CITATION: Canadian Thermo Windows Inc. v. Seangio, 2021 ONSC 6555
COURT FILE NO.: CV-21-656765
DATE: 20211004

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CANADIAN THERMO WINDOWS INC. C.O.B. MAGIC WINDOWS INNOVATIONS and SHAUL GOLDENBERG, A.K.A. SOL GOLDENBERG Plaintiffs	*R. Lee Akazaki* and *Josef Finkel,* for the Plaintiffs
– and **–**	
ALDWYN SEANGIO and ALISON SHIRAISHI-SEANGIO Defendants	*Lawrence E. Thacker and Derek Knoke*, for the Defendants
	HEARD: September 13 and 17, 2021

FL MYERS J

REASONS FOR DECISION

Background and Outcome

[1] The plaintiffs sued the defendants for defamation because they posted three very negative customer reviews on internet review sites concerning their experiences with the plaintiffs' business. Procedurally, this action is confused by steps taken by both parties and the court set out below.

[2] While I will try to unravel some of the procedural knots I may have helped to tie, at its core, the defendants seek the dismissal of this defamation action on the basis of the anti-SLAPP provisions of s. 137.1 of the *Courts of Justice Act*, RSO 1990, c C.43. The defendants also seek costs on a full indemnity basis and damages under the statute. The defendants would have me assess these amounts either on the summary process that I tried to devise (in an unsuccessful effort to assist the parties to avoid complexity and costs) or under a full analysis under s. 137.1.

[3] The plaintiffs say that when faced with the defendants' threat to bring an anti-SLAPP motion, they properly discontinued this action. On that basis, the defendants cannot bring an anti-SLAPP motion and the court has no jurisdiction to award enhanced costs or damages under s. 137.1. Alternatively, they argue that this action is one that should go forward on its merits as it is not brought as a lawsuit to prevent the defendants from expressing themselves on a matter of public interest. They submit that the defendants defamed them in a private, personal way that does not involve any matter of public interest that could fall under s. 137.1 of the statute. While they do not want to proceed with the litigation, the plaintiffs argue that they should be allowed to do so because they have a strong case that does not run afoul of the anti-SLAPP provision of s. 137.1.

[4] In my view, the plaintiffs brought this lawsuit to bully the defendants into removing their reviews from the internet so as to control the public narrative about the plaintiffs' business and products. The fact that the plaintiffs sought to discontinue when faced with the anti-SLAPP motion is among the most telling facts exposing the motivations at play.

[5] The plaintiffs sell their goods to the retail public. Discussion among the consuming public of the quality of the plaintiffs' goods and services is a matter of public interest.

[6] There are serious and triable issues raised on the defences of justification and fair comment at least. The plaintiffs have little provable loss justifying their investment in expensive litigation. They want out, but, only on their terms.

[7] The defendants offered, with prejudice, to walk away for $35,000 during scheduling discussions last May. They were not willing to withdraw their reviews from the internet. Instead of finding a reasonable exit from a lawsuit that they did not want to continue, the plaintiffs withdrew their notice of discontinuance and delivered 10 affidavits with over 1,000 pages of evidence running up the defendants' costs to a claim of almost $165,000.

This amount does not include any billed time for Mr. Thacker, the senior partner acting for the defendants, after early May.

[8] For the reasons set out below, this action is dismissed under s. 137.1. The plaintiffs shall pay the defendants' costs fixed on a full indemnity basis in the amount of $164,186.76 plus damages assessed in the nominal sum of $2,500.

The Basic Facts

[9] I am not going to deal with most of the evidence in detail. This is not a motion for summary judgment. I will not be finding facts on contested evidence or trying to determine if the enhanced powers set out in Rule 20.04 (2.1) might have enabled me to do so were it a motion for summary judgment. There are many contested facts which elude findings at this stage.

[10] The essence of the story is that the defendants bought windows from the plaintiffs.

[11] Mr. Sol Goldenberg prides himself on his patented window technology that he says makes his windows virtually impervious to water.

[12] After the plaintiffs installed a new glass door in the defendants' main floor living room, the defendants suffered major water leaks around that door. The existence of the substantial leaks of water into the defendants' living room is not in issue. The video evidence leaves no doubt. The principal factual issue is whether the plaintiffs' door and windows as installed by them caused the leaks.

[13] The plaintiffs attended many times to try to help the defendants discover the source of the leaks. The plaintiffs were always clear that their products were not the cause of the leaks. Mr. Goldenberg arranged for his consultants to attend to try to assess the source of the leaks.

[14] The plaintiffs reinstalled the glass door in the living room for the defendants. The installer discovered that the wooden beam header above the door was wet and rotten. The parties agree that it must have been wet for many years – long before the plaintiffs installed its windows and doors.

[15] There is no dispute that the defendants' house had some water penetration issues over time. There is little first hand evidence on what the situation was just prior to the plaintiffs' windows being installed. No one was cross-examined. There is disputed evidence over whether evidence of water was seen by the plaintiffs before they installed the new windows.

[16] The defendants put a new roof on their house and put on new stucco to try to fix the leaks. They say they did this on the advice of the plaintiffs' consultants. Those steps did not stop the leaks.

[17] Apart from the installer seeing a wet, rotten door header in the living room, there is no evidence that anyone opened the walls to actually see where the water was coming from. This seemingly obvious step may well have occurred and yielded information. None of it is before me however.

[18] While steps to fix the leaks were underway, the relationship between the parties soured.

[19] The plaintiffs acknowledge in their own evidence that Mr. Goldenberg has a gruff interpersonal manner to say the least. At one stage he brought a cake to the defendants as a peace offering to make amends for his "abruptness".

[20] As will become apparent below, the other principal issue in the case is that the parties dispute whether Mr. Goldenberg swore at Ms. Shiraishi-Seangio in front of their young child. This is purely a credibility issue.

[21] Eventually, the plaintiffs washed their hands of the defendants.

[22] A year later, the defendants' contractor found a small crack in the window frame of window provided and installed by the plaintiffs in the bedroom directly above the living room door. The defendants invited the plaintiffs to come and inspect the crack. The plaintiffs declined the opportunity. The plaintiffs have fairly compelling (although not independent) evidence that structurally a small crack where the defendants say they found the crack could not physically admit the amount of water that was involved in the leaks below. Nor is there any technical evidence as to how a crack in the body of the window frame upstairs would lead to substantial water entry around the glass door below.

[23] But, the defendants' uncontested evidence is that their contractor filled the crack and the leaking stopped. There is no evidence to the contrary. Again, no one was cross-examined.

[24] I suppose there are other possible explanations for why the leaking stopped when it did. But none is before me in evidence. Moreover, I understand the fallacy of assuming cause by temporal association alone; *post hoc ergo propter hoc*. However, until rebutted, the temporal association between fixing the crack and the end of the leaking (that did not end with a new roof or new stucco) raises a real factual issue in the case.

[25] I do not ignore Mr. Goldenberg's technical evidence. It does seem unlikely that the crack by itself could be the cause of the major leaks below. But there may be far more complex systems at play with multiple causes or contributing causes. I am in no position on this motion to make a determination of what role the plaintiffs' windows or installation played in the leaks, if any. At this stage the burdens are much lower than the standard required for proof at trial.

