Docket: 2009-1717(IT)G

BETWEEN:

WILLIAM A. KELLY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion to Dismiss heard on common evidence with the motions of *Steve Djelebian* 2009-1332(IT)G and *Glen R. Mullins* 2009-1336(IT)G on December 4, 2013, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Samantha Hurst
	Donna Dorosh

ORDER

The Motion is granted with costs in the amount of $2,500 payable to the Respondent forthwith. The Appeal is therefore dismissed.

Signed at Ottawa, Canada, this 18th day of December 2013.

"David E. Graham"

Graham J.

Docket: 2009-1332(IT)G

BETWEEN:

STEVE DJELEBIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion to Dismiss heard on common evidence with the motions of *William A. Kelly* 2009-1717(IT)G and *Glen R. Mullins* 2009-1336(IT)G on December 4, 2013, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:	W. A. Kelly, Q.C.
Counsel for the Respondent:	Samantha Hurst Donna Dorosh

ORDER

The Motion is granted with costs in the amount of $1,500 payable to the Respondent forthwith. The Appeal is therefore dismissed.

Signed at Ottawa, Canada, this 18th day of December 2013.

"David E. Graham"

Graham J.

Docket: 2009-1336(IT)G

BETWEEN:

GLEN R. MULLINS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion to Dismiss heard on common evidence with the motions of *William A. Kelly* 2009-1717(IT)G and *Steve Djelebian* 2009-1332(IT)G on December 4, 2013, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:	W. A. Kelly, Q.C.
Counsel for the Respondent:	Samantha Hurst
	Donna Dorosh

ORDER

The Motion is granted with costs in the amount of $1,500 payable to the Respondent forthwith. The Appeal is therefore dismissed.

Signed at Ottawa, Canada, this 18th day of December 2013.

"David E. Graham"

Graham J.

Citation: 2013 TCC 411
Date: 20131218
Docket: 2009-1717(IT)G

BETWEEN:

WILLIAM A. KELLY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2009-1332(IT)G

AND BETWEEN:

STEVE DJELEBIAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2009-1336(IT)G

AND BETWEEN:

GLEN R. MULLINS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Graham J.

[1] The Appellants are appealing the denial by the Minister of National Revenue of limited partnership losses that they claimed in the 1990's. The Respondent has brought a motion to dismiss the Appeals pursuant to *Rule* 64 of the *Tax Court of*

Canada Rules (General Procedure) for failure to prosecute the Appeals with due dispatch.

[2] In addition to being one of the Appellants, Mr. Kelly, who is a lawyer, represents himself and the other two Appellants in these Appeals.

History

[3] The history of these Appeals is set out in detail in the Affidavits of Charlene Cho filed by the Respondent and the Affidavit of Mr. Kelly. I will highlight only the key events described therein[1].

[4] The following is a short history of the initial stages of Mr. Kelly's appeal[2]:

(a) Mr. Kelly filed his Notice of Appeal on May 21, 2009.

(b) By Order dated June 14, 2010, the parties were ordered to complete various steps in the litigation by various dates.

(c) Mr. Kelly either served his List of Documents on time but provided proof of service to the Court after the court ordered deadline or both served his List of Documents and filed his proof of service after the deadline. In either case, Mr. Kelly did not write to the Court in advance of the deadline to seek an extension nor did he bring a motion for such extension after the deadline[3].

(d) On two occasions Mr. Kelly was served with notices to attend examinations for discovery. In both cases Mr. Kelly advised the

---

1 I note that Mr. Kelly's Affidavit only dealt with events that occurred from December 2012 onwards. It did not offer any description of events prior to that nor did it challenge the events described in Ms. Cho's Affidavit.

2 I note that the document entitled "Appellants' Position" which the Appellants filed in response to the Respondent's motion gives the impression that all three Appellants have followed the same path through the litigation. This is not accurate. Mr. Kelly's path has been considerably different than that of Mr. Mullins and Mr. Djelebian. The details of how the progress of Mr. Kelly's appeal has differed from Mr. Mullins' and Mr. Djelebian's appeals are set out in Ms. Cho's Affidavit.

3 One of the breaches raised by the Respondent was the fact that Mr. Kelly's List of Documents itself was not in compliance with the *Rules*. While I agree that the List of Documents was not in compliance with the *Rules* and was certainly not prepared in either a professional or courteous manner, the breach was relatively minor and more in the way of an inconvenience than a serious breach. I have not given it any weight in reaching my decision.

