

CITATION: Way v. Schembri, 2025 ONSC 946
COURT FILE NO.: CV-12-457 and CV-11-42
DATE: 2025/02/11

SUPERIOR COURT OF JUSTICE-ONTARIO

RE: AL WAY, KINGSLEY FINANCIAL INC. and TRIUMPH FINANCIAL HOLDINGS INC., Plaintiffs

AND:

GORDON SCHEMBRI, SCHEMBRI FINANCIAL LIMITED, 41 COLUMBIA INC., KING & COLUMBIA INC., 69 COLUMBIA ST. INC., 5 RITTENHOUSE INC., THE BLOCK INC., THE BLOCK I INC., and THE BLOCK II INC., Defendants

BEFORE: Gibson J.

COUNSEL: A. Winton and P. Underwood, Counsel for the Plaintiffs (Moving Parties)

J. Wortzman and C. Allen, Counsel for the Defendants (Responding Parties)

HEARD: November 19, 2024

ENDORSEMENT

Overview

[1] These complex, protracted, contentious and document-intensive actions have been joined together on consent. By direction of the Regional Senior Judge Central South Region, I have been appointed to hear all motions for both proceedings pursuant to Rule 37.15 of the *Rules of Civil Procedure*.

[2] The issue on this motion is how the court should respond to the Responding (“Schembri”) Parties’ prolonged, repeated and intentional failure to comply with their documentary disclosure obligations in the face of an undertaking, two court orders, including a peremptory order, and a direction from the court to comply with the first order within a reasonable time frame. The Moving (“Way”) Parties submit the only response that properly addresses Schembri’s failure to comply with his fundamental production obligations is the dismissal of Schembri’s action and striking Schembri’s defence to Way’s action.

[3] In September 2018, Schembri undertook to produce certain documents if their pending motion for summary judgment was dismissed. That motion was dismissed on appeal in November 2020. Since then, instead of producing the documents, Way says that Schembri resiled from his undertaking and breached the *Rules of Civil Procedure* and this court's orders by failing to produce the documents.

[4] This court ordered Schembri to produce the subject documents on September 26, 2023. On October 30, 2023, I directed him to comply with the order within a reasonable time frame. Schembri only sought assistance to review the documents for relevance and to manage a voluminous document set after this court set peremptory deadlines on February 27, 2024. Even then, those steps were manifestly inadequate: he did not retain any outside help to assist in reviewing millions of documents for relevance and hired a single individual to prepare the documents for electronic production. He knew since March 2024 that his efforts would lead to a breach of the peremptory order and yet he made no effort to vary the order.

[5] These reasons explain why I have concluded that Schembri's conduct justifies the dismissal of his claim in the Schembri Action and the striking of his defence in the Way Action.

Background

The Actions

[6] This motion arises out of a 15-year-old dispute between Al Way and Gordon Schembri regarding a real estate development joint venture. In 2007, Schembri and Way formed Triumph Financial Holdings Inc. ("Triumph") to pursue real estate development opportunities in Waterloo, London, and Oshawa. They entered into a shareholders' agreement in April 2008 to govern Triumph's operations. Among other things, the shareholders' agreement required Schembri to offer Way a right of first refusal with respect to any real estate opportunities that Schembri or his company Schembri Financial Limited acquired in the Regional Municipality of Waterloo (the "ROFR Clause").

[7] The parties' relationship broke down in 2008 and spawned a dispute that resulted in two related actions (the "Actions"): one commenced by Schembri and certain associated companies in 2010 (the "Schembri Action") and one brought by Way and associated companies in 2012 (the "Way Action").

The primary allegation in the Way Action is that Schembri breached the ROFR Clause in connection with at least 26 properties in the Kitchener-Waterloo area that Schembri developed without first offering the opportunities to Triumph (the “Lands”).

[8] The Actions are being tried together and share common discoveries, but no significant progress has been made since November 2020. By his Notice of Motion dated October 18, 2024, Way moves for an Order dismissing the claim in the action in Kitchener Court File No. CV-42-11, and striking the defendants’ Statement of Defence in the action in Kitchener Court File No. CV-457-12.