[26] There is also no basis in the evidence to doubt the defendants' *good faith belief*, on the express advice of their contractor, that fixing the crack stopped the leaks and hence that a defect in the upstairs window and the installation of the windows and doors was in some way the cause of the leaks. This goes to the defence of fair comment discussed below.

[27] As noted at the outset, there is much more evidence than I have recited on all of these points. The plaintiffs submit that the defendants' house must have had a serious and active leaking problem from the outset. They present some evidence to support this. The defendants deny the severity of the problem although there is at least one email acknowledging a pre-existing issue. The rotten header leaves no real doubt that there was a pre-existing water issue inside the walls. But whatever problems there were before the plaintiffs installed their new windows, massive leaking followed and only stopped after the defendants' contractor filled a crack in the bedroom window installed by the plaintiffs.

[28] If the pre-existing serious rotting and water damage was seen and known in advance by all, as indicated by the plaintiffs' Ms. Gould, then this raises questions of the plaintiffs' installation of windows in the circumstances and what steps they ought to have taken to ensure that their windows would be fit for their intended use in the circumstances. If the defendants knew about the water and did not tell the plaintiffs about it, this still does not answer why or how the water found an outlet by the plaintiffs' new windows and raises at least an issue about the adequacy of installation. As discussed above, the crack upstairs at least raises a factual issue as to the quality of the product delivered by the plaintiffs.

[29] But this motion is not about defective windows or installation *per se*. This is a defamation action.

The Negative Reviews

[30] On Nov. 14, 2020, the defendant Aldwyn Seangio published the following one-star review on Magic Windows' Google Review webpage.

> 100% NOT RECOMMENDED! MWI installed 14 windows and 1 sliding door in our home. Shortly after installation, we developed a major water leak due to 1 defective product - the window above our patio door. The leak caused major water damage throughout our main floor (wall, floor, door). After contacting MW to correct this issue, which was within 2 months of installation and well within the warranty period, we were immediately made to feel that the issue was not with the window but other possible contributors which began an over one year battle with MWI. The owner Sol was extremely rude and defensive, to the point that he yelled at my wife and myself over several different phone conversations! We marched on, continued to work through all possibilities eliminating all factors (as recommended by MW). 1+ years later, after reaching the point of no longer dealing with MW, our contractor found the issue; a defective seal on the window which enabled water to leak into our house. We notified the company of the situation and solution but to no surprise they tried to begin a defensive correspondence, which we did not entertain. We've turned the page on this chapter with the resolve of knowing that we will let people know of our own experience and having potential customers make their own decision with at least knowing what we went through. Regards, An extremely dissatisfied and disappointed former customer.

[31] The review was removed after the plaintiffs' lawyers served a libel notice. However a nearly identical review was also posted by the same defendant and remains on the HomeStars website. The plaintiffs describe HomeStars as "a Canadian network of verified and community-reviewed home services professionals".

[32] On November 23, 2020, the Defendant Alison Shiraishi-Seangio published another review on the Yelp website. The plaintiffs describe Yelp as "an online service that connects consumers with local businesses. This review says:

> Terrible!!! Horrible experience!!! I would NEVER recommend this company. After Magic Windows installed the windows we started to have massive leaking into our home. Water damage to our curtains, walls (need to be replaced), insulation, floor, etc. Such a long ordeal

> and from day 1 the owner, treated us with a complete lack of respect (I actually had to ask him to leave my home more than once, as on one occasion he aggressively cursed me out in front of my child). After changing our roof, soffit, exterior stucco facing we still had leaking. During this entire process the owner refused time and time again it had any thing to do with their windows. Our contractor found a crack in the actual window frame. We fixed the crack and now no more leaking. Such a small error caused thousands of dollars and unneeded stress. The installation was not done 100% to my expectation. When my contractor pulled away the caulking, the Magic Window installer had not completely filled in around the frame with the foam insulation. The caulking was applied so unprofessionally, it had sunk into the area which had not been filled with foam. A sore sight which took away from the aesthetic of the finished project. I would say that functionally the windows work minus the retractable screen and solar which both cause continual issues. They do not roll into the system properly after time. We called the repair team twice and now I just don't use the solar blinds anymore. Yet another waste of money! Please think twice before you invest a hefty sum of money with this less-than customer friendly company. PS. The latest as of November 28, 2020, the owner served us with an official legal threat to take down our reviews.

[33] The plaintiffs plead in their statement of claim that the reviews injured their reputations. They assert that the reviews carried the following defamatory stings:

a. that their windows were the cause of the defendants' leaks;

b. that they do not take clients' problems seriously;

c. that Sol Goldenberg does not maintain professional behaviour while servicing his clients;

d. that the plaintiffs provided defective products, and/or did not properly install the products, and that the Plaintiffs have a tendency to not resolve their clients' issues; and

e. that when notified of an alleged defective seal on a window, the plaintiffs reacted with defensive correspondence.

Procedural Issues

[34] The plaintiffs commenced this claim under the Simplified Procedure. On April 20, 2021, counsel appeared before me in Civil Practice Court to schedule an anti-SLAPP motion. The plaintiffs did not want to go through an expensive anti-SLAPP motion and purported to discontinue the lawsuit the night before CPC. The defendants wanted costs.

[35] My endorsement from CPC expressed great reluctance to continue a lawsuit that the plaintiffs did not want to continue. I tried to get counsel to find a way to resolve the costs issue summarily. My CPC endorsement provides:

> It appears that the plaintiff was not expecting that the defendants would respond with an anti-SLAPP motion under section 137.1 of the Courts of Justice Act. They did so.
>
> In order to avoid the significant costs associated with an anti-SLAPP motion and the severe cost consequences set out in the statute, the plaintiff purported to discontinue the action yesterday night.
>
> The defendants argue that the plaintiff is not entitled to take any steps once an anti-SLAPP motion has been made. Therefore, the action cannot be discontinued and their motion should proceed.
>
> The plaintiff argues that the motion has not been properly made because no hearing date was obtained prior to the service of the notice of motion as required under section 137.2.
>
> The defendants want the court to schedule the motion notwithstanding that the plaintiff is trying to abandon the lawsuit. I am [not] going to order a very substantial and significant motion practice in an action in which the plaintiff does not wish to proceed. I understand that the defendants say they are entitled to costs under section 137.1 and that they should not be facing even an argument for any other measure of costs. However, they remain free to say that to any judge who hears the matter.
>
> In addition, there appears to be some degree of unseemly *animus* between Mr Finkel and Mr Knoke. If they intend to file evidence of their complaints against each other's behaviour, both parties will require separate law firms to act for them. Other partners of the firm cannot act when their colleague's credibility is directly an issue. I do not see any reason why matters have to proceed in that way.