Respondent just 2 or 3 days before the scheduled date that he would not be attending. In the first case, the Respondent obtained an extension of time to complete discoveries. In the second case, the Respondent obtained a certificate of non-attendance[4].

(e) On March 24, 2011, Mr. Kelly's appeal was made part of a larger group of similar cases for the purposes of case management.

(f) Nothing further happened in his case until January 25, 2012 when the Respondent requested a case management conference for the group. The Court set a status hearing for April 3, 2012.

[5] The following is a short summary of the initial stages of Mr. Mullins' and Mr. Djelebian's appeals:

(a) Mr. Mullins and Mr. Djelebian filed their Notices of Appeal on April 28, 2009. They were part of a group of similar appellants.

(b) Nine test cases were selected from the group. Those cases were settled in June 2011.

(c) On January, 2012 the Respondent asked the Court for a case management conference for the remaining appeals in the group. The Court set a status hearing for the group on April 3, 2012.

[6] At the status hearing on April 3, 2012, Mr. Kelly appeared on his own behalf and on behalf of Mr. Mullins and Mr. Djelebian. By Order dated April 10, 2012, the Court ordered that all of the Appellants' Appeals be heard together on common evidence. The Court also ordered that Mr. Kelly's examination for discovery be peremptorily completed by October 31, 2012 and that discoveries in Mr. Mullins' and Mr. Djelebian's appeals be completed by October 31, 2012. The Court also set other dates for the completion of the remaining steps in the litigation.

[7] By Amended Order dated May 7, 2012, the Court ordered that the parties in Mr. Mullins' and Mr. Djelebian's appeals serve their Lists of Documents by June 30, 2012.

[8] Mr. Mullins' and Mr. Djelebian's Lists of Documents were served on the Respondent on July 9, 2012, after the court ordered deadline. Mr. Mullins and

---

[4] I note that as Mr. Kelly ultimately decided not to examine a witness of the Respondent for discovery, he was not in breach of the Court Order requiring examinations to be completed by January 21, 2011.

Mr. Djelebian did not write to the Court in advance of the deadline to seek an extension nor did they bring a motion for such extension after the deadline.

[9] The Respondent made attempts to agree to dates for examinations for discovery but the Appellants did not provide any dates. As a result, the Respondent served Notices to Attend on the Appellants. All discoveries were to be held in Toronto. One week before the discoveries were to be held, Mr. Kelly tried unsuccessfully to convince the Respondent that the discoveries should be conducted by way of written interrogatories. When the Respondent told him that that would not be acceptable, Mr. Kelly advised the Respondent that Mr. Mullins' and Mr. Djelebian's discoveries would have to be held in Windsor. The Respondent accordingly arranged for those discoveries to take place in Windsor. One day before the scheduled discoveries, Mr. Kelly advised the Respondent that Mr. Mullins and Mr. Djelebian were not available to be discovered[5].

[10] As a result of the above delays the Respondent was again forced to apply for extensions to the status dates. By Order dated November 19, 2012, the parties were ordered to complete examinations for discovery by December 31, 2012, satisfy undertakings by January 31, 2013 and communicate with the Court by March 28, 2013.

[11] After some additional back and forth between the parties regarding dates and locations, the examinations for discovery were finally held on December 13 and 14, 2012 in Toronto. A number of different undertakings were given by the Appellants at the discoveries.

[12] The Appellants did not satisfy their undertakings by the court ordered deadline of January 31, 2013. They did not write to the Court in advance of the deadline to seek an extension nor did they bring a motion for such extension after the deadline.

[13] On March 28, 2013, the Respondent wrote to the Court, explained that the Appellants had not yet satisfied their undertakings and requested a show cause hearing. The Court denied the request but advised the Respondent that she was free to bring a motion at any time. Accordingly, on August 7, 2013, the Respondent brought this Motion.

[14] Mr. Kelly ultimately provided his responses to his undertakings on October 22, 2013. Mr. Mullins and Mr. Djelebian provided their responses on November 5, 2013.

---

5 Mr. Kelly appears to have tried to convey this information to the Respondent 3 days prior by email but the email was addressed to the wrong address.

Reason for Breaching the Order Regarding Undertakings

[15] The Appellants have stated that the reason that they had not satisfied their undertakings when the Respondent wrote to the Court on March 28, 2013 was that the Respondent had failed to provide the Appellants with lists of those undertakings.

[16] There is nothing in the *Rules* that would require the Respondent to provide the Appellants with lists of their undertakings. The normal procedure followed in this Court is that the party being examined for discovery makes a list of the undertakings when they are given or obtains a copy of the transcript. The normal procedure is not to ask the other side to compile the list for the discovered party.

