CITATION: Uzelac v. Dufferin Aggregates 2025 ONSC 3723
COURT FILE NO.: CV-17-576946
DATE: 20250623

SUPERIOR COURT OF JUSTICE - ONTARIO

2025 ONSC 3723 (CanLII)

RE: GOJKO UZELAC and G. UZELAC TRUCKING, Plaintiffs (Respondents)

AND:

DUFFERIN AGGREGATES, a division of CRH CANADA GROUP INC. and 470474 ONTARIO LIMITED, carrying on business as AGGREGATE TRANSFER SYSTEMS, Defendants (Appellants)

BEFORE: L. Brownstone J.

COUNSEL: *C. Michael J. Kealy and Mirel Giugaru*, for the Plaintiffs/Respondents

Mari Maimets, for the Defendant/Appellant Dufferin Aggregates

HEARD: June 18, 2025

REASONS FOR DECISION

[1] The defendant Dufferin Aggregates ("Dufferin") appeals Associate Justice McGraw's decision extending the time for the plaintiffs (together, "Uzelac") to set the action down for trial: *Uzelac v. Dufferin Aggregates, a division of CRH Canada Group Inc.*, 2025 ONSC 896.

[2] Uzelac commenced their claim on June 12, 2017. The claim alleges, among other things, that Dufferin wrongfully terminated Uzelac's employment or dependent contractor services. Given the six-month suspension of time periods due to the pandemic, the claim was required to be set down for trial by December 12, 2022.

[3] Pleadings were exchanged in the summer of 2017. Uzelac wished to proceed to early mandatory mediation in September 2017. Dufferin's first position was that examinations for discovery should proceed before mediation. Examinations were scheduled for January 2018. On December 19, 2017, the defendant ATS served its first notice of change of lawyers.

[4] By January 2018, the plaintiff had served affidavits of documents, but the defendants had not. Uzelac therefore suggested examinations be rescheduled. In January 2018, ATS served its second notice of change of lawyers. On May 8, 2018, Dufferin served its first notice of change of lawyers. At the end of May 2018, Dufferin advised that it would agree to mandatory mediation before examinations if ATS would, and delivered an unsworn affidavit of documents. On June 1,

2018, facing receivership, ATS advised it no longer intended to defend the action and therefore would not participate in mediation. It ceased participating in the action thereafter.

[5] From June to October 2018, Uzelac sought Dufferin's agreement to appoint a mediator. In October 2018, Dufferin stated it required discoveries to occur first, and that it was not available for examinations until January 2019.

[6] There followed a period of delay until August 2020, at which time Uzelac's counsel canvassed Dufferin's availability for examinations for discovery. In September 2020, Dufferin delivered a second notice of change of lawyers. Discoveries were conducted on November 9 and 10, 2020, and transcripts were received in December 2020. By the time of the status hearing before Associate Justice McGraw, Uzelac had not delivered their answers to undertakings.

[7] In May 2021, Dufferin advised it would not agree to attend mediation until it received answers to undertakings. Dufferin repeated the same position a year later and asked that Uzelac circulate a timetable given that Dufferin believed the set-down date was June 12, 2022. Uzelac sought a case conference to seek the court's assistance in establishing a timetable and scheduling a summary trial. Uzelac requested the appointment of a roster mediator. Dufferin refused because it was of the view that the five-year anniversary was imminent. Dufferin required a status hearing at which it advised it would seek the dismissal of the action.

[8] Uzelac followed up on their request for the appointment of a mediator several times in the fall of 2022 and January 2023. Mediation was scheduled without prejudice to Dufferin's right to assert its position at the status hearing that the action should be dismissed. The parties were required to file their statements of issues to the mediator by March 13, 2023. Dufferin delivered its statement of issues on March 20, 2023, and Uzelac did not deliver one. A certificate of non-compliance was issued against Uzelac, after which they again requested a case conference to seek a timetable for the completion of steps in the action. Dufferin stated it would seek the dismissal of the action. For various reasons, the status hearing did not occur until October 30, 2024.

[9] Associate Justice McGraw's decision extending the time for Uzelac to set down the matter for trial and imposing a timetable for the remaining steps was released on February 10, 2025.

[10] The parties agree that a motion judge's decision at a status hearing is discretionary and entitled to deference on appeal. The appellate court is not to reweigh the evidence and substitute a different discretionary decision for that of the associate justice: *Prescott v. Barbon*, 2018 ONCA 504, 141 O.R. (3d) 616 at para. 11. The appellate court may, however, set aside a decision that was made on an erroneous legal principle, was infected by a palpable and overriding error of fact, or gives no or insufficient weight to relevant considerations: *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544 at para. 16; *H.B. Fuller Co. v. Rogers*, 2015 ONCA 173 (CanLII) at para 19.

[11] The parties also agree that Associate Justice McGraw set out the proper test to be applied on a motion at a status hearing at para. 16 of his decision:

2025 ONSC 3723 (CanLII)

> The well-established test on a motion for a status hearing is two-fold and conjunctive. The plaintiff bears the onus of demonstrating that: i.) there is an acceptable explanation for the delay; and ii.) that if the action were allowed to proceed, the defendant would not suffer non-compensable or actual prejudice [citations omitted].

2025 ONSC 3723 (CanLII)

[12] Dufferin argues that Associate Justice McGraw erred in finding there was an acceptable explanation for delay. It argues that Associate Justice McGraw made palpable and overriding errors of fact and based his decision on erroneous legal principles.

[13] With respect to the factual errors, Dufferin points to two lengthy periods of delay for which, it asserts, the plaintiff provided no explanation. The first is from October 2018 (or January 2019, when defendant's counsel was first available for examinations) until August 2020, and the second is from November 2020 to April 2022.

[14] Dufferin states that the respondent did not provide sufficient evidence to explain those two periods of delay, and that Associate Justice McGraw made palpable and overriding errors in finding that the plaintiff had done so. Dufferin argues there was no evidence to support the following facts found by Associate Justice McGraw at para. 26:

> …The Plaintiffs' explanation is that there were internal supervision and file management issues at Plaintiffs' counsel's Firm. Specifically, when the lawyer with carriage of the matter returned from maternity leave, the file was transferred back to her then transferred again to an associate where it remained dormant. In March 2023, the lawyer with carriage left on an early maternity leave due to repeated lapses in file management.

[15] Dufferin points to evidence in the record that the lawyer had returned from maternity leave by September 2018 and evidence that it was only in August 2020 that a different lawyer sought to move the file forward.

[16] The affidavit of an articling student at Uzelac's counsel's firm states:

> 4. I have confirmed with Uzelac's counsel's Human Resources Department, and I verily believe to be true, that between the period of October 5, 2018, and September 1, 2020, counsel of record for Uzelac returned from maternity leave and the lawyer who assumed carriage of Uzelac's file during said leave transferred the file back to her. Shortly after, the file was then transferred to another associate at the firm.
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> 5. I have been informed by various partners at Levitt LLP [Uzelac's counsel] and verily believed to be true, that in March 2023, counsel with carriage of this matter was pregnant and commenced an early maternity leave due to repeated lapses in the management of her files.

[17] Dufferin argues this is an insufficient basis for Associate McGraw's findings of fact. It argues that the affidavit insufficiently specifies the source of the information and belief upon which it is based, in contravention of the Rules. It fails to provide specifics of the lawyers involved and the issues that gave rise to the delay. Dufferin argues the affidavit ought not have been relied on at all by Associate Justice McGraw given its fatal frailties.

2025 ONSC 3723 (CanLII)

[18] Dufferin did not move to strike the affidavit before Associate Justice McGraw. The cases it cites in support of its position that the affidavit ought not have been admitted were cases in which a party had moved to strike an affidavit. In this case, Dufferin agreed before Associate Justice McGraw that he should address the affidavit's frailties as a matter of weight.

[19] This is exactly what Associate Justice McGraw did. He held:

> [27] I have concerns with the Plaintiffs' evidence regarding this period of delay. The Plaintiffs filed an affidavit from a law student in which the lawyer who had carriage of the file is not named nor are the Partners at the Firm who advised the student on certain statements in her affidavit. There is also no direct evidence from the Plaintiffs. At the same time, the affiant was not cross-examined and CRH has not moved to have it excluded. Accordingly, I am satisfied that the appropriate approach is to give this evidence less weight and balance it within the larger context and circumstances. In considering this explanation, I am mindful that the Court of Appeal has stated that the preference that actions be decided on their merits is even stronger where there is delay due to counsel's inadvertence:
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>> "The court's preference for deciding matters on their merits is all the more pronounced where delay results from an error committed by counsel. As the court stated in *Habib,* at para. 7, "[O]n a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel." In *Marché*, Sharpe J.A. stated, at para. 28, "The law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor" (citations omitted). (*H.B. Fuller Company et al.* v. *Rogers (Rogers Law Office),* 2015 ONCA 173 at para. 27).
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> [28] Notwithstanding the evidentiary issues, I accept the Plaintiffs' explanation that some of the delay during this time period, and later in the proceedings, was due to inadvertence arising from maternity leaves and related file management and supervision issues, and not the intentional actions of counsel or the Plaintiffs to delay the litigation. In my view, this is the kind of counsel inadvertence which the Court of Appeal has held should not be visited upon the client to deprive them of the right to proceed with their action.

[20] Associate Justice McGraw clearly turned his mind to the problems with the affidavit evidence, considered it in the context of the entire record before him, and drew inferences and made factual determinations on the basis of the record. This is precisely his task and falls squarely within his discretion. He provided reasons for his decision, directly facing the frailties of the affidavit in the context of the entire record. It is not for me as a reviewing court to interfere with that exercise of his discretion or to substitute my view of the factual record. There was evidence on which Associate Justice McGraw based his decision. The findings he made were available to him on the record. He made no palpable and overriding errors, and there is no basis for me to interfere with his factual findings.

[21] Dufferin also makes several arguments about legal errors said to have been committed by Associate Justice McGraw. Dufferin complains about Associate Justice McGraw's application of the test on a status hearing and his use of the term "guided by" in reference to the two-part test. Associate Justice McGraw stated:

> [18] Although the court must be guided by the applicable two-part test, the determination as to whether to allow an action to proceed is discretionary and determining whether it would be unfair for the action to be dismissed requires a consideration of the circumstances and a balancing of the parties' respective interests [citations omitted]. While Rule 48.14 was designed to have some "teeth", the court should not take a rigid or purely formalistic approach to the application of timelines that would penalize parties for technical non-compliance and frustrate the fundamental goal of resolving disputes on their merits [citation omitted]. The court must apply a contextual approach weighing all of the relevant factors to determine the order which is just in the circumstances [citations omitted]

[22] Dufferin argues Associate Justice McGraw thereby misdirected himself on the legal test, which is more than simply a guide.

[23] I disagree.

[24] A review of Associate Justice McGraw's reasons show that he carefully instructed himself on the "well-established" legal test, and on the application of the test. He noted that the test was not to be applied rigidly or formalistically. Associate Justice McGraw properly noted that whether an explanation for delay is acceptable depends on the facts of each case. The explanation need only be adequate to be acceptable; it need not be faultless. He noted the action's progress had not been ideal, and found that material periods of delay had been contributed to by Uzelac.

[25] He went on to apply the test, finding that despite their lapses in moving the matter forward, Uzelac had provided an acceptable explanation for the delay. Further, Uzelac had established that Dufferin would not suffer non-compensable prejudice, a conclusion that Dufferin does not challenge. The use of the word "guided' does not change the fact that Associate Justice McGraw applied the test. Indeed, the very language used by Associate Justice McGraw with which Dufferin

2025 ONSC 3723 (CanLII)

takes issue has been approved by the Divisional Court in a different decision: *Integrated Business Concepts Inc. v. Akagi*, 2023 ONSC 1496 at para. 8.

[26] Dufferin also argues that Associate Justice McGraw erred in applying the legal test, in that he did not require Uzelac to discharge their onus, but rather improperly balanced the conduct of the parties. Dufferin argues that Associate Justice McGraw has engaged in an impermissible "third step" of the two-part test, and that the cases that performed a balancing exercise are no longer good law: *Cascadia Fine Art Limited Partnership v Gardiner Roberts LLP*, 2014 OSNC 6602 (Div Ct).

[27] Dufferin acknowledges that Associate Justice McGraw is entitled to consider Dufferin's conduct but argues that he "went too far". Dufferin argues Associate Justice McGraw scrutinized its conduct, and not the plaintiff's' conduct, when it is the plaintiff who bears the onus for explaining the delay. Dufferin argues Associate Justice McGraw went beyond the contextual approach and did away with the plaintiff's onus.

[28] Associate Justice McGraw was somewhat critical of Dufferin's resistance to the appointment of a mediator, a mandatory step, even seven months before the expiry of a set down date, until it had the answers to undertakings from Uzelac. He noted that "[t]he courts have held that a defendants' refusal to schedule mandatory mediation, even in the face of the impending expiry of a set down date, is a relevant factor in assessing delay and whether the set down date should be extended [citations omitted]."

[29] However, Associate Justice McGraw also repeatedly referred to and considered the periods in which plaintiffs' counsel's failed to move the matter forward. He considered plaintiff counsel's error in not providing its statement of issues to the mediator as part of his assessment of the context. The evidence before him revealed that counsel was attempting to provide the mediator with what was needed, but failed to do so. Associate Justice McGraw was entitled to consider this context, and the difficulties expressed by counsel, to make inferences and findings about the lawyer's inadvertence, and to exercise his discretion to permit the matter to be set down for trial and decided on its merits.

[30] I agree that it would have been an error had Associate Justice McGraw treated the contextual approach as a factor that eliminated the onus on Uzelac to satisfy both parts of the status hearing test. However, I find that Associate Justice McGraw did not commit this error. He did not apply the contextual balancing separately from the two-part test. Rather, he referred to the context in applying the first branch of the two-part test, an approach recently endorsed by the Court of Appeal in *Henderson v. Kenora-Rainy River Districts Child & Family Services*, 2022 ONCA 387 at para. 10.

[31] Further, Dufferin argues that Associate Justice McGraw ran afoul of the Court of Appeal's admonishment that flexibility should not be "permitted to descend into toleration of laxness": *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544, 112 O.R. (3d) 67 at para. 42.

2025 ONSC 3723 (CanLII)

[32] I do not agree. Associate Justice McGraw carefully considered the entirety of the progress of the case and the reasons for delay. He summarized the factors and his findings as follows:

> [37] Having considered and weighed all of the relevant factors discussed above, I conclude that the Plaintiffs have shown cause that the time to set this action down for trial should be extended. This is largely based on the Plaintiffs' intention as reflected by their efforts to move this action forward; the impact of counsel advertence related to file management; the Defendants' contribution to the delay through 5 counsel changes, a lawyer removal motion and [Dufferin's] positions with respect to mandatory mediation; and the fact that documentary and oral discoveries have been completed…

[33] In sum, Associate Justice McGraw applied the proper legal test. He did not misdirect himself or misapply the test. He made no palpable and overriding errors of fact. There is no basis for appellate intervention.

[34] The appeal is dismissed. By agreement of the parties, Dufferin shall pay Uzelac costs in the amount of $12,500 all inclusive.

L. Brownstone J.

Date: June 23, 2025

2025 ONSC 3723 (CanLII)