> In my view, costs should be resolved summarily with a judge at a case conference. **However, I will not require that if the parties are dead set on proceeding more formally and expensively.**
>
> Mr Finkel advises that his clients consent to an order [that] their discontinuance of the action is with prejudice and prevents them from commencing new proceedings on the same subject matter. The only outstanding question then is whether the defendants are entitled to costs on a full indemnity basis under section 137.1 (7). That can be resolved very readily If the parties wish to do so.
>
> The defendants have a counterclaim for damages under section 137.1 (9). The discontinuance of the action does not preclude the continuation of the counterclaim if the defendants so desire.
>
> I do not expect a judge to be terribly moved by the very fine parsing of the provisions of section 137.1. What happened is self evident. The plaintiff brought a seemingly small claim and ran into a very expensive response under a process specifically enacted by the Legislature. Whether the defendants" review was a matter of public interest or, if so, was defamatory enough to allow the claim to proceed is no longer the issue. Whether the plaintiff is technically entitled to deliver a notice of discontinuance does not disguise the fact that the plaintiff realises that it no longer wishes to proceed with the claim.
>
> There are exceptions to full indemnity costs under section 137.1 (7). None of the technical back and forth would preclude a judge from considering alternatives even if only that section applied.
>
> It seems to me that counsel are very able to rise above the fray and with cooler heads devise a process to argue about the appropriate costs order in the circumstances. If they reach an agreement on process, they should submit a draft order and signed consent to me through my Judicial Assistant. If they cannot agree by April 30, 2021, they should contact my Judicial Assistant. to arrange a case conference at which I will assist counsel to work out a process for the most efficient, affordable, proportionate, and civil resolution of the issues. [Emphasis added.]

[36] Regrettably, I was wrong. Both sides had highly technical arguments as to why each was or was not entitled to costs. So, rather than negotiating a $35,000 costs issue in a case that the plaintiff had abandoned, they turned it into a $165,000 costs issue for one side alone with the plaintiffs now

proposing to proceed to trial in a Simplified Procedure case that they want to discontinue and with limited, if any, provable loss.

[37] The parties attended before me at a case conference on May 3 and I scheduled this hearing. I explained the process issues as follows:

> I thought that at CPC I had assisted the plaintiffs to cut through technicalities that might have prevented them from discontinuing their claim unilaterally. I determined not to allow the anti-SLAPP motion to proceed in a case where the plaintiffs did not want to carry on with their lawsuit. It did not seem like a good idea that in order to fix costs as at today and damages, if any, there should be a further, significant amount of time and cost invested in a motion designed to end a claim that the plaintiffs were already willing to end. Instead, I preserved the defendants' right to claim costs and damages and suggested that a summary process could be available to deal with those limited issues.
>
> Today, I heard a case conference with counsel to try to schedule just the issues of costs and damages. Several things happened that changed the landscape. The defendants advised that they would be relying on their motion record, that was already prepared, to assist them prove an entitlement to costs under ss. 137.1 (3) and (7) and damages under s. 137.1 (9). The plaintiffs advised that they were relying on their discontinuance to seek to deny the availability of those sections despite the fact that the *quid pro quo* of my having allowed the discontinuance without considering the leave requirement of s. 137.1 (5), was the preservation of the defendants' rights under those subsections. The plaintiffs also want to make the argument that the defendants are disabled from seeking costs under s. 137.1 (7) and damages under (9) because they did not book a motion date prior to serving their notice of motion as positively and expressly required under s. 137.2 (3).
>
> Finally, the plaintiffs advised that if the defendants are going to rely on their motion record to try to establish their right to costs and damages, then the plaintiffs will need to respond to argue all of the issues including the merits of the lawsuit and the policy balancing considerations under s. 137.1 (4).
>
> With the plaintiffs wishing to positively assert a defence to the motion on the merits, it follows that they should be taken to have withdrawn their notice of discontinuance. If I am wrong and they propose both to discontinue the lawsuit and argue the motion on its merits, then I then

must leave to the judge hearing the motion the defendants' argument that the plaintiff has no entitlement to discontinue the lawsuit unilaterally the night before CPC in light of the statutory stay in s. 137.1 (5). The plaintiffs will argue that the stay was not available to the defendants because of their failure to book a motion hearing date before serving their motion record as noted above.

…

Finally, I note that the defendants have made a with prejudice offer to settle the costs and damages for $35,000 all-inclusive. I appreciate that this seems high if s. 137.1 (7) is not available to the defendants. However, it is also a claim for an amount that would in other circumstances be dealt with summarily in the Small Claims Court rather than expensive process-laden proceedings in this court. Had the defendants given notice to the plaintiffs of their intention to bring an anti-SLAPP motion and had the plaintiffs then decided to discontinue their lawsuit, they would have been liable for some amount of costs in the ordinary course. That would include some motion preparation time for the defendants to determine that they had a good case to advance under s. 137.1. One need pause therefore, to consider how much more should be invested to try to save the incremental costs now claimed by the defendants under s. 137.1 (7). Might this not be an example of throwing good money after bad? Can a more economical process for negotiation not be devised?

The defendants should serve their Bill of Costs to allow the plaintiffs to make a more informed estimate of the amounts truly in issue. I would not preclude the plaintiffs from arguing as a matter of principle that s. 137.2 (3) applies due to the defendants' failure to obtain a date in advance of serving their motion record. **I doubt that the plaintiffs actually have much interest in spending money to advance the jurisprudential principles on this issue of procedural law.** Rather, their interest in spending more is only to generate possible savings in the amount claimed by the defendants. I respectfully suggest that counsel on both sides should be able to lead their clients to a more cost effective resolution now that the plaintiffs no longer wish to continue their lawsuit. Perhaps a mutually respected third party intermediary might be able to facilitate a discussion for example. A small investment in a mediator might be better than a large investment

> in litigation that neither party wants. But that presumes a willingness to compromise and settle. If both sides prefer to test their legal rights to the fullest and cost is no object, then the schedule ordered above allows for that outcome. [Emphasis added.]

[38] I was wrong again. Apparently the minute details of the timing and order of service of pleadings in an anti-SLAPP motion under s. 137.1 of the *Courts of Justice Act* are matters of great principle to Mr. Goldenberg and the Seangios. So much so that they each invested more than is realistically in issue in the lawsuit in order to establish their procedural rights.

[39] The defendants argue that the case is over. I allowed the notice of discontinuance with prejudice while preserving their rights to argue costs under s. 137.1. I disagree. I made clear in both endorsements that I was trying to have counsel agree. I said expressly in my first endorsement that I would not require the parties to proceed sensibly if they were dead set on proceeding more formally and expensively. In my second endorsement I plainly allowed the plaintiffs to proceed as if they had withdrawn their notice of discontinuance if continuing the litigation was how they wanted to find a more efficient, affordable, and proportionate outcome to a $37,000 costs issue.

[40] All of this is about whether the defendants can rely on ss. 137.1 (7) and (9) of the *Courts of Justice Act*. Those sections provide:

> **Costs on dismissal**
> (7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding **on a full indemnity basis**, unless the judge determines that such an award is not appropriate in the circumstances.
>
> **Damages**
> (9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, **the judge may award the moving party such damages as the judge considers appropriate**. [Emphasis added.]

[41] The defendants want full indemnity for their costs and $5,000 for damages as a result of either the plaintiffs withdrawing the claim or if I dismiss the claim under s. 137.1.

[42] The plaintiffs say that the defendants never "made" their anti-SLAPP motion and the plaintiffs have now abandoned the lawsuit so those punitive costs provisions cannot apply.

The Stay under s. 137.1 (5) comes into force when the Motion is "made". So, when is a Motion made under that Subsection?

[43] The defendants submit that the plaintiffs were not entitled to discontinue the lawsuit as a result of s. 137.1 (5) of the statute that says:

> (5) Once a motion under this section **is made,** no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. [Emphasis added.]