[17] The Respondent directed me to a transcript of the examination for discovery of Mr. Kelly which stated[6]:

[Mr. Kelly]	By the way, I am not taking any notes here. I still have to get a list of undertakings from somebody.
[Ms. Chasson[7]]	Sir, you can order a transcript and get that –
[Mr. Kelly]	That is a lot more expensive. If your assistants are making a list of undertakings, I could – I will do what I can.

[18] This exchange makes it clear that the Appellants were aware right from the time of the discoveries both that the Respondent had no intention of providing them with lists of the undertakings and that the Appellants could have obtained a list of the undertakings by simply ordering a copy of the transcripts of the discoveries.

[19] Furthermore, the transcript of the examination of Mr. Mullins suggests that Mr. Kelly was taking notes during the discovery. When counsel for the Respondent asks for two different undertakings in succession, Mr. Kelly asks for clarification of the second undertaking. He states "Sorry, I was writing"[8]. This statement suggests to me that, at least in Mr. Mullins' discovery, Mr. Kelly was taking notes of the undertakings.

[20] The Appellants did not provide any evidence that they made any attempt whatsoever to determine the lists of required undertakings between the completion of the discoveries and the January 31, 2013 deadline. Nor did they provide any evidence that they made any attempt to determine those lists in the 2 months thereafter. In fact,

---

6 Transcript of the discovery of Mr. Kelly, page 38, lines 2 to 9.

7 Counsel for the Respondent.

8 Transcript of the discovery of Mr. Mullins, page 67, line 19.

it was only when the Respondent, in compliance with the order to report to the Court by March 28, 2011, advised the Court that the Appellants had not completed their undertakings that the Appellants asked the Respondent for the lists. When the Respondent refused that request, there is no evidence that the Appellants made any attempt to establish the undertakings through other means. They simply continued to reiterate their request that the Respondent provide the lists to them.

[21] Ultimately, the only way that the Appellants ever obtained the lists of undertakings was that the Respondent attached them to her motion.

[22] The above conduct shows that the Appellants made no real efforts to comply with the undertakings either before or after the deadline. In my view, the explanation regarding the lists of undertakings is nothing more than a convenient excuse designed to delay the proceedings. The Appellants knew that the Respondent was not going to give them lists of the undertakings. In my view, their requests for such lists served no purpose other than an attempt to somehow shift the blame for their inaction to the Respondent. Had the Respondent not brought her motion, I have no doubt that the Appellants would still not have provided any responses to their undertakings.

Failure to Apply for Extension of Time to Satisfy Undertakings

[23] The Appellants have never attempted to remedy their breach of the court ordered deadline of January 31, 2013 to provide responses to undertakings. No motion for an extension of time was ever brought. At a minimum I would have expected such a motion to be brought for hearing at that same time as the Respondent's motion.

[24] Mr. Kelly argued that he had neither applied for extensions of time prior to the expiry of his court ordered deadlines nor brought a motion applying for an extension of those deadlines after their expiration on behalf of himself and the other Appellants because he was unaware of the rules requiring him to do so. The Respondent drew my attention to a letter from the Respondent to Mr. Kelly dated October 26, 2010 in which the Respondent set out the specific requirements for applying for extensions of time. On the basis of that letter, I do not accept Mr. Kelly's explanation. The letter from the Respondent to Mr. Kelly stated, in part:

> As I indicated, in order to extend the time set out in a court ordered timetable, a party must request the extension from the Court. The request may be done by form if done on consent before the expiry of the court ordered performance date. Otherwise, a formal motion will be required.

[25] I also note that at no time at the hearing of this motion or in the Appellants' written submissions did Mr. Kelly apologize to the Court for the Appellants' breach of the order regarding undertakings or even acknowledge that the Appellants had done anything wrong in failing to comply with it.

[26] Based on the foregoing, I conclude that the Appellants were and continue to be indifferent as to whether they comply with orders of this Court.

Undertakings Actually Provided

[27] Even a brief review of the answers that were ultimately provided to the undertakings makes it clear that the Appellants have not been responsive to many of the questions. The Respondent provided me with copies of the responses to Mr. Mullins' undertakings. Mr. Mullins' and Mr. Djelebian's accountant was named Mr. Qadir. Mr. Mullins gave undertakings that he would ask Mr. Qadir:

(a) if Mr. Mullins' accountants and lawyers had prepared summaries of the limited partnership offerings;

(b) if Mr. Qadir ever undertook a significant analysis of the software; and

(c) for all of his information regarding allegations of a lawsuit and the settlement thereof that were set out in Mr. Mullins' Notice of Appeal.

