Adjusters Inc. and Claim Restore to pay costs of \$5,000 each to the Defendant on the Motion. The Court is not satisfied that these parties acted promptly upon being served with the Order, despite the absence of a compliance deadline in the Order. The Motion against Clear Claim Adjusters Inc. and Claim Restore was served on the parties shortly after its issuance yet it was complied with mere days before the hearing.
100. As previously mentioned in the contempt portion of this decision, the Court directs payment of \$10,000 in costs by K² Property Management to the Defendant. K² Property Management was hired by the Plaintiff to manage the property and was significantly involved in the management of the property, the reporting of the damages, and the steps taken to remedy the issues. Its disregard for the Court Order and for two Motions which proceeded before this Court must be sanctioned. As such, the Court awards the Defendant costs of

\$10,000 from K² Property Management for the established disregard and failure to comply with the Court's Order.

101. As for the Plaintiff, the Court orders the payment of \$7,500 in costs to the Defendant. The Motion was necessary and warranted considering the Plaintiff's continued disregard for undertakings which were to be provided to the Defendant. The Court also considered the Plaintiff's unresponsiveness to attempts to move the matter forward.

DISPOSITION

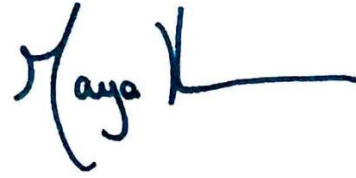
102. The Court orders as follows:

- a. **Dismissal of the action for failure to comply with the *Rules of Court* and Order of the Court** – The request of the Defendant is denied. The Court imposes a monthly case management conference call during which the parties will advise the Court of their progress in moving the matter forward, until the Court deems it appropriate to discontinue the case management conference calls.
- b. **Stay of proceedings and security for costs** – The request of the Defendant is denied.
- c. **Contempt of Court** – The request of the Defendant is denied vis a vis the Plaintiff, Clear Claim Adjusters Inc. and Claim Restore. The request of the Defendant is granted as it pertains to K² Property Management. The Court finds K² Property Management to be in contempt of Court and sanctions K² Property Management to pay \$10,000 in costs to the Defendant.
- d. **Production of Documents by Clear Claim Adjusters Inc. and Claim Restore** - The request of the Defendant is granted. The Court orders Clear Claim Adjusters Inc. and Claim Restore to produce all emails in their possession and control which were exchanged or copied on between Matthew Brannon (the Plaintiff), Matthew Brannon's father, Jonathan Frenette, Rémi Doiron, Bayne Campbell, and K² Property Management pertaining to 476 Robinson Street.
- e. **Additional discovery** – The request of the Defendant is granted. The Plaintiff has consented to further discovery under Rule 32.02(1) of the *Rules of Court*. The Court orders the oral examination for discovery, under Rule 32.10 of the *Rules of*

Court, of Jonathan Frenette of Clear Claim Adjusters Inc. and of Rémi Doiron of Claim Restore.

- f. **Costs** – The Plaintiff shall pay the Defendant \$7,500 in costs. Clear Claim Adjusters Inc. and Claim Restore shall each pay \$5,000 in costs to the Defendant. K² Property Management shall pay \$10,000 in costs to the Defendant (as referenced in paragraph (c) above).

DATED at Moncton, New Brunswick, this 23rd day of January 2026.

A handwritten signature in blue ink, appearing to read 'Maya', followed by a long horizontal line extending to the right.

Justice Maya Hamou
Court of King's Bench of New Brunswick