Schembri Refuses to Produce Outstanding Documents

[9] In May 2017, Schembri brought a motion for summary judgment to dismiss the Way Action on the basis that the ROFR Claim is unenforceable. During cross-examination in September 2018, Schembri was asked to produce documents relating to the Lands (the “Outstanding Documents”). Schembri refused to produce these documents on the basis that his motion would, if successful, dispose of the Way Action. However, he undertook to deliver a supplementary affidavit of documents that would include the Outstanding Documents if his summary judgment motion was not successful.

[10] On February 1, 2019, Sloan J. granted Schembri’s motion for summary judgment and dismissed the Way Action. Way successfully appealed and the Court of Appeal reversed the dismissal on November 2, 2020 (*Way v. Schembri*, 2020 ONCA 691). A week after the Court of Appeal’s decision, on November 7, 2020, Way’s counsel wrote to Schembri’s counsel, advising that he was required to produce the Outstanding Documents forthwith and that “We cannot move these actions forward ... until we receive these documents”. Schembri did not respond.

[11] Four years later, Schembri still has not fully produced the required documents.

[12] On December 30, 2020, Way’s counsel followed up on his previous letter. On January 4, 2021, Schembri’s counsel advised that Schembri would not produce the Outstanding Documents because he was seeking leave to appeal the Court of Appeal’s decision to the Supreme Court of Canada. Way’s counsel’s response the next day noted that an application for leave does not stay the obligation to comply with an undertaking and did not justify Schembri’s refusal to deliver the

Outstanding Documents.

[13] Schembri did not respond and did not seek a stay.

[14] The Supreme Court of Canada dismissed Schembri's application on April 15, 2021. On April 28, Way's counsel again sought production of the Outstanding Documents. Five weeks later, Schembri's counsel responded. This time, Schembri refused to produce the Documents on the basis that he was bringing a motion to bifurcate the Way Action.

Schembri Fails to Comply with September 2023 Production Order

[15] Way brought a motion for an order to produce the Outstanding Documents (the "Production Motion"). This court heard the Production Motion and Schembri's Bifurcation Motion on May 15, 2023. By reasons dated September 26, 2023 (*Way v. Schembri*, 2023 ONSC 5425) the court dismissed Schembri's motion and granted the Production Motion.

[16] This court found, among other things, that the Outstanding Documents are "relevant and necessary to determine liability", that they are not only relevant to the Way Action but also Way's defence to the Schembri Action, that no prejudice would result from producing the documents, and that a production order would not be disproportionate. The court ordered Schembri to produce a further and better affidavit of documents, including, but not limited to, the Outstanding Documents (the "Production Order").

[17] Schembri sought leave to appeal the Production Order to the Divisional Court. He decided to wait to see if the motion was granted before he began to comply with the Order. But at an October 30 case conference, this Court directed Schembri to comply with his production order within a reasonable time frame unless a stay was granted.

[18] On November 8, 2023, Schembri asked Way to consent to a stay of the Production Order. His counsel wrote, "If your client will not consent, we will be required to prepare a full motion record and will seek costs of the motion." The next day, Way refused to consent to a stay. Notwithstanding the indication in his counsel's letter, Schembri never sought a stay, yet he still failed to comply with the Production Order and the court's October 30 direction.

[19] Schembri’s motion for leave to appeal to the Divisional Court was dismissed on January 5, 2024 (*Way v. Schembri*, 2024 ONSC 13). On January 15, Way’s counsel again requested production of the Outstanding Documents. Schembri did not respond.

[20] In light of this, in February 2024, Way requested a case conference to impose a timetable for production of the Outstanding Documents. Way specifically asked that the order be made peremptory, that it be a “last-chance direction”, and that the Defendants’ pleading be struck if they failed to comply with the schedule.

[21] Schembri said that he was waiting for the outcome of this case conference before taking steps to comply with the Production Order.

[22] At the February 27, 2024, case conference, I directed Schembri to produce documents in respect of two properties by April 30, with the remaining Outstanding Documents to be produced by August 30, 2024. The Order was made “peremptory on the Defendants” (the “Peremptory Order”).