[44] The defendants say that they served their notice of motion and then booked a CPC appointment and therefore they had "made" their motion. As a result, the plaintiffs were stayed from discontinuing the action to avoid the motion and the costs consequences of ss. 137.1 (7) and (9).

[45] The plaintiffs respond that the motion is not "made" under s. 137.1 (5) until a date has been obtained from the court and a notice of motion is served under s. 137.2 (3). Therefore, they remained free to discontinue the claim because
s. 137.1 (5) did not apply until I set the return date of the motion at the case conference in May and by then, the action was already discontinued.

[46] The plaintiffs rely on ss. 137.2 (1) to (3) of the *Courts of Justice Act* that provide:

> **Commencement**
> 137.2 (1) A motion to dismiss a proceeding under section 137.1 **shall be made in accordance with the rules of court, subject to the rules set out in this section,** and may be made at any time after the proceeding has commenced.
>
> **Motion to be heard within 60 days**
> (2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion **is filed** with the court.[1]

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[1] Neither party argued that the failure to hear the motion within 60 days after the notice of motion was filed as mandated by subsection 137.2 (2) had any effect on the court's jurisdiction to resolve the issues.

> **Hearing date to be obtained in advance**
> (3) The moving party shall obtain the hearing date for the motion from the court **before notice of the motion is served**. [Emphasis added.]

[47] The plaintiffs argue that because the defendants did not obtain a hearing date from the court before serving their notice of motion, the motion was not "made" within subsection 137.1 (5). The statute rules.

[48] This is a questions of statutory interpretation. I must determine the meaning of the word "made" in s. 137.1 (5). What does a defendant have to do to "make" a motion and bring about the statutory stay of proceedings?

[49] In *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para 21, the Supreme Court of Canada adopted Professor Drieger's "modern approach" to the interpretation of a statute.

> …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[50] I therefore need to look at the words used, in light of their context, and try to interpret them in harmony with the overall statutory purpose.

[51] Starting just with the word used, I agree with the plaintiffs that the statute trumps the *Rules of Civil Procedure* and that, unlike the *Rules*, the court has no apparent authority to dispense with compliance with sections of the statute.

[52] For the sake of argument, therefore, I accept that the defendants should not have served their notice of motion before they had obtained a hearing date at CPC. This not only complies with subsection (3) but it also fits better with subsection (2). The motion must be heard within 60 days of the *filing* of the notice of motion. If the notice of motion is *served* and *filed* before a date is obtained, arguably, the 60 days could run before the motion hearing is ever scheduled.

[53] But, subsection 137.2 (1) also makes it clear that the *Rules of Civil Procedure* apply unless the statute provides otherwise.

[54] Rule 37.01 provides that:

> A motion shall be **made** by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary. [Emphasis added.]

[55] Considering the context, subsections s. 137.2 (1), (2) and (3) refer respectively to motions "*made*", documents "*filed*", and documents "*served*". Each is a known and different step under the *Rules*. Each has its own meaning and import.

[56] The *Rules* are a regulation under the *Courts of Justice Act*. The statute and regulation are related enactments. They speak to and draw from each other. The statute trumps of course. But the Legislature chose to use procedural words in the statute that have meanings under the *Rules*.

[57] One might expect a notice of motion to normally include the return date of the motion hearing. The notice of motion is, after all, supposed to give notice of the hearing of the motion. Form 37A provides a spot for a date to be entered on the form. However, it is common for notices of motion to be served with no fixed date and the date written as "on a date to be fixed by the Registrar".

[58] Rule 37.06 lists three classes of mandatory contents of a notice of motion. The hearing date is not listed as a mandatory component of a notice of motion.

[59] Rule 37.05 deals with how a date is to be obtained for a motion:

> **Hearing Date for Motions**
>
> **Where no practice direction**
> 37.05 (1) At any place where no practice direction concerning the scheduling of motions is in effect, a motion may be set down for hearing on any day on which a judge or associate judge is scheduled to hear motions.
>
> **Exception, lengthy hearing**
> (2) If a lawyer estimates that the hearing of the motion will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of motion is served.

[60] There is no rule dealing with how to schedule a date for a motion at a place where a practice direction is in effect. It is apparent however that if a practice direction provides the process, then subrule 37.05 (1) is not applicable by its terms.

[61] Procedures in civil proceedings in Toronto are bound by the *Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region.*

[62] Part B.3(b) of the *Practice Direction* provides:

> **Long Applications, Long Motions, Summary Judgment Motions and Urgent Matters before a Judge**: Applications and motions before a Judge that require more than two hours for all parties to argue are considered long applications and long motions. **These applications and motions are booked first by contacting the Civil Practice Unit for a date in Civil Practice Court. The Civil Practice Court will confirm the date for hearing the motion, and make any necessary procedural orders that are required.** [Emphasis added.]

[63] Part D.20 of the *Practice Direction* mandates how a hearing is obtained in Civil Practice Court:

> Appointments to appear in CPC may be booked by emailing the Civil Practice Unit at CivilPracticeCourt@ontario.ca, along with a completed Requisition to Attend Civil Practice Court.

[64] Under subrule 37.05 (2), a long motion date is obtained from the registrar. Then a notice of motion is served. These are unilateral acts available to the moving party. Common courtesy suggests that there be some consultation between counsel/parties, but the formal rules do not. It is important to recognize therefore that in the ordinary course a motion can be "made" under the *Rules* by unilateral steps by the moving party.

[65] In Toronto (and many other regions), long motions do not follow the normal process set out in Rule 37.05. In Toronto, before the registrar provides a date, a judge must hear from the parties in Civil Practice Court.

[66] The goals of Civil Practice Court are to bring case management to bear on long motion practice for all the important reasons discussed in Part A of the *Practice Direction*.

[67] The *Rules* require a date to be obtained for a long motion before the notice of motion is served. The *Practice Direction* says that is to happen at CPC. Similarly, s. 137.2 (3) of the statute requires a moving defendant to obtain a hearing date before serving a notice of motion for an anti-SLAPP motion. But does that mean that it is necessary to obtain a date and serve a notice of motion before the motion is "made"?

[68] The *Rules* then do not provide that a date must be obtained before a motion is "made" within Rule 37.01. It provides that a motion is made by notice of motion "unless the nature of the motion or the circumstances make a notice of motion unnecessary".

[69] That begs the question of how a motion is “made” for the purposes of the stay in s. 137.1 (5). What does the word “made” mean in that subsection?

[70] Subsection 137.2 (1) refers to the *Rules* to determine when a motion is “made”. Rule 37.01 allows the motion to be “made” otherwise than by waiting for the delivery of the notice of motion where circumstances make the notice of motion unnecessary to do so.

[71] The intention of the anti-SLAPP motions in s. 137.1 of the *Courts of Justice Act* is to provide a quick and inexpensive mechanism to end lawsuits being used to stifle public debate on a topic of public interest. It sweeps away potentially valid claims at common law in favour of the public purpose of promoting expression on matters of public interest.

[72] The purpose of the stay under s. 137.1 (5) is self-evident. It prevents a plaintiff in a defamation lawsuit from taking any steps in the lawsuit to prejudice the defendant, to run up costs, or otherwise, until the court determines if the claim survives scrutiny under s. 137.1.

