

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** John Jordan and William Neilson, Plaintiffs

**AND:**

The Commonwealth Mutual Insurance Group and Finnegan Insurance Brokers Ltd., Defendants

**BEFORE:** Justice M. Fraser

**COUNSEL:** M. Switzer, Counsel for the Plaintiffs

K. Schultz, Counsel for Commonwell Mutual Insurance Group

M. Kitigawa, Counsel for Finnegan Insurance Brokers Ltd.

**HEARD:** November 22, 2021

**ENDORSEMENT**

- [1] The Plaintiffs have brought a motion to, among other things, compel the Defendant, Commonwell Mutual Insurance Group (“CMIG”) to provide a further and better affidavit of documents and to compel a representative of CMIG to reattend at discovery to answer questions which were refused at its examination for discovery and to reattend to answer questions it had undertaken to answer.
- [2] The Plaintiffs also ask for an order compelling the Defendant, Finnegan Insurance Brokers Ltds (“Finnegan”) to provide a sworn affidavit of documents and to compel a representative to reattend at discovery to answer questions refused, to answer questions answered by counsel, for the cost of reattendance, and to refrain from improper interruptions and lengthy objections.
- [3] CMIG has brought a cross-motion to, among other things, compel the Plaintiffs to answer certain questions it maintains were improperly refused at the examination for discovery of the Plaintiffs.
- [4] At the hearing I was advised by Plaintiffs’ counsel, Mr. Switzer, that the issues on the Plaintiffs’ motion had narrowed.
- [5] Mr. Switzer advised that the Plaintiffs were no longer needing an order requiring the production of a further and better affidavit of documents from CMIG or Finnegan.
- [6] Mr. Switzer also advised that he was satisfied with both CMIG’s and Finnegan’s answers to undertakings and the answers provided on questions taken “under advisement”. He also

advised that he was no longer advancing “the issue of starting the examination for discovery on time” or “the issue of producing a different representative from Commonwell.”

[7] The Plaintiffs still seek the following relief:

1. That Finnigan return to answer questions at an examination for discovery for an additional 30 minutes;
2. That the cost of the court reporter for the continuation of the examination for discovery of Finnegan shall be paid by Finnegan;
3. That CMIG return to answer questions at an examination for discovery for an additional 45 minutes;
4. That the cost of the court reporter for the continuation of the examination for discovery of CMIG be paid by CMIG;
5. That counsel for the defendants refrain from interrupting the examination for discovery of their client except to understand the question put to their client in order to determine whether the question is a proper question or to object to an objectionable question;
6. That the representative of CMIG have his affidavit of documents and the documents in schedule “A” and “B” with him when he returns to answer questions at an examination for discovery;
7. That counsel for the Defendants state the grounds for any objection briefly and succinctly;
8. That counsel for the Defendants refrain from answering questions for their client;
9. That counsel for a Co-defendant shall refrain from interrupting the examination for discovery of a defendant;
10. That the representative of Finnegan answer questions 421, 431, 435, 436, 450, 454, 456, 464 and 474, if posed at the continuation of the examination of Finnegan;
11. That the representative of CMIG answer questions 2, 5, 6, 15, 16, 17, 20, 21, 25, and 31, if posed at the continuation of the examination of CMIG;
12. That if the parties are unable to resolve the costs of this motion, then they may make written submissions within 30 days.

[8] With respect to the cross-motion, I was advised at the outset of the hearing that the substantive claims were resolved as between the parties.

- [9] In this respect, Mr. Switzer advised that the Plaintiff, Neilson consented to an order that the refusals made at his examination for discovery and as more particularly set out in Schedule “A” to the Notice of Cross-Motion be answered forthwith.
- [10] Also, the parties have agreed to an order that the Appraisal Agreement dated February 23, 2021 regarding the premises located at 155 Christie Lake Road, Perth, Ontario is binding on the parties, except for the items that were specifically excluded in the appraisal and without prejudice to the other claim for damages sought by the Plaintiffs.
- [11] Finally, it was agreed that the costs of the cross-motion and of the Responding Motion Record served in response to the Plaintiffs’ motion would be addressed by way of written submission.