Schembri Fails to Comply with February 2024 Peremptory Production Order

[23] By letter sent April 29, 2024, Schembri’s counsel wrote to advise that he would be unable to meet the April 30 deadline. Schembri’s counsel committed to delivering the documents by May 16, and on that basis, Way agreed to briefly extend the deadline for the first tranche.

[24] Schembri missed the August 30 deadline to produce the remaining Outstanding Documents without any advance notice or explanation. After Way’s counsel wrote on September 3 to inquire as to the missed deadline, Schembri’s counsel asserted that a “server issue” prevented Schembri from delivering the remaining documents on time. This response did not commit to a date by which the remaining documents would be produced. Way sought a third case conference to address Schembri’s failure to comply with the Production Order.

[25] In response to this motion, it emerged that the “server issue” Schembri relied on to justify missing the peremptory deadline occurred in early July 2024 and was resolved by July 11, more than seven weeks before the deadline. It was clearly not the cause of the missed deadline.

[26] Schembri's affidavit confirms he did not take any material steps to comply with his undertaking to produce the documents, or the Production Order, until after the Peremptory Order was made on February 27, 2024.

[27] Instead of acting diligently to comply with his disclosure obligations under the *Rules*, his undertaking, and the Court's orders and direction, Schembri took a "wait and see" approach, although he did not bother to seek a stay of the production order.

[28] His affidavit discloses that, even after his motion for leave was dismissed on January 5, 2024, he waited until after the February 27, 2024, case conference to begin "compiling" documents for production.

[29] Even after the Peremptory Order, Schembri continued to take inadequate steps to comply with his obligations. Despite his awareness of the volume of documents that needed to be reviewed, he initially only assigned a single employee to assist, on a part time basis, with a review for relevance. Together, Schembri and this employee each spent about seven hours per week reviewing "millions" of documents. He did retain legal professionals to assist with reviewing the documents, which his e-discovery technician Ms. Ayling confirmed is typical for document review projects.

[30] This failure to invest adequate resources to comply with the Peremptory Order is not due to a lack of financial wherewithal: Mr. Schembri, or his companies, own many properties.

[31] On October 30, 2024, two months after the peremptory deadline, Schembri delivered a second partial tranche of 60,000 documents. He now says he will not be able to deliver the remaining Outstanding Documents until February 28, 2025, 6 months after the peremptory deadline and 17 months after the Production Order.

[32] Schembri acknowledged in 2018 that the documents were relevant. Instead of litigating the merits of the proceedings, there have been many letters between counsel, multiple motions and repeated case conferences. These unnecessary attendances have led to wasted costs, time and court resources.

Positions of the Parties

[33] The Plaintiffs (Way) bring this motion seeking an order dismissing the Schembri Action and striking the Statement of Defence in the Way Action. They submit that this is how the court should respond to what they say is Schembri's prolonged, repeated and intentional failure to comply with his documentary disclosure obligations in the face of an undertaking, two court orders, including a peremptory order, and a direction from the court to comply with the first order within a reasonable time frame.

[34] The Defendants (Schembri) submit that Way is seeking the extraordinary relief of striking Schembri's Statement of Defence and the Statement of Claim in its own action against Way in the context of a 14-year-old litigation, involving many parties, where over \$100,000,000 in claimed damages are in issue. Schembri asserts that the circumstances of this matter do not meet the threshold necessary for a court to exercise its discretion to grant the extreme relief of striking a pleading and would be a disproportionate response. Schembri asserts that, as of the date of the motion, he has already produced 136,646 documents in respect of 22 of the 26 properties in issue, and that production for the remaining four properties (about 1,000,000 further documents) will be produced as soon as possible.

Issues

[35] The issue raised on this motion is whether the Schembri Action should be dismissed, and Schembri's defence in the Way Action struck, due to Schembri's repeated failures to disclose relevant documents, comply with his undertaking, and comply with orders and the direction of this court, including the Peremptory Order.

Law

Governing Principles and Legal Test

[36] The *Rules of Civil Procedure* provide the court with the authority to enforce its interlocutory orders by imposing sanctions on defaulting parties. Subrule 30.08(2) provides that:

Where a party fails to ... 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 ... dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant.