[28] All of these questions were answered with the statement:

> Mr. Qadir relied on the tax opinion provided by Mr. Beach, senior tax partner at Faskin, Campbell, Godfrey as well as the information contained in the Offering Memorandum, financial projections and all supplementary information provided by the General Partner.

[29] Even to someone unfamiliar with the issues in the underlying litigation, it is clear that this answer is unresponsive.

[30] In addition, the answer to one question in Mr. Mullins' undertakings is completely blank. Another question regarding a lawsuit is met with the following response:

> To the best of Mr. Qadir's knowledge, he is not aware of what lawsuit is being referred to? Please provide detailed information as to the plaintiff and the defendant and provide [*sic*] copy of the statement of claim/defense [*sic*], so that he can provide an appropriate response.

[31] The lawsuit in question is not only described in the transcript of discovery immediately before the undertaking is given but is also referred to in the Appellants' Notices of Appeal. The above response appears to be designed to either avoid answering the question or delay the litigation.

[32] During submissions, Mr. Kelly advised me that the responses to the undertakings had been prepared by Mr. Qadir, and had not been reviewed by the Appellants prior to their being delivered to the Respondent. The undertakings were undertakings given at discovery by the Appellants, not by Mr. Qadir. While many of the undertakings required the Appellants to ask questions of Mr. Qadir, that in no way relieves the Appellants from their obligations to ensure that the answers are accurate and complete. Three of the answers to Mr. Mullins' undertakings contain statements that are qualified by the phrase "to the best of my knowledge and information" or "to the best of my knowledge" and one of them refers to Mr. Mullins' recollection of whether he signed a document. I cannot see how such responses can be accurate if Mr. Mullins has not even read them. The Appellants' failure to review the responses leaves the Respondent in an untenable position. What possible use can the Respondent make of responses to undertakings when those responses have not been adopted by the Appellants? The Appellants' conduct effectively amounts to their not having responded to their undertakings.

[33] This is not a case where one party has not been as fulsome in its response to undertakings as the other party thought it should have been. It is clear that the Appellants were simply indifferent as to whether the responses were even adequate let alone complete. Such indifference demonstrates a lack both of respect for the Court and the *Rules* and a lack of intention to actually move ahead with the appeals.

Pattern of Conduct

[34] Overall, it is clear to me that the Appellants have made no attempt to prosecute their appeals with any level of dispatch. On the contrary, their pattern of behaviour is indicative of, at best, indifference and more likely a concerted effort to delay the appeals.

[35] The Appellants have all failed to meet court ordered deadlines for their Lists of Documents and undertakings and have failed to obtain extensions of time to rectify those breaches. It is clear that they have little, if any, regard for the orders and procedures of this Court. The Appellants have also made the completion of discoveries unnecessarily complex. When I look collectively at the series of events surrounding each attempt at setting up a discovery, I see either indifference as to whether the discoveries were held or intentional delay. As the Appellants have

offered no alternative explanation of these events, those are the conclusions with which I am left.

[36] Ms. Cho's Affidavit sets out a list of other events that could individually be described as creating minor delays in the proceedings but that collectively paint a picture of either indifference or intentional delay.

[37] The Appellants submit that in determining whether their cases should be dismissed, I am prevented from considering any conduct (including any breaches of the *Rules* or of Orders) that occurred prior to the show cause hearing that was held on April 3, 2012. They submit that all such conduct was already considered by the Court at that hearing and thus that the Respondent is estopped from raising it again in this motion.

[38] There is no merit to this position. First, it is not clear to me on the record whether the Court even considered on April 3, 2012 whether the Appellants' appeals should be dismissed. More importantly, even if the Court had considered that issue, the legal question that would have been considered was whether the Appellants' conduct up to April 3, 2012 was sufficient to warrant a dismissal. I am not being asked to reconsider that question. Rather I am being asked to consider whether the Appellants' conduct to date justifies dismissing their appeals. In other words, I am being asked to apply the same legal test that may previously have applied but to apply it to a larger set of facts. The fact that the Respondent may have had insufficient evidence to convince the Court to dismiss the appeals on April 3, 2012, by no means wipes the slate clean for the Appellants.