**Background:**

- [12] This matter arises from a fire-loss which took place on November 3, 2018 at 155 Christie Lake Road, Perth, Ontario K7H 3C6 (the “property”). A small hunting cabin was located on the property and was completely destroyed by fire.
- [13] The property was insured by under a policy of insurance which provided up to \$55,000 in coverage for the cash value of the property (\$50,000.00 for the main dwelling, \$5,000.00 for a detached structure).
- [14] The action was commenced under Simplified Procedure, Rule 76, and the aggregate damages sought are \$100,000.00.
- [15] These motions follow the Examinations for Discovery of the Plaintiffs, which took place on July 15, 2019 and the Examinations for Discovery of the Defendants which occurred on April 14, 2021.
- [16] The Plaintiffs’ counsel served a Notice of Motion on June 9, 2021, an Amended Notice of Motion on June 13, 2021 and an Amended Amended Notice of Motion on November 1, 2021. Plaintiff’s counsel did not serve an affidavit to support the motion until November 15, 2021. He did not serve a Motion Record or a Factum.
- [17] CMIG’s Cross-motion was served November 11, 2021.
- [18] The Plaintiff’s counsel submitted the following in argument:
- (a) With respect to their request for further time, *the Rules of Civil Procedure* were amended so that what was originally two hours was expanded to three. Mr. Switzer argued that even though this action was commenced prior to the amendments, that they should be “grandfathered” in so that he should be allowed three hours of examination effective as of the date the Rule changed.
- (b) In terms of the return to answer additional questions if granted counsel for Finnegan terminated the examination before it was completed.

(c) In terms of CMIG, Mr. Switzer argued that the discovery was not proceeding in an appropriate manner and that he concluded he needed to get directions.

(d) In terms of interruptions which occurred during both examinations, Mr. Switzer submitted that certain rules in examinations for discovery are to be followed so that if a lawyer objects to a question, the deponent must nevertheless answer. If a question is confusing, then the lawyer may interject. Similarly, if information is privileged, then counsel may refuse. Otherwise, it is incumbent on counsel to allow the question be asked in full, and while counsel may object to it on certain grounds, the objection should be succinct. In this case, the Plaintiffs assert that the CMIG and Finnegan (through their counsel) did not follow the rules. Rather, it is submitted that counsel were answering the questions instead of their clients and their objections would turn into long diatribes when their objections should have been concise.

**Analysis:**

- [19] I have read the transcripts from the Examinations for Discovery of the Defendants. A total of two hours and forty-seven minutes were spent.
- [20] The examination of CMIG, in particular, clearly got off to a rocky start. This seems to have set the tone for the remainder of the day and for the most part, the examinations were interspersed with argument and rather intemperate remarks until counsel for the Plaintiffs terminated the examination.
- [21] However, I don't attribute this to the actions of counsel for either CMIG or Finnegan.
- [22] I propose to set out an example of what transpired.
- [23] The examination of CMIG began as follows (See pages 3 to 9 of transcript):

*Upon commencing on Wednesday, April 14, 2021 at 1:38 p.m.*

*MR. SWITZER: So we are not able to start the examination for Mr. Daprato because Ms. Schultz is not able to connect. Mr. Lamm is here as counsel for Mr. Daprato but is not prepared to proceed without Ms. Schultz present. We are going to wait another minute, at which point, if we don't have her connected, we will have to adjourn and reschedule for another day. Off the record.*

*--- Off the record at 1:39 a.m.(sic.)*

*--- On the record at 1:40 a.m.(sic.)*

*MR. SWITZER: Madam Reporter, you can go ahead and swear the witness in.*

*MS. SCHULTZ: Can I just have a moment?*

*MR. SWITZER: No. We've been waiting for you. You're ten minutes late. We're starting.*

*MS. SCHULTZ: Counsel –*

*MR. SWITZER: We're on the record.*

*MS. SCHULTZ: -- the ID that was given to me did not work. Okay? Just give me a moment please, to --*

*MR. SWITZER: All right. We're going to stay on the record but go ahead. What do you need to do?*

*MS. SCHULTZ: I need to be able to see who's on the Zoom. I can't even see. All that's showing up right now is your face. I would like to be able to see who's on.*

*MR. SWITZER: Okay. Well, is there somebody that can help you with that?*

*MS. SCHULTZ: No. I just need a moment. You started speaking the second I got onto the Zoom and I'm just asking for a moment to see who's here. So I can't see the court reporter. Is the court reporter here?*

*MR. SWITZER: She's here. We're on the record. Mr. Santini is here. I'm here and Mr. Daprato is here.*

*MS. SCHULTZ: Okay. And there should also be my associate.*

*MR. SWITZER: There is no one else that we can see. There was a Mr. Lamm that was here earlier but I don't know what's come of him.*

*MS. SCHULTZ: So let's find out what happened to 2.*

*MR. SWITZER: Anything else before we begin?*

*MS. SCHULTZ: No. I'm just not ready to begin yet. I'm sorry. Just give me a moment.*

*MR. SWITZER: Ms. Schultz, we've been waiting 12 minutes to start.*

*MS. SCHULTZ: And I'll give you the 12 minutes at the end of the three hours and I'm sorry for that. It's Covid and things happen with us doing things remotely and we all need to work together.*

*MR. SWITZER: Okay, but are you going to pay my client's time for me to sit here for 12 minutes. I don't think so, so can we start --*

*MS. SCHULTZ: You know, Mr. Switzer? I'm quite convinced that your time and your costs are going to be the eventual subject matter of the decisionmaker's time and that's okay. So --*

*MR. SWITZER: I'm going to ask one more time. Are you ready to start because –*

*MS. SCHULTZ: I'm not ready to start. Madam Court Reporter, my colleague has been kicked off of the Zoom invite twice and he is texting me to tell me that he has been kicked out twice so --*

*MR. SWITZER: Ms. Schultz, I'm going to start in one minute. You've got 60 seconds to --  
--- (unintelligible cross-talking)*

*MS. SCHULTZ: You're not asking my clients --*

*MR. SWITZER: -- get our coffee and do what you've --*

*MS. SCHULTZ: -- any questions --*

*MR. SWITZER: -- got to do and then we're going to start.*

*MS. SCHULTZ: Mr. Switzer, you're being unreasonable. We're not going to start until we can start. Please behave. Thank you.*

*Madam Court Reporter, can I please hear from you?*

*THE REPORTER: Yes, I'm right here. I--*

*MS. SCHULTZ: So Mr. Lamm was on.*

*THE REPORTER: Yes, he was.*

*MS. SCHULTZ: Can you please let him back in? He's trying to get back in.*

*MR. SWITZER: Are we on the record, Madam Reporter --*

*ARBITRATION PLACE TECH: Hi counsel and Sonia, I'm from Arbitration place. I can confirm that right now there is nobody in the waiting room and nobody was kicked out. It may have just been a lost connection.*

*MR. SWITZER: All right. Okay so let's just --*

*MS. SCHULTZ: Okay so he is trying to get back in and he's texted me that he's trying to get back in. And I'm so sorry. So what do we have? We've got the court reporter and Arbitration Place? Why do we have both?*

*ARBITRATION PLACE TECH: Because as Arbitration Place, we admit everybody into the Zoom room and because there was no technician booked, I would pass the hosting duties to Sonia and then that would be the end of that. But I can confirm right now that there is nobody in the waiting room.*