[73] If, for the purposes of s. 137.1 (5), the motion is not “made” until the notice of motion is served after a return date has been obtained at Civil Practice Court, a plaintiff could know that an anti-SLAPP motion is coming under s. 137.1 and take all manner of untoward steps before the CPC attendance. The plaintiff could demand a statement of defence and note the defendant in default. It could move for summary judgment if a statement of defence has already been filed. It could move for an interlocutory injunction to seek to prohibit defamation pending trial. The steps might not bear fruit ultimately. But they would subject the defendant to potentially expensive proceedings.

[74] The whole point of s. 137.1 is to prevent a plaintiff from inflicting substantial costs on defendants in order to chill their participation in expressions on matter of public interest. Without the stay under s. 137.1 (5), the full panoply of expensive procedural steps under the *Rules of Civil Procedure* would remain open to a plaintiff who knows that an anti-SLAPP motion is being scheduled in Civil Practice Court. An interpretation allowing that outcome risks frustrating the intention of s. 137.1.

[75] Once the defendant delivers the Requisition to Attend Civil Practice Court under Part D.20 of the *Practice Direction*, it can do no more unilaterally to “make” the motion. If a notice of motion is required to “make” the motion, the commencement of the stay would then depend on the cooperation of the plaintiff at Civil Practice Court or the willingness of a judge to book a return date right away.

[76] The Legislature has determined that a particular kind of lawsuit should not be brought in Ontario. It tried to create a quick and inexpensive process to end lawsuits that offend that purpose. The stay ensures that a plaintiff cannot cause any of the harms associated with lawsuits generally and anti-SLAPP lawsuits in particular while the issue is determined. The fact that the Legislature did not succeed in making the process either quick or inexpensive makes it that much more important that the stay be effective and robustly enforced to maintain the statutory purpose as best as possible.

[77] The question then is whether, in order to maintain and promote the statutory purpose of containing defamation lawsuits while the anti-SLAPP issue is resolved, the word "made" in subsection 137.1 (5) should refer to the service of a notice of motion after a date has been obtained from the registrar (at CPC or otherwise) or the taking of the last step that is unilaterally available to the moving party to commence the formal motion process? In Toronto, that would be delivery of Requisition to Attend Civil Practice Court.

[78] In my view, the booking of a CPC hearing to schedule an anti-SLAPP motion falls within the "circumstances [that] make a notice of motion unnecessary" to "make" a motion under Rule 37.01. To best ensure efficiency, affordability, and the earliest resolution of an anti-SLAPP motion under s. 137.1 without abuse by a SLAPP plaintiff, the motion must be considered made when the moving defendant has done all that it can do unilaterally to deliver the formal documents to commence the process under the *Rules* and any applicable *Practice Direction*, if any.

[79] Subsection 137.2 (3) requires that a date be obtained before the notice of motion is *served*. It does not say that the notice of motion must be *served* before the motion can be considered "*made*". Under subrule 137.2 (2) the motion must be heard within 60 days of the notice of motion being *filed.* Neither of those subsections say when the motion is *made*. For that, subrule 137.2 (1) refers to the *Rules*.

[80] I do not read the timing of service and filing in subsections 137.1 (2) and (3) as preventing or trumping a determination of when a motion is *made* under the *Rules* for the purposes of subrules 137.1 (5) and 137.2 (1).

[81] In my view, it is the intention of the Legislature, and consonant with the purposes of the anti-SLAPP provisions that a motion is "made" under s. 137.1 (5) when the moving defendant takes the last step unilaterally available for it to do so under the applicable *Rules* and practice directions. The defendant's formal and unilateral step under an applicable practice

direction “makes” the motion and thereby brings into force the stay in s. 137.1 (5).

[82] It follows that I disagree with the plaintiffs’ submission that the delivery of a premature notice of motion by the defendants, before they had obtained a motion date, in breach of s. 137.2(3) prevented the stay in s 137.1 (5) from coming into force. The motion was “made” and hence the stay was brought into force by the defendant delivering the Requisition to Attend Civil Practice Court under Part D.20 of the *Practice Direction*.

[83] The plaintiffs took great umbrage at the defendants’ service of a notice of motion before the date was obtained in CPC in breach of s. 137.2 (3) of the statute. They submit that the defendants should not be able to prevent them from discontinuing the action. This assumes that it is appropriate for a plaintiff to sue someone for defamation while maintaining the option to discontinue if the defendant has the wherewithal to bring an anti-SLAPP motion. In my view, that strategy is itself an abuse of the court’s process and a plaintiff who implements that type of strategy likely has SLAPP suit motivation.

[84] I therefore find that (a) the notice of discontinuance delivered by the plaintiffs was ineffective because, when it was delivered, the case was already stayed under s. 137.1 (5) of the *CJA*; and (b) the anti-SLAPP motion is properly before the court. The plaintiffs ask for leave to deliver the notice of discontinuance if necessary. However that would violate the stay. I have already accepted the plaintiffs’ own submission that I have no authority to dispense with the statutory provisions.

***1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22 (CanLII)**

[85] Just last year, the Supreme Court of Canada provided guidance on the implementation of the anti-SLAPP provisions of s.137.1 in *Pointes*. Both sides rely on the case.

Subrule 137.1 (3) - Expression on a Matter of Public Interest

[86] The first step is to consider whether the proceeding arises from an expression made by the defendants related to a matter of public interest. The burden is on the defendants to meet this test.

[87] The public interest is a broad concept and is discussed at length in *Grant v. Torstar Corp.*, 2009 SCC 61, as applied in *Pointes.* In both cases, the Supreme Court directs motion judges to ask whether, “some segment of the

community would have a genuine interest in receiving information on the subject."

[88] The fact that there are thriving internet review sites and that the plaintiffs adduced evidence about the importance of those sites to their business, makes the answer straightforward.

[89] In *910938 Ontario Inc v. Moore*, 2020 ONSC 4553 (CanLII), DE Harris J considered an online review of a retail store. The review in that case contained more invective and personal allegations against the owner than in this case. Harris J. had no difficulty finding that the review was expression on a matter of public interest as follows:

> [19] The applicants' reviews are unquestionably "expression." They also clearly relate to a matter of public interest. A matter of public interest must be distinguished from a private matter: *Pointes* at para. 61. Here, if the expression consisted solely of a personal attack, it would not relate to a matter of public interest. Although I would characterize the posts as more personal attack than a matter of public interest, they were also, judged on an objective standard, a critique of the Plumbing Mart store, the management of the store and the services offered at the store. The invective and malice tainting the critique does not alter its essential nature. The quality and the merit of the criticism, together with the manner of the expression, are irrelevant at this stage: *Pointes* at paras. 55, 65
>
> [20] The plaintiff attempts to separate the portions attacking the personal plaintiff from the parts reviewing the service at Plumbing Mart. This approach cannot prevail in light of *Pointes*: see para. 60. It would allow parsing of expression into components that themselves have no relation to the public interest and those that do. The purposes of the legislation to encourage expression and to promote participation in debate would be almost entirely defeated. The Supreme Court held in the defamation case of *Grant v. Torstar Corp*., 2009 SCC 61 at para. 101 that the communication as a whole, not the impugned words themselves, are what must be assessed.
>
> [21] Two cases have stressed the public importance of reviews of products and services in a similar on-line context: *Bradford Travel and Cruises Ltd. v. Viveiros,* 2019 ONSC 4587, [2019] O.J. No. 4217; *New Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517 at paras. 24-26, affirmed on other grounds, 2019 ONCA 141. As Justice De Sa said in Bradford (para. 31):

> Members of the public or at least segments of the community will have an interest in knowing something about the companies that offer them services. This is true not only from the perspective of the "quality" of the services offered, but also from the perspective of whether or not a member of the public would want to contribute funds to the business/corporation.