[37] More generally, subrule 60.12 empowers the court to, where a party has failed to comply with an interlocutory order, “dismiss the party’s proceeding or strike out the party’s defence”.

[38] The legal test and associated principles regarding orders of this type are set out in depth in the Court of Appeal’s decision in *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310. The principles set out there have been followed extensively and expressly re-affirmed by the Court of Appeal in more recent decisions, *Rimon v. CBC Dragon Inc.*, 2024 ONCA 128, and *Kanata Utilities Ltd. v. 1414610 Ontario Inc. (MAG Eastwood Construction)*, 2024 ONCA 367.

[39] In *Falcon Lumber*, Justice Brown emphasized the “fundamental obligation” to produce relevant documents, which he described at para. 41 as lying “[at] the heart of the rules governing actions in the Superior Court of Justice”. He noted that litigants’ “fundamental obligation to disclose relevant documents and produce those that are not privileged should be performed automatically by a party”, and that compliance with this obligation is essential to achieving the overarching goal of the justice system, to provide the public with a just, expeditious, and efficient determination of civil proceedings. He also identified the negative consequences that occur when a litigant breaches this duty: increased costs, waste of court time and delay.

[40] Justice Brown then enumerated at paras. 50 - 55 the general principles that guide the court’s exercise of its discretion on a motion under subrule 30.08. He explained that:

- (a) An order to strike out a pleading is not limited to “‘last resort’ situations”, or even cases where a party has breached a prior production order or orders. Rather, the breaching party should generally have “a reasonable opportunity to cure its non-compliance before [an order] striking out its pleading”;
- (b) The court should consider six “common sense factors” in deciding whether to strike the pleading: (i) whether the failure was deliberate; (ii) whether it was “clear and unequivocal”; (iii) whether there is a reasonable explanation for default, along with a “credible commitment to cure the default quickly”; (iv) whether the default is material or minimal in nature; (v) the extent to which the breaching party remains in default; and (vi) the impact on the court’s ability to “do justice in the particular case”;

- (c) Consideration of the merits will be limited as it is to be expected that a party with a strong claim or defence would “comply promptly with its disclosure and production obligations”;
- (d) The court should also consider whether an order striking the pleading would be the proportional remedy, bearing in mind the fact that “Parties who default on their documentary disclosure and production obligations impede the ability of our civil justice system to provide the fair, timely, and cost-effective adjudication of civil disputes”, and the efforts of the Supreme Court and other stakeholders in the justice system to ensure accessible and cost-effective access to justice; and,
- (e) Orders to strike a pleading for non-compliance with discovery obligations are a means to “ensure that the civil justice process delivers justice that is proportionate, timely, and affordable”. With that in mind, the court should consider the extent to which a defaulting party’s conduct has increased the other party’s costs and the extent to which it has delayed the final adjudication of the case on its merits.

[41] Subsequent jurisprudence has noted that, in adjudicating a motion under Rule 30.08, the court should strive to balance the competing interests of “having claims defences adjudicated on their merits and ensuring that the administration of justice is not undermined by litigants failing to comply with court orders and their statutory obligations as litigants”: *Ponnampalam v. Thiravianathan*, 2023 ONSC 1361, at para. 6.

[42] In summary, the case law recognizes that orders to dismiss a claim or strike a party’s defence, while exceptional, play an important role in protecting the legal system from delay and indeed maintaining the integrity of the justice system by reinforcing the importance of compliance with court orders.

Analysis

Schembri Had Ample Opportunity to Comply with His Obligations

[43] This motion does not take Schembri by surprise. He has had numerous chances to comply with his obligations and numerous warnings that continued failure to comply would lead to this

motion. He has had a “reasonable opportunity” to cure his default.

[44] The Peremptory Order was made following Schembri’s failure to comply with the Production Order after five months, which was itself made due to Schembri’s prolonged refusal to comply with his undertaking and disclosure obligations.

[45] It was open to Schembri to bring a motion to seek to vary the timetable order if technical issues outside his control were the real cause of his failure to comply with the order. He would have faced a high evidentiary burden given the importance of compliance with court orders and his history of breaching disclosure obligations, but this cannot excuse the approach he took instead: ignoring the peremptory order. In oral submissions, Schembri’s counsel characterized his failure to promptly fulfill his disclosure obligations as a “business decision.” It was not. It was disregard of a court order.