[39] The Appellants relied on a decision of the Federal Court in *Paszkowski* v. *The Queen*, 2001 CanLII 22070, [2001] F.C.J. No. 129 (T.D.). In that case the Court was asked to make an interlocutory ruling based on a set of facts that would have run completely counter to another interlocutory ruling that had previously been made on virtually the same facts. That is not what I am being asked to do. I am being asked whether a legal test that was not previously met has, given events that have since occurred, now been met when looking at both the new and old events as a whole. The Federal Court of Appeal has held that *res judicata* does not apply is such a circumstance (*Apotex Inc.* v. *Richter Gedeon Vegyeszeti Gyar RT*, 2003 FCA 221).

[40] In *1196158 Ontario Inc.* v. *6274013 Canada Ltd.*, 2012 ONCA 544, the Ontario Court of Appeal dealt with a plaintiff who had done nothing to move its appeal forward over a period of many years. I adopt the Court's reasoning. At paragraph 25, the Court stated:

> I completely disagree with the contention that the plaintiff was somehow absolved for all prior delay be the order made at the January 2010 status hearing. That order, made despite over three years of delay, was properly described by the September 2011 status hearing judge as a "lifeline" that allowed the plaintiff to proceed on the basis of the timetable ordered. The plaintiff ignored the lifeline it had been given and failed to respect the timetable that had been set. Without repentance there can be no absolution. The plaintiff did not emerge from the January 2010 status hearing with a clean slate and it was open to the status hearing judge to consider the entire history of delay. [emphasis added]

Suggested Alternative Relief

[41] The Appellants would have me dismiss the Respondent's motion and order the Respondent to provide the Appellants with a list of deficiencies in their undertakings by a certain date and order the Appellants to correct those deficiencies by a further date. I have no confidence whatsoever that if I were to do so the Appellants would comply with my order. They have consistently demonstrated indifference with respect to orders of this Court. Even if they did comply, based on what I have seen of their previous responses to the undertakings, I have no confidence that their responses would be adequate. Either way, the most likely outcome would be that the parties would be back in Court in a matter of months trying to deal with this matter once again and the Respondent would, once again, be forced to expend significant effort and cost in order to try to move the Appellants' appeals forward. I see no reason why I should place this burden on the Respondent.

Conclusion

[42] Based on all of the foregoing, the motions are granted. The Appeals are hereby dismissed pursuant to *Rule* 64.

Costs

[43] The Respondent is seeking full indemnity costs of $2,500 from each Appellant or, if I am not prepared to award costs on a full indemnity basis, partial indemnity costs of $1,000 from each Appellant. The Appellants accept that if I were to award partial indemnity costs that $1,000 from each Appellant would be appropriate but argue that if full indemnity costs were awarded, $1,500 per Appellant would be sufficient.

[44] I believe that a high award of costs is appropriate in light of the Appellants' indifference to orders of this Court and their intentional delay of the proceedings. The Respondent has also been put to a great deal of unnecessary work both in these

motions and throughout the litigation as a whole. I feel that a higher award of costs against Mr. Kelly is more appropriate due to the fact that his failure to prosecute his appeal with due dispatch has occurred over a longer period of time and involved a more significant number of delays and because I expect a higher standard of conduct from appellants who, like Mr. Kelly, are professionals familiar with the legal system and the conduct of litigation. In that regard, I find Mr. Kelly's apparent indifference as to whether court ordered deadlines are met and his admitted failure to review the responses to his own undertakings before submitting them to the Respondent to be particularly troubling. Based on all of the foregoing, I am going to award costs of $1,500 each against Mr. Mullins and Mr. Djelebian and of $2,500 against Mr. Kelly all payable to the Respondent forthwith.

Signed at Ottawa, Canada, this 18th day of December 2013.

"David E. Graham"

Graham J.

CITATION:	2013 TCC 411
COURT FILE NOS.:	2009-1717(IT)G 2009-1332(IT)G 2009-1336(IT)G
STYLE OF CAUSE:	WILLIAM A. KELLY AND HER MAJESTY THE QUEEN STEVE DJELEBIAN AND HER MAJESTY THE QUEEN GLEN R. MULLINS AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 4, 2013
REASONS FOR ORDER BY:	The Honourable Justice David E. Graham
DATE OF ORDER:	December 18, 2013

APPEARANCES:

Counsel for the Appellants:	W.A. Kelly, Q.C.
Counsel for the Respondent:	Samantha Hurst Donna Dorosh

COUNSEL OF RECORD:

For the Appellants:

Name:	W.A. Kelly, Q.C.
Firm:	W.A. Kelly, Q.C. Toronto, Ontario

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada