IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan EPS 3173 v. Intracorp S.W. Marine Limited Partnership,* 2023 BCSC 1003

Date: 20230612
Docket: S36678
Registry: Chilliwack

Between:

The Owners, Strata Plan EPS 3173

Plaintiff

And

Intracorp S.W. Marine Limited Partnership; Intracorp S.W. Marine Ltd; Travelers Insurance Company of Canada; Axiom Builders Inc.; Integral Group Consulting (BC) LLP; Olympic International Sales Ltd.; Olympic Controls Inc.; Jaga Canada Climate Systems Inc.; Aermec S.P.A; Giacomini Consulting Canada Inc.; Giacomini S.P.A.; Enerpro Systems Corp.; DMS Mechanical Ltd.; James K.M. Cheng Architects Inc.

Defendants

And

Intracorp S.W. Marine Limited Partnership, Intracorp S.W. Marine Ltd., Axiom Builders Inc., Integral Group Consulting (BC) LLP, Olympic International Sales Ltd., Olympic Controls Inc., Jaga Canada Climate Systems Inc., Enerpro Systems Corp., DMS Mechanical Ltd., James K.M. Cheng Architects Inc., AWM – Alliance Real Estate Ltd., and Zenith Commissioning Consulting Ltd. Aermec S.P.A., Giacomini Consulting Canada Inc., Giacomini S.P.A., Trane Canada ULC

Third Parties

Corrected Judgment: The text of the judgment was corrected throughout June 14, 2023.

Before: The Honourable Madam Justice Walkem

Reasons for Judgment

In Chambers

Counsel for The Owners, Strata Plan EPS 3173 and AWM-Alliance Real Estate Ltd.:	V.G. Critchley
Counsel for Giacomini Consulting Canada Inc. and Giacomini S.P.A.:	J.D. Shields
No Other Appearances	
Place and Dates of Hearing:	Chilliwack, B.C. May 1-2, 2023
Place and Date of Judgment:	Chilliwack, B.C. June 12, 2023

Table of Contents

INTRODUCTION

[1] The defendants in this action apply to have it dismissed per Rule 22-7(7) of the *Supreme Court Civil Rules* [the *Rules*] which allows for the court to order a proceeding be dismissed if “it appears to the court there is want of prosecution”.

BACKGROUND

[2] The plaintiff is a Strata Corporation (“the Strata”), representing several owners of a condominium building located in South Vancouver. This civil claim has been brought by the Strata against numerous defendants regarding the quality of the construction and materials in the condominium development. The applicant in this matter, the defendant, Giacomini, supplied radiator and fan coils that were installed in the plaintiff's buildings. The other named defendants took no position in this application.

[3] The original Notice of Civil Claim (“NOCC”) was filed on August 9, 2019. On August 7, 2020, the plaintiff applied to renew the NOCC for a period of six months.

[4] In February of 2021, the defendant filed an application to strike a portion of the plaintiff's pleading, or in the alternative to dismiss for want of prosecution. After limited communication between counsel, an agreement was reached to adjourn the matter generally in May 2021. At that time, the defendant says there was an agreement the plaintiff would file amendments to their pleadings. Since then, the defendant argues the plaintiff has taken no steps to advance the matter.

[5] After the filing of this application, the plaintiff filed an Amended NOCC on March 27, 2023.

POSITION OF THE PARTIES

[6] The applicant argues that it has been, and continues to be, impacted by the existence of this unresolved litigation. The applicant argues that routine and lengthy delays cause problems within the court process, and urges this Court to discourage a culture of litigation delay. The defendant argues that its reputation and business has suffered as a result of having this unresolved litigation hanging over them.

[7] The plaintiff's primary argument was that given the circumstances of the litigation, that there has not been inordinate or inexcusable delay. The plaintiff points out that some time and effort since the initial filing of the claim was taken up with third party notices, and that complex multi-party construction matters take a longer time to litigate. The plaintiff argues that any fault for the delay should be laid at their counsel's feet (counsel who appeared for the plaintiff in response to the application to dismiss was not the counsel of record), and that they should not be penalized for the delay.

LAW

[8] The factors to be considered in dismissing an action for want of prosection were described in *Wiegert v. Rogers*, 2019 BCCA 334 [*Wiegert*], at paras. 31-33. An order dismissing an action for want of prosecution is an extreme measure. Such orders should be made sparingly and only if it is clear justice requires a dismissal of the action: *Wiegert* at para. 31. The principals in *Wiegert* were recently affirmed by the Court of Appeal in *Drennan v. Smith*, 2022 BCCA 86 [*Drennan*], and by this Court in *New Rightway Contracting Ltd. v. 0790792 B.C. Ltd*., 2023 BCSC 216 [*New Rightway Contracting*].

[9] The test for whether an action should be dismissed for want of prosecution is assessed according to these steps:

a) Has there been inordinate delay?

b) If there is inordinate delay, is the delay inexcusable? The party seeking dismissal bears the onus of showing inordinate delay for which there is no credible excuse.

c) Has the delay caused, or is it likely to cause, serious prejudice to the defendant? Once a defendant establishes that delay is inordinate and inexcusable, a rebuttable presumption of prejudice arises. The court's concern is in the prejudice that a defendant will suffer in mounting and presenting a defence if the matter goes to trial. Assessing prejudice to the

defendant could include consideration of the length and reasons for the delay; the stage of the litigation; the context in which the delay occurred; and, the role of counsel in causing the delay (although negligence on the part of a plaintiff's lawyer may not always amount to an excuse).

d) If the former factors have been established, on balance, the court must then ask: does justice demand a dismissal of the action?

[10] The delay should be analysed holistically, not in a piece-meal fashion. The extent to which a delay may be excusable is highly fact-dependent. See: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at paras. 38-39 [*Ed Bulley BCCA*].

[11] It is "no light matter" to dismiss a claim for want of prosecution, and this discretion should be exercised sparingly, particularly if it is likely that a fair trial of the issues is possible, despite the delay: *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145 at para. 37. Where “the parties can have a fair trial notwithstanding the delay and some prejudice”, the interests of justice may require the action be allowed to proceed: *New Rightway Contracting* at para.72.

Inordinate Delay

[12] The defendants bear the onus of demonstrating a delay is inordinate: *Singh v. Media Waves Communications Inc.,* 2022 BCSC 1611 [*Singh*] at para. 44. Inordinate delay was described in *Wiegert* at para. 32 as being a delay that is "immoderate, uncontrolled, excessive and out of proportion to the matters in question”. See also: *Azeri v. Esmati-Seifabad,* 2009 BCCA 133 at para. 9. It has also been defined as a "lengthy delay which exceeds the normal time-frame": *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation,* 2013 BCSC 991 at para. 42 [*Ed Bulley BCSC*], citing *Hannah's Construction v. Blue River,* 2006 BCCA 142 at para. 22.

[13] The date of commencement of the action is typically considered the point from which delay is measured. In cases where the issues are dependant upon the

recollection of witnesses, the length of delay itself may demonstrate an inordinate delay.

[14] At the filing of this application in February of this year, 3.5 years had elapsed since the filing of the original NOCC on August 9, 2019. It was filed near the expiry of the period to do so. After it was filed, the NOCC was not served until the near expiry (under the *Rules*) of the period to do so. Prior to this application being filed, the plaintiff had taken no steps for 21 months. The Amended NOCC was only filed on March 27, 2023, after this second application to dismiss for want of any prosecution was filed.

[15] The plaintiff argues that nearly four years that have elapsed since the filing of the original NOCC are not an inordinate delay in the context of construction litigation and cites *The Owners, Strata Plan EPS1977 v. Travelers Insurance Company of Canada/LA Compagnie D'Assurance Travelers Du Canada*, 2021 BCSC 178 [*Strata Plan EPS1977*] in support of their position. In *Strata Plan EPS1977* Justice Iyer, at para. 7, observed that a delay period of four years and two months, "[i]n the context of complex construction litigation", was "not unusual*"*. Iyer J. cited *Owners of Strata Plan LMS 2174 v. 387903 B.C. Ltd.,* 2010 BCSC 401 at para. 67, where a 10-year delay between the conclusion of construction and the filing of a Writ of Summons was found to be common.

[16] The plaintiff argues the defendant has taken no actions of their own to advance the proceeding, including communicating with plaintiff's counsel regarding dates for trial or a request for documents. While this may be relevant to assessing the delay, a defendant has no obligation to advance an action, and inactivity by a defendant where there is no requirement to comply with the *Rules* is irrelevant: *Tri-City Contracting Ltd. v. Leko Precast Ltd*., 2016 BCSC 623 at para. 31 [*Tri-City*], citing: *Irving* at paras. 322-23. Absence of action by a defendant to move a case along should not fall to the plaintiff's favour.

[17] The actions, or inactions, of the plaintiff are relevant to assessing whether a delay is inordinate. While it may be that delays are common in complex construction

litigation, there has been no active steps taken in the litigation for nearly two years. The lack of action by the plaintiff to advance its case is contrary to the just, speedy and inexpensive resolution of legal disputes on their merits as directed by the *Rules*.

[18] The plaintiff says that the defendants' February 2021 application to dismiss for want of prosecution was brought prematurely and bound to fail. The defendant says the fact this is the second application brought to strike and/or dismiss the claim is relevant to the analysis. Also of relevance, is the fact that the application was adjourned generally in May 2021, at which time the plaintiff agreed to amend the pleadings and be back in touch with the defendant. The plaintiff did not honour this agreement. The amended NOCC was only filed after this second application to dismiss for want of prosecution was filed.

[19] I find the lack of active steps to advance the litigation for nearly two years, with minimal steps taken since the original NOCC was filed nearly four years ago, to be inordinate.

Unreasonable/Inexcusable Inordinate Delay

[20] I now turn to the question of whether the delay can be said to be unreasonable or inexcusable.

[21] A delay may be found to be unreasonable if it was made for tactical reasons that purposely better the position of the plaintiff and/or prejudice the defendant(s): *Irving v. Irving* (1982), 38 B.C.L.R. 318, 1982 CanLII 475 (C.A.) at 324; *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.,* 2020 BCCA 120 at para. 47.

[22] In determining whether a delay is unreasonable, the complexity of the matter and the number of litigants is relevant to the analysis: *Gemex Developments Corp. v. Sekora*, 2011 BCSC 318 at para. 95 [*Gemex*]. The plaintiff is expected to proceed in a "reasonably expeditious way" pursuing a matter through the court process: *Gemex* at para. 104.

[23] The actions or inactions of counsel, to no fault of the defendants, may not amount to an inexcusable delay: *Singh* at para. 77. However, deliberate inaction by a plaintiff while prioritizing other business ventures may be considered an inexcusable delay. Though not to the level that was described in *Singh*, it is the negligence of plaintiff's counsel that appears to have created the delay in the present case.

[24] The defendant argues the plaintiff chose to file at the Chilliwack Registry, rather than in Vancouver, as a tactical delay. The defendant suggests some form of sharp practice reflected in the plaintiff's decision to file in the Chilliwack Court Registry when the parties, building and events are closely tied to Vancouver, and have no Chilliwack connection.

[25] The defendant further argues that not serving the NOCC on some defendants until nearly a year later, and failing to file an amended NOCC in a timely way, is evidence of a tactical delay intended to prejudice the defendants.

[26] In similar circumstances to this case, the defendants in *The Owners Strata Plan EPS1977* argued the delay by the plaintiff was purely tactical. In that case, after the NOCC was filed, the Strata continued with investigative and repair work. Three years after the claim was filed, it discontinued its claim against three of the other defendants. Justice Iyer disagreed the delay was for tactical reasons, and found the plaintiff had filed its claim in accordance with the *Rules* and relevant timelines in order to preserve its legal rights. She also found the plaintiff took steps to resolve the claim while it was held in abeyance, which was in accordance with the settlement and efficiency purposes outlined in the *Rules*.

[27] The plaintiff argues that this is complex multi-party litigation requiring more time and resources than more straightforward matters. The plaintiff further suggests that some of the delay is excusable as the courts were impacted by the COVID-19 pandemic and plaintiff's counsel has a busy practice. Aside from affidavits filed by plaintiff's counsel in this regard, no further evidence was submitted as to the specific delays created by the COVID-19 pandemic on this claim or on the practice of

plaintiff's counsel. Absent further specific evidence of COVID-19 related delays, I do not find it to be a factor. Court processes have steadily increased to pre-pandemic levels over the past two years, during which time the matter continued to sit in abeyance.

[28] The Strata argues they filed the NOCC within the limitation period, as is permitted by statute, and that its choice of Registry and timelines of service upon the defendants are all in accordance with the *Rules* and therefore an allowable practice. The plaintiff suggests perhaps the Chilliwack Registry was chosen to secure earlier trial dates. The plaintiff says there was no tactical or inexcusable delay created by any of these actions. Further, the plaintiff points out that they have complied with both the *Rules* and with the relevant legislation. There are timelines set out in the legislation and *Rules*. The fact that a party meets the prescribed deadlines at the end (rather than beginning or middle) of a timeline set in legislation or the *Rules* cannot be said to be unreasonable.

[29] The suggestion of the Strata that the NOCC was filed in Chilliwack with the aim of securing earlier court dates in a less busy registry does not align with how the claim has proceeded, without haste or pursuit of potentially earlier trial available trial dates.

[30] The lack of communication with opposing counsel is one aspect to be considered, balanced to a very limited extent, with the lack of follow-up communication from defendant's counsel. As noted above, the onus does not sit on the defendant to move the plaintiff's parked case forward.

[31] The plaintiff's filing the Amended NOCC, only after the filing of this application, indicates there was some ability of plaintiff's counsel to act when incentivized to do so. As was stated by Madam Justice Smith in *Gemex* at para. 105:

> The plaintiff should have dealt with a surfeit of litigation, largely of its own creation, by devoting adequate resources to proceeding against all of the defendants it sued with reasonable expedition.

[32] Delay forced upon a party through the negligence of their counsel must be distinguished from a tactical delay: *Tri-City* at para. 33. I do not find the plaintiff's actions and inactions to be tactical in nature, in the sense that they were intended to prejudice the defendant. Rather, these delays appear to have been based on the inaction on the part of plaintiff's counsel and failure to effectively manage the case.

[33] The question then arises about whether the plaintiff bears some responsibility for the inaction of their counsel. For example, in *Tri-City* at para. 62, Justice Sharma held the plaintiff should be held partially responsible for the delay as he had asked his counsel to suspend activity. Here, there was no indication that the delay was driven by the request or direction of the plaintiff.

[34] Given the February 2021 application, and subsequent correspondence between counsel with little to no action on the plaintiff's part until the present application was filed, I find the delay to have been unreasonable in the circumstances. While complex, multi-party litigation may take longer to advance, that complexity is no excuse for the near complete lack of action in moving a file forward, as evidenced by the plaintiff's lack of action in this case. I find there has been inordinate delay, which is unreasonable in the circumstances.

Prejudice to the Defendant as a Result of the Delay

[35] If it is determined that delay in prosecuting litigation has been inordinate and unreasonable, the burden shifts to the plaintiff to rebut a presumption of prejudice to the defendants: *Singh* at para. 79.Dismissal for want of prosecution requires a finding the delay has caused, or is likely to cause, serious prejudice to the defendant: *Drennan*.

[36] The court can assume a defendant will suffer prejudice as a result of a delay given the passage of time and potential for memories to fade: *Tundra* at para. 37; *Wilson v. Hrytsak,* 1997 CanLII 3396, [1997] B.C.J. No. 1115 (QL) at para. 9. However, that in itself is not enough to create the presumption the parties will not have a fair trial, thus warranting the extreme measure of dismissing in the interests of justice: *New Rightway Contracting* at para. 72; *Tundra* at para. 37.

[37] The question is whether, on a balance of probabilities, absence of prejudice has been established; *Tundra* at para. 37. This is so because courts have recognized the evidence about specific prejudice will almost always be in the exclusive knowledge of the defendant: *Singh* at para. 78; *Tundra* at para. 36.

[38] Considering this portion of the test, the B.C. Court of Appeal in *New Rightway Contracting* found that although there had been inordinate and unreasonable delay, the defendant had not suffered any prejudice and thus dismissed the action.

[39] The expiration of a limitation date is a factor in determining whether prejudice may be assumed: *Ed Bulley BCSC* at para. 62. In *Ed Bulley BCSC*, the Chambers judge found a delay of five years, in which no steps were taken to be inordinate and unreasonable. Though the plaintiff indicated this was due, in part, to financial hardship–this was not in the evidentiary record. Prejudice was found as one of the key witnesses had died, and because the limitation period had expired during the delay. These reasons were upheld on appeal, with the court of appeal commenting the chambers judge "was generous to the plaintiff" in determining the date from which the delay should be counted.

[40] In *Busse v. Robinson Morelli Chertkow,* 1999 BCCA 313, the Court of Appeal dismissed the action for want of prosecution as the delay (10 years) was found to be inordinate, the reasons for the delay were inexcusable (impecuniosity, with little documentary evidence of such). Further, it was found that the defendant would suffer prejudice given the death of one of the witnesses.

[41] In *Gemex*, Madam Justice Smith dismissed the case for want of prosecution finding the delay was inordinate (12 years) and inexcusable. She found that despite several defendants and different, but related, proceedings, the plaintiff had failed to take meaningful and adequate steps to move the litigation along. Prejudice was found, in part, due to the deaths of two key defendants and the fading memories of several other witnesses and defendants. She found justice required a dismissal.

[42] A relevant factor in assessing prejudice is whether the defendant has, or may lose, the best evidence available to them: *Drennan* at para. 42. The expense and inconvenience incurred, unless there is evidence it may interfere with the defendant's ability to defend itself at trial, are not relevant. These are factors which may be compensable through costs, or a claim for damages if the plaintiff is unsuccessful in the action: *0690860 Manitoba Ltd. v. Country West Construction Ltd*., 2009 BCCA 535 at para. 50. To some extent, it is assumed that factors such as expense and inconvenience are compensable through damages. It can be inferred that some prejudice will be faced by defendants in complex and lengthy litigation given the passage of time and the likelihood for memories to fade: *Tundra* at para. 37.

[43] The defendant argues they have experienced prejudice, and will continue to, in part because of the stigma created by having this litigation hanging over their business. This is not enough to establish the serious prejudice that is required as per *Drennan.* The prejudice relevant to the analysis of whether an action should be dismissed for want of prosecution is that which impacts the defendant's ability to defend the action.

[44] While it appears there is a realistic likelihood the defendant has faced stigma, that is not relevant to the analysis here. On the evidence, it does not appear the defendant has, or will suffer serious prejudice as a result of the delay. The claimed deficiencies in their product are outlined within insurance claims, and communications with third-party defendants. The Strata argues it has continued investigations and repairs. The evidentiary record as it stands is available to the defendant. There is no obvious prejudice to the defendant being able to properly defend their case. Further, the defendant, while not expected to advance the litigation, has been able to take necessary steps to secure documentary evidence that would assist it in its defence.

[45] Based on the evidence before the court, it is not apparent that the defendant has suffered, or will suffer, serious prejudice which undermines their ability to defend

themselves in this action as a result of the delay. Accordingly, I find the interests of justice do not require this claim to be dismissed for want of prosecution.

CONCLUSION

[46] I have found the delay in this case is both inordinate and inexcusable. I do not find, on balance, any obvious prejudice to the defendant, in the sense of them not being able to defend themselves through the dissipation of evidence due to the delay or other interference with the defendant's ability to defend themselves at trial caused the delay, which would warrant the claim being dismissed in the interests of justice.

[47] I order the plaintiff to set a judicial case conference within two months of this decision, with all parties, to discuss a case plan and timeline moving forward.

[48] Given the circumstances, I am of the opinion that no costs should be payable by the applicant.

"A. Walkem J."