[46] Given the seriousness of a breach of a peremptory order, the explanation required by a party seeking to overcome this presumption is high. The party must identify “the most compelling reason” to excuse the failure, and that “something beyond his control has caused his failure to comply with the order”. Mere inadvertence or the failure to devote sufficient resources is insufficient to meet the “high onus” to justify non-compliance. Moreover, “the public interest in the administration of justice to prevent delay and wasted costs weigh very heavily and any injustice to the defaulting party comes a long way behind those two factors”: *Jourdain v. Ontario* (2008), 91 O.R. (3d) 465 (SCJ), at para. 28.

[47] Schembri cannot meet this standard. He never sought an extension to the peremptory timeline, and even if he had, could not meet the test to justify an extension. He has been given more than sufficient opportunity to comply with his obligations.

“Common Sense” Factors Favour Dismissal and Striking Defence

[48] Each of the factors identified by Justice Brown in *Falcon Lumber* support an order dismissing the Schembri Action and striking his defence in the Way Action. Schembri’s breaches have been deliberate and unequivocal. They have seriously delayed this proceeding and threatened to undermine the administration of justice. They are deserving of appropriate sanction, and the court is

well within its authority to do so under the *Rules*.

[49] *Deliberateness of conduct*: Schembri’s breach of the *Rules* and the Court’s orders is deliberate. He was aware of his obligations and was reminded of them many times. He was aware of the volume of relevant documents in his possession and the amount of work required to prepare them for production. Nevertheless, by his own admission, he intentionally chose to delay efforts to comply with this obligation until long after he was already in default. This unreasonable delay was compounded by his failure to assign adequate resources to complete the process on time. There is no doubt that Schembri had the means to deliver the Outstanding Documents by August 30, 2024. His decision not to do so should weigh heavily against him.

[50] *Clarity of failure*: There is no dispute about Schembri’s failure to comply with his undertaking and the court’s orders. The court found in September 2023 that Schembri had undertaken to produce the Outstanding Documents if his summary judgment motion failed. He spent three years avoiding the obligation to honour his undertaking. He then ignored the September 2023 order for five months. Further, the terms of the February 2024 peremptory order were clear: he was required to produce the first tranche of documents by the end of April and the second tranche by the end of August. After receiving a brief indulgence to produce the first tranche, Schembri failed to produce a single document between May 15 and August 30, 2024, even though his e-discovery technician had completed her processing of thousands of documents by that date.

[51] *Reasonable explanation and commitment to quick remedy*: Schembri has not provided a reasonable explanation for his delay and breach of the court’s orders. Indeed, his own evidence confirms his lack of diligence: he testified that he intentionally failed to take steps to collect relevant documents until after the February 27, 2024, case conference. He says he quickly came to the belief that the timeline for [production] would be “impossible to meet”, yet he did not ask for an extension to the August 30 timeline. He simply chose to breach the order, relying on a nine-day server interruption in early July as his excuse when challenged.

[52] This breach is the continuation of Schembri’s intentional disregard for the court’s directions. Schembri was repeatedly warned that his previous motions did not relieve him of his production obligations. He intentionally failed to seek a stay and instead chose to breach the *Rules* and this

court's orders and force Way to seek the Court's assistance.

[53] Schembri admits he did not begin reviewing the Outstanding Documents for relevance until March 2024. This is itself a breach of his obligations: Justice Brown held in *Falcon Lumber* that waiting three years before seeking relevant documents from one's bank "does not satisfy a party's obligation of prompt and automatic disclosure and production".

[54] After Schembri belatedly started to make efforts to comply with the Production Order, his approach continued to be insufficient. He had only had one other person assist him on a regular basis with reviewing the millions of documents in his files, and they each devoted about seven hours per week to the task. Two other employees devoted 100 hours, total, between March and October 2024—about 6 hours each per month. Schembri did not retain an e-discovery service provider until April 2024.

[55] Moreover, the evidence of the consultant he retained, Tracy Ayling, makes clear that it was Schembri's delay in collecting and delivering the documents which led him to breach the court-ordered timeline. For example, he did not provide the "first tranche" of documents to her for processing and relevance review until late April. He did not provide her with any documents from his own records between May and September 2024. He waited until late September, after the peremptory deadline to produce all of the remaining documents, before delivering any further documents for processing, and he failed to produce documents that she had ready in July. To the extent Schembri submits his failure to meet the peremptory deadline was the result of delays in processing the documents for production, Ms. Ayling refutes that position: her evidence confirms that her turnaround time for the production was "exceptionally responsive" and that it was not possible to prepare documents for production any faster due to the late delivery by Schembri.

[56] Although Schembri now says he will deliver the remaining documents by the end of February 2025, he provides no reasonable basis for confidence on which to accept this projection, particularly given his failure to comply with the orders of this court in the past.

[57] *Material quality of default:* Schembri's default has undoubtedly been material. He was ordered to produce documents six years after having undertaken to do so. He failed to produce them to an overwhelming degree. Although he has now made belated partial production of Outstanding

Documents, his evidence is that at about 92% of the total documents remain outstanding as at the time of the hearing for this motion. The Court of Appeal has noted that, where a party has only come into “very late compliance” with a production order by only producing documents shortly before the motion date, an order to strike is appropriate: *Advanced Farm Technologies-JA v. Yung Soon Farm Inc.*, 2021 ONCA 569, at para 14.

[58] *Continuing default*: As noted above, Schembri remains substantially in default of the Court’s peremptory production order. As of the date of this motion, he has not produced the large majority of documents.

[59] *Impact of default on Court’s ability to do justice*: Schembri’s default has frustrated the court’s ability to adjudicate the Actions on the merits. As explained by Justice Brown in *Falcon Lumber*, the obligation to produce relevant documents is a “fundamental” feature of the civil justice system. That is because, without a proper evidentiary record, it is not possible to fairly resolve legal disputes. This has been borne out here. Rather than advancing to trial and a resolution on the merits, Way had to spend the last four years fighting for Schembri’s documents, with Schembri playing the “delay game”. This has both deprived the parties of a resolution and caused a serious expenditure of limited judicial resources.

Order Sought is Proportionate to Schembri’s Defaults

[60] An order to dismiss Schembri’s claim and strike his defence to Way’s claim would be a proportional remedy for his many defaults given the extent to which they have increased Way’s costs of litigating the action and delayed the adjudication of the Actions.

[61] Way had to bring two motions (including this one) and schedule multiple case conferences to address Schembri’s continued failure to produce the Outstanding Documents. As Justice Brown noted at para. 48 in *Falcon Lumber*: “[m]otions are not cheap; they add significantly to the overall costs of a civil case”.

[62] In *Rimon v. CBC Dragon Inc.*, 2023 ONSC 3710, aff’d 2024 ONCA 128, a case which similarly involved the responding party’s partial compliance with production orders after several motions, Justice Osborne at para. 59 found “the conduct of the Defendants has increased the costs

of the non-defaulting parties, the Plaintiffs, particularly when I consider the costs of the successive motions ... and the repeated and continued efforts to follow-up on these defaults over a two-year period”. In the present case, Way has been seeking disclosure for over four years. Similarly, in *Advanced Farm Technologies*, the Court of Appeal noted at para. 15 the “prejudice to the plaintiff, through the ongoing cost of chasing the appellant to fulfill its procedural obligations and to participate in the litigation”.

[63] The extensive delay in this case also supports a finding that the order sought is proportionate. In September 2018, Schembri undertook to provide the Outstanding Documents if his summary judgment motion failed, which it did as of November 2, 2020. I do not accept the submission of Schembri’s counsel that this undertaking is somehow “spent.” Despite the passage of four years, Schembri has only produced a small portion of the documents he undertook to deliver. As a result of this delay, the Actions have been unable to progress.

[64] Significantly shorter delays have previously been held sufficient to justify an order striking pleadings for failure to comply with production obligations. In *Rimon*, for example, the delay was two years; in *Kanata Utilities*, it was two-and-a-half years; in *Advanced Farm Technologies*, it was approximately a year.

[65] The nature of the case further supports Way’s motion. As Justice Osborne noted in the first instance decision in *Rimon*, this is a “dispute about money”, and sophisticated commercial parties like the ones here should be prepared to produce relevant documents on a timely basis.

[66] As Gomery J.A. observed for the Court of Appeal in *Rimon* at paras. 24 - 27:

[24] The motion judge was alive to the particular facts of this case. He nonetheless found that Brown J.A.’s observation in *Falcon Lumber* about the fundamental importance of documentary production in any action is “particularly apt here, where the documents that are the subject of the outstanding production requests, and multiple court orders, go to the very heart of the issues in this action on the merits.” This led him to conclude that the *Falcon Lumber* analysis applied:

While the action was “front-end loaded” in the sense that a significant motion was brought early on, the Defendants have still had a very significant period of time to produce the relevant documents as they were, given the terms of the adjournment of the motion as originally ordered by Cavanagh, J., clearly aware of their obligations, there were successive orders directing them to comply with their obligations, and yet they have still not done so.

[25] I cannot fault this reasoning. The *Rules* are intended to ensure that parties to civil suits disclose all relevant information in a timely manner at all stages of a proceeding. A party’s failure to comply with their disclosure obligations increases the costs of litigation and frustrates the opposing party’s ability to move the proceeding forward. The *Falcon Lumber* principles apply even more forcibly when a party fails to disclose records when repeatedly ordered by the court to do so within a specific deadline. In such a case, the defaulting party does not simply delay or prevent an adjudication on the merits but undermines the court’s authority.

[26] The motion judge applied the correct principles of law and evaluated the record before determining that the order sought by the respondents was just. As observed in *Falcon Lumber*, at para. 73, citing *Starland Contracting Inc. v. 1581518 Ontario Ltd.*, [2009 CanLII 30449 \(ON SCDC\)](#), 252 O.A.C. 19 (Div. Ct.), at para. [26](#):

The authority to dismiss proceedings for repeated failure to comply with court orders and flagrant disregard for the court process is an essential management tool. A case management judge or master who has a continuous connection with an action, the parties and their counsel is well-positioned to monitor the conduct of the participants throughout the proceedings, and to determine whether anyone is deliberately stalling, showing bad faith or abusing the process of the court when deadlines are missed and defaults occur under procedural orders.

[27] I agree that the appellants' failure to comply with the successive orders of the court to disclose critical records and information, including a final "last chance" order, opened the door to the exceptional discretionary order made here.

Conclusion

[67] Schembri has consistently "ragged the puck" with regard to his disclosure obligations, and made calculated decisions to either not comply, or not devote sufficient resources to comply with the court's orders in a responsible and timely fashion. The court has a responsibility to prevent waste and uphold the integrity of the justice system by enforcing compliance with its orders. The evidence on this motion demonstrates only a grudging, tardy and insufficient investment of resources to comply with the order. Appellate jurisprudence makes clear that the court can and should take appropriate steps, up to and including dismissal of claims and striking of pleadings, to ensure that parties follow its orders.

[68] I find that striking Schembri's statement of defence in the Way Action, and the claim in the Schembri Action, is an appropriate and proportionate remedy in the circumstances. Way's motion is granted.

Order

[69] The Court Orders that:

1. the Schembri Action (CV-42-11) is dismissed; and,
2. the Statement of Defence in the Way Action (CV-457-12) is struck.

Costs

[70] The parties are encouraged to agree upon appropriate costs. If the parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs) by email to my judicial assistant at mona.goodwin@ontario.ca and to Kitchener.SCJJA@ontario.ca. The Moving (Way) Parties may have 14 days from the release of this decision to provide their submissions, with a copy to the Responding (Schembri) Parties; Schembri a further 14 days to respond; and Way a further 7 days for a reply, if any. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue

of costs as between themselves. If I have not received any response or reply submissions within the specified timeframes after Way's initial submissions, I will consider that the parties do not wish to make any further submissions and will decide on the basis of the material that I have received.

M. Gibson J.

Date: February 11, 2025