[90] The plaintiffs argue that the criticisms made by the defendants in their reviews in this case were personal attacks. In the first review, Mr. Seangio called Mr. Goldenberg rude and defensive. In the final review, Ms. Shiraishi-Seangio said that he cussed her out in front of her child. In my view, the behaviour of the manager and owner of a business during a meeting to deal with a customer's complaint is a proper part of a review of the business's customer service. Even if it might be argued to amount to a private, personal attack, in my view, in light of Mr. Goldenberg admitting to bringing a cake to the customer to make up for his "abruptness," the plaintiffs acknowledge that his behaviour forms an issue that they address in performing customer service.

[91] Moreover, I agree with Harris J. that the plaintiffs are not entitled to have the court parse the review that finely in any event.

[92] On finding that this lawsuit arises from expression made on a matter of public interest, subrule 137.1 (3) requires me to dismiss the action unless the plaintiffs can meet the tests to save it under subrule 137.1 (4).

Subrule 137.1 (4)(a) – Assessing the Merits of the Plaintiffs' Claims and the Defendants' Defences

[93] To save the action, subrule 137.1 (4) requires the plaintiffs to show that there are "grounds to believe" that the claim has "substantial merit" and that there are "grounds to believe" that the defendants have "no valid defence in the proceeding".

[94] The requirement of "grounds to believe" is meant to prevent these motions from becoming major affairs at which the entire claim is proven or disproven. The action is at its very beginning. Proof on evidence is supposed to happen at a trial – if one is reached.

[95] In *Rebel News v. Al Jazeera Media*, 2021 ONSC 1035 (CanLII), Diamond J. described the judicial task in this way:

> [28] As held by the Supreme Court of Canada in *Bent*, unlike a balance of probability standard, a "grounds to believe" standard

> requires “a basis in the record and the law – taking into account the stage of the litigation – for finding that the underlying proceeding has substantial merit and that there is no valid defence.” This means that any basis in the record and the law will be sufficient for *Rebel* to discharge its initial onus.
>
> [29] Whatever basis may exist, it must be legally tenable and reasonably capable of belief. The Court must be satisfied that Rebel’s prospects of success in this proceeding are more than a mere possibility.
>
> [30] One issue which arose during argument was the level to which the Court may delve into the merits of the proceeding (ie. the evidence filed on this motion) at this early stage. As recently held by the Court of Appeal for Ontario in *Subway Franchise System of Canada Inc. v. Canadian Broadcast Incorporation* 2021 ONCA 26 (CanLII), given the early stage at which motions under sections 137.1 are argued, “there is only a limited assessment of the evidence from the motion judge’s perspective”. If the record before the Court raises serious credibility issues, or perhaps inferences necessary to be drawn from competing material facts, “the motion judge must avoid taking a ‘deep dive’ into the ultimate merits and instead, engage in a much more limited analysis.”

[96] The “grounds to believe” standard is supposed to be a lesser or easier test to meet in order to prevent these motions from becoming massive, onerous, lengthy, costly proceedings like summary judgment motions and trial. If that was the hope, the Legislature has respectfully failed. These motions are huge as the materials in this motion show (even without cross-exanimations). The 60 day time limit, although mandatory, is virtually never met as counsel need more time to develop their massive evidentiary records. Moreover, the statute did not provide any further resources to the court to enable it to hear these long motions that quickly in any event.

[97] Anti-SLAPP motions generally take at least a full day to argue and are presented as “trials in a box” (like too many long summary judgment motions). That is, the entire case is presented in full with no specific or narrow, neat issue for determination. Rather, a trial that would normally take days or weeks is presented in a several bankers’ boxes (or thousands of megabytes) of material.

[98] The outcome of an anti-SLAPP motion can put a final end to the lawsuit. The plaintiff has every incentive to put its full case forward. If the plaintiff loses, it will never get a chance to present anything held back. Counsel have shown that they are not willing to take the risk of putting less than their client's best foot forward only to be told that their evidence did not meet the threshold when more was available back at the office.

[99] As the costs run up on this motion demonstrate, despite appellate decisions calling for these motions to be something less, they are typically presented as something more.

[100] Case management will not assist on this issue. A judge at a case conference early in the process cannot know what universe of evidence is available to counsel or whether particular evidence would be sufficient. Nor would a case management judge readily second guess the amount of evidence that counsel determines is needed in her professional judgment. By contrast, a judge at a pretrial conference right before trial can often tell if two witnesses are needed to prove the same point or if multiple experts may be too many. But that is a very different task than asking a judge at the outset of a case to determine what amount of appropriate to show "grounds to believe" that the claim has "substantial merits" and especially that the defendant has "no valid defence in the proceeding". The statute requires assessment of the merits of the action and any available defences on evidence. Unless a bright line test can be set for "grounds to believe" to be found or not found, expressions of the desire for everyone to do less, contain costs, and move more quickly on anti-SLAPP motions will continue to be ignored by the bar as they have been to date.

[101] The proof of the grounds to believe that the action has merit is generally not difficult in a defamation case. A plaintiff alleging libel or slander need only show that the defendant published words of or concerning the plaintiff that would tend to hurt his, her, or its reputation to members of the public. The assessment of the truth or appropriateness of the words used is a matter for the defendant to prove in its defences.

[102] It is perfectly apparent that the defendants published their reviews about both plaintiffs. The criticisms, justifiable or not, are intended to impair their reputations. The goal of one-star reviews is to alert people of risks of doing business with the target. Ms. Shiraishi-Seangio couldn't have been clearer than stating, "I would NEVER recommend this company." There are therefore grounds to believe that these words are defamatory in the senses used in the first four of the plaintiffs' stings listed in para. 33 above.

[103] The real issue on the merits is whether the plaintiffs can show grounds to believe that the defendants have no valid defence.

[104] Dealing first with statement about the cause of the leak, Mr. Seangio wrote:

> Shortly after installation, we developed a major water leak **due to** 1 defective product - the window above our patio door.
> …
> 1+ years later, after reaching the point of no longer dealing with MW, our contractor found the issue; a defective seal on the window which **enabled** water to leak into our house.

[105] Ms. Shiraishi-Seangio wrote

> After Magic Windows installed the windows we started to have massive leaking into our home.
> …
> Our contractor found a crack in the actual window frame. We fixed the crack and now no more leaking. Such a small error **caused** thousands of dollars and unneeded stress.

[106] Both defendants published that the crack in the frame of the upstairs window caused the leaks. Mr. Seangio called it a “defective product.”

[107] The defendants plead this is their true belief based on information provided to them by their contractor.

[108] In his affidavit delivered on this motion, the defendants’ contractor Mr. Draga Ivic swears:

> 11. On January 23, 2020, the Defendants called me and said that water was leaking into their home. I inspected the stucco. There were no issues with the stucco. I looked at the bedroom window on the second floor. I found a crack in the window frame.
>
> 12. I suggested that they contact Magic Windows to address the issue.
>
> 13. The Defendants told me that they contacted Magic Windows, and Magic Windows said that they would not come back out to the Defendants' home and address the issue. As such, I asked one of my employees to go to the Defendants' home to seal the crack with silicone.

> 14. On February 24, 2020, my employee attended at the Defendants' home and sealed the crack with silicone when the outside temperatures had warmed enough.
>
> 15. After this, the Defendants have not contacted me with respect to water leaking into their home.

[109] Ms. Shiraishi-Seangio swears:

> 44. We hired a trades worker to seal the crack with silicone. After we did this, we did not experience any more water leaks at our home and have not experienced any water leaks since.
>
> 45. I believe that the water was entering through the crack in the Bedroom Window and then dripping on the main floor around the Sliding Glass Door Window.

[110] There is a question as to whether by calling the product defective or in stating a cause for the leaks, the defendants were stating fact or opinion. In light of the view that I take of the issues, it does not matter. If the statement is one of fact, then, in their defence of justification, the defendants have a burden to prove on a balance of probabilities that the plaintiffs' product caused the leaks and was defective. Regardless of what they believed, the defendants may well be required to prove the cause as a matter of fact.

[111] As I discussed above, the plaintiffs adduced evidence with seeming credibility that the upstairs window cannot have leaked as the defendants claim.

[112] Not only was there no cross-examination of either Mr. Goldenberg or Mr. Ivic, but neither side produced independent, expert evidence of someone who had studied the cause of the leak thoroughly.

[113] *Pointes* directs me to analyze this evidence in this way:

> [59]…the motion judge must first determine whether the plaintiff's underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success, and must then determine whether the plaintiff has shown that the defence, or defences, put in play are **not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success.** In other words, "substantial merit" and "no valid

> defence" should be seen as constituent parts of an overall assessment of the prospect of success of the underlying claim.
>
> [60] In summary, s. 137.1(4)(a)(ii) operates, in effect, as a burden-shifting provision in itself: the moving party (i.e. defendant) must put potential defences in play, and **the responding party (i.e. plaintiff) must show that none of those defences are valid in order to meet its burden.** [Emphasis added.]

[114] Even accepting the inherent logic of the evidence provided by Mr. Goldenberg about his inventions, I cannot say that the proposed defence of truth based on the evidence of Mr. Ivic and Ms. Shiraishi-Seangio is not valid or is not supported by grounds on which it can be believed and succeed at trial.

[115] Mr. Akazaki submits that I should find more than a mere suspicion that there is *no* valid defence and that is enough to allow the action to proceed. I find that I have more than a mere suspicion that there *is* a valid defence. There is a triable issue of fact on contested evidence.

[116] The determination of the cause of the leak cries out for independent expert evidence. Plus, even if the windows themselves do not leak, and even if there was a pre-existing water problem in the house, there still needs to be an explanation of why water poured into the living room from around the plaintiffs' door after it was installed. The quality of the installation services provided by the plaintiffs are fairly in issue. I would not parse the defendants' reviews so finely as to limit them to the products themselves as distinct from their installation. The plaintiffs complain about the reviews being a disparagement of their installation services as well. [See: para. 33 (d) above].

[117] The defence of fair comment is also raised by the defendants. If their facts are correct, their opinions, if honestly held, are protected and defeated only by bad faith or malice. The validity of this defence turns on the truthfulness of the underlying facts. If the facts are true, then I cannot say that the defence is not valid. The plaintiffs will try to show bad faith. They claim that the defendants threatened them with bad reviews and the defendants deny doing so. This is also a triable issue of fact.

[118] The question of whether Mr. Goldenberg swore at Ms. Shiraishi-Seangio is a "he said; she said" issue. I have not been favoured with the precise words said by Mr. Goldenberg for which Ms. Shiraishi-Seangio ordered him to leave her house. Neither have I been provided with the words that Mr.

Goldenberg admits using (I think at a different time) that led him to apologize with an offering of a cake.

[119] There is also much interpretation involved in this issues. One person's cuss words can be another person's bawdy vernacular. Mr. Goldenberg denies swearing and is supported by an employee. He admits being ordered to leave the house.

[120] I cannot say that there are grounds to believe that the defence of truth is not valid. The truth of the allegations that Mr. Goldenberg was rude and cussed out Ms. Shiraishi-Seangio in front of her child is a triable issue that will turn on the credibility findings to be made in relation to the evidence given by witnesses at trial. It is not as if Mr. Goldenberg could provide evidence that he was not there or he never had a harsh word for the defendants. Mr. Goldenberg and Ms. Gould provide their own evidence of his behaviour that give an air of reality to the defence raised. As there is a triable issue of credibility, I cannot find that there are grounds to believe that there is no valid defence.

[121] I do not deal with the defence of responsible communication. As I find that there are no grounds to believe that the first two defences are not valid, I do not need to deal with the third defence offered.

Subrule 137.1 (4)(b) Weighing the Harm Suffered by the Plaintiffs against the Public Interest in the Defendants' Expression

[122] In light of my finding that the plaintiffs failed to show that there are grounds to believe that the defendants have no valid defence, I do not need to reach this issue either. I touch on it for completeness only.

[123] The corporate plaintiff says it suffered a dramatic loss of revenue in December, 2020 consequent on the defendants posting their reviews in mid-November. They deny that the loss of revenue was caused by the shutdown of Ontario due to the pandemic.

[124] The plaintiffs offer no evidence of any resulting net income loss however. I know nothing about their expenses during the timeframe. Nor do I know if any or all of the revenue was made up later.

[125] The plaintiffs' revenue numbers do show that it has increased its revenue by substantial amounts year-over-year however. Moreover, it always suffers a revenue decrease in December as people spend their money on Christmas rather than on home renovations in the dark of winter. But the drop suffered last year was distinctly worse than before. However, even with a one-time

revenue drop, it is not at all clear that the plaintiffs have suffered any loss of income given the significant increase in its revenue since then. The plaintiffs' will be hard put to show that they would have made even more net income but for the defendants' reviews in the height of the pandemic.

[126] I do not dismiss the causation assertion based on the relative timing of events. Just as I was satisfied that the defendants' sealing of the crack raised an issue for liability, so too the precipitous decline in revenues raises an issue of causation for damages.

[127] But, under this subsection of the statute, I am required to weigh competing values. So I am required to come to some conclusions about relativity. I have already noted my concern about proof of income as distinct form a decline in revenue. I have noted the pandemic as a significant possible alternative cause. But the thing that most makes me dubious about the claim that the plaintiffs' income loss was caused by the defendants' negative reviews was that this was not the first or only negative reviews the plaintiffs' business has endured.

[128] Other reviews note Sol Goldenberg's offensive manner. Other reviews echo the defendants' concern that the plaintiffs will not admit any possibility of their windows leaking. Other reviews are highly negative. If Lior Goldenberg's evidence of the correlation of negative reviews to huge revenue drops is correct, then each of the prior negative reviews should have caused similar losses. At least some of them should have caused some identifiable losses. The plaintiffs treat the defendants' reviews as a singular event that caused a massive loss of revenue. If that is so, where are the other revenue losses caused by the other negative reviews? There is no indication that there was anything so special, different, or weighty about the defendants' negative reviews compared to the others.

[129] It may be that the plaintiffs will be able to show some loss of revenue. They have some evidence of potential customers saying that they did not buy due to negative reviews. It would be very difficult to prove the negative – that unknown people were going to buy and changed their minds after reading the defendants' reviews. But accountants can translate the revenue loss to an income loss or a loss of potential income and then account for other events such as the pandemic. In my view, the resulting loss, if any, will be very modest.

[130] Sol Goldenberg also claims damages for anxiety and hurt caused to him by the defendants' reviews. It is hard to think of him as emotionally vulnerable given his own employees' evidence about his manner. But I do not dismiss

the possibility of a modest award of general damages at large if Sol Goldenberg is able to establish a successful claim.

[131] The fact that this case was commenced under the Simplified Procedure and that the plaintiffs want nothing more than to discontinue it also suggests that the provable losses suffered, if any, are modest.

[132] I must weigh the plaintiffs' right to claim some modest damages against the public interest considerations involved in this case.

[133] In my view, this case has the four *indicia* of a SLAPP suit discussed at 78 of *Pointes*. There is evidence that the plaintiffs use threats of lawsuits against others who wrote negative reviews. The plaintiffs have the economic power of a successful and growing business as compared to that of retail consumers. The plaintiffs have likely suffered little provable loss.

[134] I also find that this litigation was likely retributive in design. The plaintiffs' lawyers knew or ought to have known that an anti-SLAPP motion was a possible answer to a defamation action for an online review. The plaintiffs' decision to try to abandon the claim when confronted with this motion lays bare their motivation. Whether other online reviewers had the wherewithal to retain counsel in face of the plaintiffs' libel notices, this one did. And when the defendants came forward with an obvious answer to the claim based on clear precedents, the plaintiffs folded like a cheap suit. The plaintiffs say they did not want to incur the cost of the process. But they refused to engage in a summary process to resolve the case because they insisted that the defendants take down their reviews. They want to control the public narrative and tried to use this lawsuit to do so.

[135] The balancing called for in this step of the anti-SLAPP analysis is straightforward. The plaintiffs have only a modest damages claim (if any) and they brought this proceeding as strategic litigation against public participation. It is the type of proceeding that s. 137.1 was designed to prevent.

Outcome

[136] The action is dismissed.

Costs

[137] Under subrule 137.1 (7) the defendants are presumptively entitled to full indemnity for their legal costs. While the quantum is exceptional and I will deal with that below, there is no basis to deviate from the presumption. I

have found that this is a SLAPP suit. Accordingly, the defendants should be fully indemnified for their costs.

[138] If Rule 76.12 would cap the costs in this Simplified Procedure action, I find that s. 137.1 (7) of the statute trumps the rule.

[139] The plaintiffs argue that if they had been entitled to abandon the action, they would not be facing this issue. I disagree. If the plaintiffs brought a SLAPP suit intending to discontinue it if the defendants defended, that too should attract punitive costs – at least on a substantial indemnity basis – under s. 131 of the *Court of Justice Act.* I do not know why this type of misconduct would not attract full indemnity costs by analogy to s. 131.1 (7) in any event.

[140] Mr. Knoke had principal carriage this action on behalf of the defendants. He was called to the bar in 2018. His hourly rate is $455. Mr. Thacker's hourly rate is more than double that. Mr. Thacker stopped billing for *inter-partes* costs purposes after the second case conference on May 3, 2021.

[141] I have reviewed closely the defendants' bill of costs. None of the hours claimed for individual items is unreasonable. The overall amount is very high for a motion generally.

[142] The defendants' total bill of costs amounts to $164,186.76 all-inclusive. I would normally reduce it by a modest amount (5% - 10%) based on a presumption that there is some duplication or inefficiency buried in a relatively large and multi-timekeeper account. However here, with Mr. Thacker not billing despite his ongoing involvement and participation for almost the full hearing, in my view counsel has already made an adequate adjustment.

[143] I have to assess the reasonableness of even a full indemnity account. In particular, is there an access to justice issue if a plaintiff is met with this account in these circumstances? The plaintiffs are facing an account at near the top end of the damages available under the Simplified Procedure under which they brought the claim. I do note however that when Mr. Finkel was making submissions about the plaintiffs' alleged losses well above $200,000, he would not rule out moving the action to the regular list. He tried to straddle both processes depending on which favoured his clients' particular argument.

[144] But knowing that they were facing a $35,000 claim for fees in May, the plaintiffs deliberately doubled down and rejected a summary process to determine their costs liability on discontinuing the action. They had to have

reasonably anticipated that their 1,000 pages of evidence diving fully into the merits in great detail would drive double or triple the costs incurred to that point. Moreover, it is a touch incongruous to be speaking about proportionality and access to justice concerns for a business plaintiff whom I have found has deliberately brought a lawsuit to bully consumer defendants with litigation costs and litigation risk for daring to express themselves. There is no basis for protect a SLAPP plaintiff's access to justice. They should not be using litigation for those purposes.

[145] My only concern then is whether the costs claimed are so high as to offend some notion of the public interest. I do not think there is a principle of law that allows me to be offended by a raw number. Despite *Hyrniak v Mauldin*, 2014 SCC 7, calls for changes to the system of civil justice, and pleas to improve access to justice for regular Canadians, the system remains as it is. I do not condemn the defendants' lawyers for their market-based hourly rates. Nor can I find that they overworked this major motion file.

[146] It would be arbitrary for me to say that anything over $X offends the public interest or the conscience of the court. The Law Society of Ontario is supposed to regulate the profession in the public interest. I have not practised law in many years. The account is high compared to the daily fare in motions court. But I saw similar bills in practice for significant motions. While some would like to think that anti-SLAPP motions should be quick and minor events, the statutory scheme imposes a complex process involving several different tests and measurement standards with weighing and balancing of difficult factors. These are massive motions as discussed earlier.

[147] I find that in all of the unusual circumstances of this case, it is reasonable and intended by the statute that the plaintiffs pay the defendants' costs of the proceeding on a full indemnity basis. The amount is not above the amount that the plaintiffs ought reasonably to have anticipated on the facts of this case. The amount claimed is reasonable in hours, rates, and overall in view of the amount of legal effort required on this motion. I fix the defendants' costs therefore at $164,186.76 all-inclusive and order the plaintiffs jointly and severally to pay the costs forthwith as the action is now over.

Damages

[148] The plaintiffs are already suffering for their own errant strategic use of the court's proceedings. However, in light of my express finding that this was a SLAPP suit in its motivation and implementation, a damages award is

contemplated by the statute and reasonable. A SLAPP suit is by definition brought for an improper purpose. Mr. Goldenberg sought to use the lawsuit to bully the defendants to take down public reviews that he did not like. In view of the quantum of the costs payment, I fix the damages at a nominal sum of $2,500.

FL Myers J

Released: October 4, 2021

CITATION: Canadian Thermo Windows Inc. v. Seangio, 2021 ONSC 6555
COURT FILE NO.: CV-21-656765
DATE: 20211004

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CANADIAN THERMO WINDOWS INC. C.O.B. MAGIC WINDOWS INNOVATIONS and SHAUL GOLDENBERG, A.K.A. SOL GOLDENBERG

Plaintiffs

– and –

ALDWYN SEANGIO and ALISON SHIRAISHI-SEANGIO

Defendants

REASONS FOR DECISION

FL Myers J

Released: October 4, 2021