*MR. SWITZER: All right. Then let's begin.*

*MS. SCHULTZ: It's just that Mr. Lamm is trying to get in.*

*MR. SWITZER: Okay, well, you're representing Mr. Daprato so I think we can get started without him.*

*MS. SCHULTZ: Mr. Switzer, I have a brain lesion and I'm visually impaired. I have my colleague on this so that he can assist me so that we didn't have to have any break in the scheduling of this. So I need him to be on. He's going to take notes for me because of my physical accommodation needs. So I'm asking you, please, to give me a moment. It was very difficult to get onto this Zoom call because the password was not working. You know that my colleague was on before. He has since been kicked out and he is doing his best to get back in right now. So please, just be professional and let us get through this. You continuously saying we're getting on the record before we can do this isn't helpful. I've already confirmed that if you need the extra 13 minutes at the end, you can have the extra 13 minutes.*

*MR. SWITZER: How long do you expect us to wait.*

*MS. SCHULTZ: Well, I can see that he seems to be in now.*

*MR. SWITZER: All right. We're on the record. Madam Reporter, will you swear the witness, please.*

*MS. SCHULTZ: All right. Thank you. And thank you for that very kind response, Mr. Switzer. That was impressive.*

*MR. SWITZER: Okay. Can you stop talking please, so I can get on with, my discovery? Madam Reporter, can you please try to swear this witness in so we can get started.*

*AFFIRMED: SCOTT DAPRATO*

[24] The examination deteriorated further.

[25] While I do not intend to reference all portions of the transcript, I include the following excerpt (See: pages 35 to 40):

*MR. SWITZER: Q. Do you know why the estimate prepared by Ryan Bennett (ph) wasn't included in your affidavit of documents?*

*A. Is that an estimate recently prepared?*

*Q. It is more recent, yes.*

*MS. SCHULTZ: Can you please show that estimate that you are referring to?*

*MR. SWITZER: It was the one that was provided to you earlier today, Mr. Daprato?*

*MS. SCHULTZ: Sorry. You were communicating with my client earlier today?*

*MR. SWITZER: Q. Do you know the one I'm referring to Mr. Daprato?*

A. Yes. It's an estimate that I received this morning so it wasn't in the documents when they were previously provided to me because it only came in this morning –

MS. SCHULTZ: Sorry. And Scott –

MR. SWITZER: Is that the first time that you –

MS. SCHULTZ: -- please stop speaking for now. I'd like to be advised what document you are referring to.

MR. SWITZER: Well, we seem to know what we're talking about.

MS. SCHULTZ: So show it on the screen and we will mark it as an exhibit because I don't know what you're talking about. And when you say provided to my client earlier today, please advise who provided that to my client.

MR. SWITZER: Mr. Daprato, your lawyer is asking you a –

MS. SCHULTZ: No, he's not answering the question. I would like to see the document and I would like to you (sic.) advise who provided it to my client.

MR. SWITZER: So you are asking me questions now?

MS. SCHULTZ: You are asking about a document. Please show the document and mark it as an exhibit.

MR. SWITZER: No. It's my discovery. I'll decide what I'm going to mark and not mark as an exhibit. He's seen it. He's looking at it. You either catch up or we're going to move on without you. Sorry, counsel.

MS. SCHULTZ: Okay. We're not going to answer questions about a document that you're not will (sic.) to put on the record. Continue.

MR. SWITZER: Okay.

MS. SCHULTZ: And just to be clear, counsel, for the record –

MR. SWITZER: Stop. Stop.

MS. SCHULTZ: -- because you've already –

MR. SWITZER: -- Stop. Stop –

MS. SCHULTZ: Excuse me. I get to make –

MR. SWITZER: Stop talking –

MS. SCHULTZ: -- it clear in the record.

MR. SWITZER: -- Stop interrupting. –

MS. SCHULTZ: Mr. Switzer, stop –

MR SWITZER: I got the refusal and I'm moving on –

MS. SCHULTZ: -- stop it –

MR. SWITZER: -- so stop interfering with my discovery.

MS. SCHULTZ: Stop it. I am not interfering –

MR. SWITZER: Yes you are –

MS SCHULTZ: -- I'm –

MR. SWITZER: -- you're talking. You can make a brief objection and –

MS. SCHULTZ: -- I'm trying –

MR. SWITZER: -- that's it.

MS. SCHULTZ: I have asked you to –

MR. SWITZER: You're whining and –

MS. SCHULTZ: identify the document.

MR. SWITZER: -- and complaining and babbling on –

MS. SCHULTZ: You are refusing to –

MR. SWITZER: -- exhaustively.

MS. SCHULTZ: identify a document, Mr. Switzer. Shame on you. Continue.

MR. SWITZER: Ms. Schultz –

MS. SCHULTZ: Please continue.

MR. SWITZER: This is my last warning to you, Ms. Schultz. You can make an objection and you can state a brief reason for the objection, but the whining and the complaining and that yelling and the carrying on, that nonsense, I'm not going to tolerate it. So, make an objection if you have you (sic.), and that's fine, I'm going to move on, I won't argue it with you, but stop with the nonsense.

MS. SCHULTZ: The misogynistic comments –

MR. SWITZER: Stop.

*MS. SCHULTZ: -- will not --*

*MR. SWITZER: Stop.*

*MS SCHULTZ: -- assist --*

*MR. SWITZER: Stop.*

*MS. SCHULTZ: -- with the motion.*

*MR. SWITZER: Stop interrupting. Stop interrupting.*

[26] The examination then was terminated as a result of the following exchange:

*MR. SWITZER: -- I have asked him if he is able to answer questions about the step-by-step claims process that was followed in this case a date-by-date basis without reference to the claim notes and he has said, no, he can't answer those question without referring to the claim notes. So I'm asking you, are you prepared to reconsider the objections earlier today or do they stand?*

*MS. SCHULTZ: They stand. Go ahead and ask your questions. If he is able to answer (sic.) question, he will, and if not, we'll take them under advisement and do out best to answer the questions.*

*MR. SWITZER: All right. In that case, I'm going to adjourn the discovery because we're going to need some directions on how to deal with this. I'm not going to have the witness try to guess at these answers if he says he needs to reference the notes.*

*Do you have anything you wish to add, anyone, before I go off the record? Thank you. Off the record.*

[27] Having read the transcripts, I have concluded that the excerpts set out above are representative of the tone and dialogue of the exchanges which occurred between counsel at the examinations.

[28] Mr. Switzer submitted that the cases support his position that the counsel for CMIG and Finnegan improperly interfered with the conduct of his examination and that he was entitled therefore to terminate the examination when he did and to ask for a further opportunity to examine the representatives of the Defendants with the court first censuring their counsel on their conduct.

[29] In this respect and in terms of the proper conduct at an examination for discovery, Mr. Switzer brought to my attention the following quote from *Asnani v. Edgecastle Holdings Inc.* [2009] O.J. No. 2658, 178 A.C.W.S. (3d) 332 (at paragraph 8):

*A party is entitled to have a lawyer present on discovery to give legal assistance to the party being examined but that assistance is to consist of the lawyer listening to the particular question and deciding whether the question is proper or improper because it is*

*irrelevant or invades solicitor/client privilege or is confusing or is incomprehensible or is otherwise improper and if so, taking objection to the question on the record in the manner contemplated. Counsel for the party or parties being examined must not interfere any more than is necessary in order to perform their proper function. They must not answer the question for a party unless there is no objection even if the answer given by the party is wrong.*

[30] Mr. Switzer also relied upon *Kudlak v. Sutherland* [2005] O.J. No. 3395; *Cooperthwaite v. Damboise* [2003] O.J. No. 6343; and *Madonis v. Dezotti*, [2010] ONSC 2180.

[31] The principles set out by these authorities are not disputed by Defendants' counsel.

[32] However, I do not agree with Mr. Switzer's suggestion that counsel for the Defendants were interfering with his ability to ask questions and obtain answers from the witnesses. To the contrary, the transcript is replete with instances where Mr. Switzer appeared, intentionally or not, to be preventing the representative who was produced from having the benefit of appropriate representation.

[33] The transcript reveals that Mr. Switzer was frequently argumentative and intemperate in his language and refused reasonable accommodations to Defendants' counsel. As seen from the transcript excerpt, he initially attempted to proceed in a way that would deprive CMIG from having its counsel ready and present, and he then attempted to prevent that counsel the opportunity to properly state an objection on the record, and he would not, for instance, share a document so that counsel for the client was able to understand the nature of what was being asked.

[34] Mr. Switzer chose to end both examinations abruptly notwithstanding that it is clear that the representatives who had been produced remained willing to answer further questions at that time.

[35] Quite frankly, any delay or interference at the examinations which interrupted Mr. Switzer's ability to complete his examinations in the manner he wished seems more attributable to the disruptive and quite frankly rude manner in which he conducted the examinations.

[36] I do not conclude that in such circumstances the Plaintiffs should be entitled to an opportunity for their counsel to conduct a further examination of the Defendants.

[37] As such, the relief sought by the Plaintiffs in subparagraphs 1 to 9 as set out in paragraph [7] above fails.

[38] I will next address the refusals in turn:

A. Examination of Lori McMunn (on behalf of Finnegan):

Qu 462 – This question was not actually refused but was answered;

Qu 485, 486, 487, 488, 489, 490, 491, 526, 527, 529, 530, 531, 532, 533 and 535 – These questions pertain to the conduct of the plaintiffs related to the fire. This is not an issue between the parties and irrelevant to any issue pleaded.

Qu 492 – This seeks an opinion from Ms. McMunn which is opinion, not fact, and is hypothetical and speculative. As such the refusal was proper.

Qu 542 – The process for writing hunt camp policies is not an issue in the lawsuit. I consider the refusal to be proper.

B. Examination of Scott Daprato (on behalf of CMIG):

Qu 5 and 6 – These questions pertain to why documents for which privilege was claimed in Schedule B were will physically with the representative. This question was answered by counsel for CMIG and was appropriately in this instance.

Qu 15, 16 and 17 – The personal contact information for a former employee who worked for CMIG, was properly refused.

Qu 25 – This question was properly refused as it had been already asked and answered by the representative.

Qu 31 – the issue of whether the representative knew anyone in the underwriting department is not relevant to any issue pleaded and therefore was properly refused.

**Conclusion:**

[39] An Order shall issue as follows:

1. With respect to the Plaintiffs' motion, the relief sought by the Plaintiffs as outlined more particularly in subparagraph [7] 1.- 9. herein is hereby denied;
2. With respect to CMIG's cross-motion:
  - (a) On consent, the Plaintiff, Neilson shall answer the questions refused at his examination for discovery and as more particularly set out in Schedule "A" to the Notice of Cross-Motion forthwith.
  - (b) On consent, the Appraisal Agreement dated February 23, 2021 regarding the premises located at 155 Christie Lake Road, Perth, Ontario shall be binding on the parties, except for the items that were specifically excluded in the appraisal and without prejudice to the other claim for damages sought by the Plaintiffs.
3. If the parties are not able to agree on costs arising from the motion and cross-motion, then the Defendants may make written submissions as to costs, no more than three pages in length, double-spaced, in addition to any pertinent offers and draft bill of costs within 30 days. The Plaintiffs will have 15 days from receipt of the Defendants' submissions to

respond on the same basis. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves.

A handwritten signature in black ink, appearing to read "M. Fraser J.", is written above a horizontal line.

M. Fraser J.

**Date:** October 6, 2022