COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173,* 2023 BCCA 473

Date: 20231218
Docket: CA49137

Between:

Giacomini Consulting Canada Inc. and Giacomini S.P.A.

Appellants
(Defendants)

And

The Owners, Strata Plan EPS 3173

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler
The Honourable Mr. Justice Voith
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated June 12, 2023 (*The Owners, Strata Plan EPS 3173 v. Intracorp S.W. Marine Limited Partnership*, 2023 BCSC 1003, Chilliwack Docket S36678).

Counsel for the Appellant:	J.D. Shields A.P. Morrison
Counsel for the Respondent:	V.G. Critchley J. Corbett
Place and Date of Hearing:	Vancouver, British Columbia October 19, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 18, 2023

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler
The Honourable Mr. Justice Voith

Summary:

The appellants appeal the dismissal of their application to dismiss this action for want of prosecution. The action, involving a construction dispute, was filed in 2019. By the time of the hearing of the application to dismiss, the respondent had not produced documents, scheduled examinations for discovery, or set a trial date. The chambers judge found the respondent's delay was inordinate and inexcusable, but dismissed the application because the delay had not resulted in prejudice to the appellants. On appeal, the appellants ask the Court to revise the existing test for dismissal of an action for want of prosecution.

Held: Appeal dismissed. The existing test for dismissal for want of prosecution does not permit a full consideration of the factors relevant to the interests of justice. The test is revised so that prejudice is no longer a stand-alone requirement for dismissal. The new test asks three questions: (1) is the delay inordinate, (2) is the delay inexcusable, and (3) if the first two questions are answered in the affirmative, is it in the interests of justice for the action to continue. Under this test, prejudice to the defendant remains a relevant consideration at the interests of justice stage, but it is not a pre-requisite to an order for dismissal. On the facts of this case, it is in the interests of justice to permit the action to proceed despite the delay.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Introduction

[1] On this appeal, the appellants ask a five-member division of this Court to revise the long-standing test for dismissal of a civil action for want of prosecution in British Columbia. The test requires a judge to be satisfied that: there has been inordinate and inexcusable delay in the prosecution of the action; the delay has caused, or is likely to cause, serious prejudice to the defendant; and it is in the interests of justice to dismiss the action. This test has governed applications for want of prosecution in this jurisdiction for many years.

[2] The underlying litigation in this case involves a construction dispute over alleged defects in an HVAC system installed in a mixed-use real estate development. The appellants—the suppliers of certain components for the HVAC system—are among the 14 defendants to the action. The respondent commenced the action in August 2019. The appellants filed their application to dismiss the action for want of prosecution in January 2023. In the intervening years, the respondent took no steps to list and produce documents, set down examinations for discovery,

or schedule a trial date. The chambers judge found that the respondent's delay in prosecuting the action was inordinate and inexcusable. However, she dismissed the appellants' application on the basis that the delay had not caused serious prejudice to their ability to defend the action.

[3] The appellants say that the chambers judgment exemplifies the flaws in the existing test for dismissal of an action for want of prosecution. They say the test is unduly narrow, and prioritizes the plaintiff's interests in a trial on the merits at the expense of other competing interests that are also of fundamental importance, such as public confidence in the administration of justice. The focus of the appellants' critique of the test is on the requirement that serious prejudice to the defendant be demonstrated before a case is dismissed for want of prosecution. This requirement, according to the appellants, condones inordinate and inexcusable delay and creates little incentive for a plaintiff to move diligently in the prosecution of a civil action.

[4] The appellants rely on the *obiter* comments of Justice DeWitt-Van Oosten, writing for the Court, in *Drennan v. Smith*, 2022 BCCA 86, that provide the backdrop for their request for a revision of the law. In *Drennan*, the Court suggested that, in light of an apparent pattern of delay in civil proceedings in British Columbia, it may be time to revisit the test for dismissal for want of prosecution: *Drennan* at paras. 59–63. The Court in *Drennan* was not asked to reconsider the test, and doing so would have required a five-member division: *Drennan* at para. 61. The same restrictions are not present on this appeal.

[5] It is common ground on appeal that undue delay in civil proceedings undermines public confidence in the justice system. The issues of contention are whether the concern over delay is adequately addressed in the existing test for dismissal for want of prosecution, and, if not, how the test should be revised to more effectively address the problem of delay. There is also, of course, a dispute as to how the test for dismissal for want of prosecution—whether or not the existing test is revised—should apply to the facts of this case.

Factual background

History of the proceedings

[6] This litigation involves a construction dispute over alleged failures in an HVAC system installed in a residential tower (the "Tower") that is located within what is described in the pleadings as the "MC2 Development". The appellants supplied HVAC-related components to the project, namely radiator and fan coils.

[7] On August 9, 2019, the respondent, a strata corporation, filed this action in the Chilliwack Registry. The strata corporation brings the action on its own behalf, and on behalf of individual owners of units within the Tower. The respondent alleges that the appellants breached the express warranty that the HVAC components they supplied would perform to proper standards. It is alleged that the breach of warranty has caused the respondent to suffer significant damages.

[8] The respondent served the notice of civil claim one year later, in August 2020. The appellants filed their response to civil claim on September 29, 2020.

[9] There are two related actions that have been filed on behalf of other owners within the MC2 Development. The same counsel acts for the plaintiffs in all three actions. The related actions were also filed in the Chilliwack registry.

[10] On February 3, 2021, the appellants filed a notice of application seeking to strike the action for want of prosecution or, in the alternative, to strike certain portions of the notice of civil claim. The respondent cross-applied for an order striking the appellant's response to civil claim.

[11] On May 11, 2021, following a telephone conversation between counsel, counsel for the appellants, via email, proposed to adjourn both applications on certain terms. The terms included that the respondent would file an amended notice of civil claim within one month, and that the appellants would file an amended response to civil claim. Counsel for the appellants further proposed that the three related actions be moved from Chilliwack to Vancouver. In a responding email sent May 14, 2021, counsel for the respondent agreed to generally adjourn the

applications, and stated: “We will get back to you shortly with respect to amendments/timing and potentially moving the action to Vancouver”.

[12] In the months that followed counsel’s May 14, 2021 email, the respondent did not amend its pleadings or take steps to move the action to Vancouver. The respondent did not take any other steps in the litigation, such as producing a list of documents, scheduling examinations for discovery, or setting a trial date.

The 2023 application to dismiss for want of prosecution

[13] On January 31, 2023, the appellants filed a second application to dismiss the action for want of prosecution. In support of their assertion of prejudice arising from the delay in the action, the appellants tendered affidavit evidence from a branch manager, Kambiz Pishghadam, who deposes that the allegations in the action “have been, and continue to be, very damaging to Giacomini’s reputation and their efforts to sell more products and services”. Pishghadam also describes having to answer inquiries from potential customers who have conducted due diligence and discovered the ongoing litigation. Further, Pishghadam states that the allegations in the litigation “continue to hamper and impede Giacomini’s business, marketing, sales, and service”.

[14] In its response to the application, the respondent advanced various explanations for its delay, including:

a) The COVID-19 pandemic caused delays in the respondent’s ability to convene a Special General Meeting to ratify the steps taken in the proceeding and authorize service and prosecution of the action. This is said to explain the delay in serving the filed notice of civil claim.

b) Investigation into the defects at the MC2 Development has been ongoing, and new defects have become apparent. In drafting an amended pleading, counsel for the respondent had to take care to capture all of the identified defects.

c) Counsel for the respondent did not commit to a firm timeline for filing an amended notice of civil claim and could not make such a commitment in light of the complex nature of the litigation and counsel's busy trial schedule.

d) Many of the named defendants in the action requested an extension of time to file responses to civil claim, and have since commenced third party claims against other parties, including the appellants. The pleadings in the action did not close until April 2023.

[15] On March 27, 2023, prior to the hearing of the dismissal application, the appellants filed an amended notice of civil claim.

The chambers judgment

[16] The judge began her analysis by stating the test for dismissal of the action for want of prosecution:

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

[17] No issue is taken with the judge's statement of the test. The parties agree that she accurately described the four steps of the analysis she was required to undertake.

Inordinate delay

[18] The judge first considered whether the respondent's delay in this case was inordinate. She noted that as of the time of the filing of the dismissal application, three and a half years had elapsed since the notice of civil claim was filed, and further, that no steps had been taken to advance the litigation in the preceding 21 months. While acknowledging that delays may be common in construction litigation, the judge held that the respondent's failure to take active steps in the litigation for nearly two years was "contrary to the just, speedy, and inexpensive resolution of legal disputes on their merits as directed by the Rules". Accordingly, she found the delay to be inordinate: Chambers judgment at paras. 12–19.

Inexcusable delay

[19] Turning to an assessment of whether the delay was inexcusable, the judge rejected the appellants' submission that the respondent's inaction was tactical. She found that the delay was not intended to prejudice the appellants, but rather was due to failures on the part of the respondent's counsel to effectively manage the case. She further held that the complexity of the case was not an excuse for the respondent's lack of action in moving it forward. The judge found that the delay was unreasonable, and, inferentially, inexcusable: Chambers judgment at paras. 32–34.

Prejudice to the defendants/interests of justice

[20] Having found inordinate and inexcusable delay, the judge turned to the question of whether the delay has caused, or is likely to cause, serious prejudice to the defendant: Chambers judgment at para. 35, citing *Drennan*. The judge summarized the relevant legal principles as follows:

> [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.

[21] The judge rejected the appellants' submission that the delay has caused them serious prejudice due to the stigma of having the litigation "hanging over their business". While the judge accepted that there is a realistic likelihood that the appellants faced such stigma, she concluded that this was not enough to establish serious prejudice. She found that the only relevant prejudice is "that which impacts the defendant's ability to defend the action": Chambers judgment at para. 43.

[22] The judge concluded that the respondent's delay had not resulted in any obvious prejudice to the appellants in terms of their ability to properly defend the case. In the absence of evidence of serious prejudice, she found it was not in the interests of justice to dismiss the claim for want of prosecution: Chambers judgment at para. 45.

[23] In the result, the judge dismissed the application. She ordered the respondent to schedule a judicial case conference within two months of her decision: Chambers judgment at para. 47.

On appeal

Issues

[24] The arguments advanced by the parties on appeal raise two broad issues:

a) Should the present test for dismissal for want of prosecution be revised?

b) Whether or not the test is revised, is dismissal of the action warranted?

Standard of review

[25] The judge's decision to dismiss the application was discretionary in nature. In the ordinary course, a discretionary decision is subject to a deferential standard of appellate review. An appellate court is not entitled to interfere unless the judge erred in principle, gave no or insufficient weight to relevant considerations or made a

palpable and overriding factual error: *British Columbia (Superintendent of Motor Vehicles) v. Chahal*, 2022 BCCA 416, at para. 9.

[26] This appeal is unusual in that this Court is sitting as a five-member division to consider whether the test for dismissal for want of prosecution should be revised. This Court does not owe deference to the judge on this issue. The Court also does not owe deference to the judge on the issue of how a revised test should be applied in this case, except to the extent that the judge has made relevant factual findings. Such factual findings are subject to appellate interference only if the judge has made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10. If the test for dismissal for want of prosecution is not revised, then the usual deferential standard of appellate review applies to the question of whether the judge erred in her exercise of discretion.

Analysis

Issue (1): Should the present test for dismissal for want of prosecution be revised?

[27] The court's power to dismiss an action for want of prosecution is codified in R. 22-7(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*], which is in substantially the same wording as the former R. 2(7) of the *Supreme Court Rules*, B.C. Reg. 221/90:

> (7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[28] It may be observed that the discretion to dismiss an action for want of prosecution is stated in broad terms. Rule 22-7(7) does not impose any conditions or requirements for the exercise of the court's discretion. The existing test for dismissal is a judicial creation, and is amenable to judicial modification.

[29] The power to dismiss an action for want of prosecution must be interpreted in light of the general object of the *SCCR*, as stated in R. 1-3(1), "to secure the just, speedy and inexpensive determination of every proceeding on its merits". This general object reflects the tension at the heart of the arguments advanced on

appeal. The appellants emphasize the objective of a "just" and "speedy" determination of a proceeding, while the respondent emphasizes the objective of determining a proceeding "on its merits". There is legitimacy to both viewpoints. The power to dismiss an action for want of prosecution is not to be lightly exercised, as it deprives a plaintiff of an adjudication of their claim on the merits. However, a plaintiff's entitlement to an adjudication on the merits cannot be given primacy to the extent that the interests of defendants, and society more generally, in the expeditious resolution of civil disputes are under-valued.

[30] In recent years, there has been increasing attention to the effect of delay on public confidence in the justice system. The Supreme Court of Canada has described the increasing delay and expense of civil proceedings as an access to justice issue: *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 23–25. In *Drennan*, Justice DeWitt-Van Oosten described the systemic impact of delay in civil law by analogy to the decision of the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, which addressed delays in the criminal justice system:

> [62] In *R. v. Jordan*, 2016 SCC 27, a majority of the Supreme Court ruled that the absence of prejudice can no longer be used to justify delay in criminal proceedings. The majority emphasized that "[t]imely justice is one of the hallmarks of a free and democratic society" (at para. 1). Extended court delays "undermine public confidence in the [justice] system" (at para. 26), and Canadians "rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner" (at para. 27). While those comments were made in the criminal law context, where timely justice takes on "special significance" (at para. 1), some of the underlying policy concerns, contextually informed, also resonate in the civil law realm. See, for example, the discussion in *The Workers Compensation Board v. Ali*, 2020 MBCA 122 at paras. 84–87.

[31] There is no doubt, and the respondent does not dispute, that unreasonable delays in civil proceedings cause systemic harm in undermining public confidence in the justice system and the public interest in a justice system that delivers timely and affordable justice. The real question is whether the existing test for dismissal for want of prosecution adequately accounts for the full measure of harm caused by delay. In addressing this question, I will begin with a review of the existing test, as it has evolved over time.

The current test for dismissal for want of prosecution

[32] The starting point is the decision in *Irving v. Irving* (1982), 38 B.C.L.R. 318, 1982 CanLII 475 (C.A.). In *Irving*, this Court first stated the existing framework for analyzing an application to dismiss an action for want of prosecution. The plaintiff in *Irving* was the former spouse of the defendant. She alleged that she was a partner in the defendant's funeral business. Pleadings were exchanged and examinations for discovery were conducted. Thereafter, the plaintiff took no steps to prosecute the action for ten years. The reason for the delay was the view of the plaintiff's solicitor that her claim was weak, but might be strengthened if the law changed over time.

[33] In determining the principles that ought to apply on an application to dismiss for want of prosecution, the Court in *Irving* drew from the judgment of the English Court of Appeal in *Allen v. Sir Alfred Mc'Alpine & Sons, Ltd.*; *Bostic v. Bermondsey and Southwark Group Hospital Management Committee.; Sternberg and another v. Hammond and another,* [1968] 1 All E.R. 543 (C.A.) [*Allen*]. Justice Seaton commented that the decision in *Allen* "directs the approach that ought to be taken" in British Columbia: *Irving* at para. 7. Of particular relevance, Seaton J.A. endorsed this passage from the judgment of Salmon L.J. in *Allen* at 561–562:

> A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff—so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognize inordinate delay when it occurs.
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> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
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> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly

> proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.
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> If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. […] In the end, the court must decide whether or not on balance justice demands that the action should be dismissed.

[34] Justice Seaton also quoted with approval from the judgment of Diplock L.J. in *Allen* at 553 and 556, including the following passages:

> …[T]here may come a time, however, when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed…
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> …
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> [Dismissal for want of prosecution] is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue.
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> [Emphasis added.]

[35] On the facts of *Irving*, the Court concluded that the plaintiff's delay was inordinate and inexcusable. Without resolving the question of whether this gave rise to a presumption of prejudice, the Court held it was clear that the delay had seriously prejudiced the defendant: *Irving* at para. 18. In considering the interests of justice at the final stage of the test, the Court held that "[j]ustice cannot now be done" due to the passage of time, and the unavailability of essential witnesses. As it was the plaintiff who chose delay as a tactic, it was she who had to bear the consequences of the delay: *Irving* at para. 23. Accordingly, the Court dismissed the action.

[36] Following *Irving*, the test for dismissal for want of prosecution has been consistently stated in this jurisdiction as requiring three conditions: (1) there has been inordinate delay, (2) the delay is inexcusable, and (3) the delay has caused, or is likely to cause, serious prejudice to the defendant. Even if those conditions are

established, this does not necessarily lead to dismissal of the action. The court retains a discretion to decide "whether or not on balance justice demands that the action should be dismissed": *Irving* at para. 22.

[37] Before turning to consider the appellants' critique of the existing test in the present appeal, it is useful to review the content of each element of the test.

Inordinate delay

[38] An inordinate delay is one that is uncontrolled, immoderate, excessive and out of proportion to the matters in question: *Wiegert v. Rogers*, 2019 BCCA 334 at para. 32. The question of whether delay is inordinate is "not just a question of temporal arithmetic", but rather requires consideration of the circumstances of the case: *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at para. 25. As explained by Saunders J.A. in *Sun Wave,* "some cases by their nature are susceptible of faster carriage or by the nature of the allegations call for more expeditious prosecution than others": at para. 25. For example, a court may be less forgiving in assessing litigation delay where the allegations impact the defendant's personal reputation, such as where fraud is alleged: *Sun Wave* at para. 25.

[39] The date of the commencement of the action is typically identified as the point from which delay is measured: *Wiegert* at para. 32. Delay must be considered holistically; the question is whether the overall delay is inordinate: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38.

Delay is inexcusable

[40] Whether the reason offered by the plaintiff for the delay amounts to an excuse also depends on the circumstances. As a rule, unless a credible excuse is offered, the natural inference is that inordinate delay is inexcusable: *Irving* at para. 8. The evidence led to explain delay may go to the issue of whether the delay was intentional and tactical, or whether it was the result of "dilatoriness, negligence, impecuniosity, illness or some other relevant cause": *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 27. A party who intentionally delays the prosecution of an action may be said to assume the risk of

dismissal. Where the delay is also tactical, in the sense of intended to prejudice the defendant, this will weigh more heavily against the plaintiff in the analysis: *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.*, 2020 BCCA 120 at para. 47. Where the reason for the delay is a lack of diligence on the part of plaintiff's counsel, this might amount to a reasonable excuse in some cases, but in others it might not: *0690860 Manitoba Ltd.* at para. 29; *Wiegert* at para. 33.

Delay has caused, or is likely to cause, serious prejudice to the defendant

[41] In assessing whether there is serious prejudice, the relevant prejudice is impairment of the defendant's ability to defend the action: *0690860 Manitoba Ltd.* at para. 50. Serious prejudice may be established through such factors as failing memories, the unavailability of witnesses, and the loss or destruction of evidence: *Wiegert* at para. 33.

[42] The question of how serious prejudice may be established, and who has the onus on this prong of the test, remains somewhat unsettled in British Columbia.

[43] In *Irving*, the Court left open the question of whether the onus is on the defendant to show prejudice, or whether prejudice can be presumed once the defendant establishes inordinate and inexcusable delay. This question was seemingly answered in *Busse v. Chertkow*, 1999 BCCA 313, as follows:

> [18] In my view, it is open to this Court to adopt the principle that once a defendant has established the delay complained of has been inordinate and is inexcusable a rebuttable presumption of prejudice arises. To continue imposing the evidentiary burden of proving prejudice after establishing inordinate and inexcusable delay is contrary to the object expressed in sub-rule (5) of Rule 1 of the Rules of Court:
>
> **Object of rules**
>
> (5) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

[44] According to *Busse*, the question that the application judge must answer is: "[H]as the plaintiff established on a balance of probabilities that the defendant has not suffered prejudice or that other circumstances would make it unjust to terminate

the action?". If the answer is "no", the judge must dismiss the action: *Busse* at para. 27.

[45] The analysis in *Busse* was qualified by the later judgment of this Court in *Tundra Helicopters et al. v. Allison Gas Turbine et al.*, 2002 BCCA 145, reversing the decision of a chambers judge dismissing an action for want of prosecution. The Court held that the chambers judge erred in principle in disposing of the issue of prejudice by asking whether the plaintiff had rebutted the presumption of prejudice. The Court clarified that the presumption of prejudice is not a presumption of law, but a presumption of fact in the sense that the circumstances may be such that a factual inference of prejudice should, but need not, be logically drawn: *Tundra Helicopters* at para. 35. The Court agreed that the question posed at paragraph 27 of *Busse* is the proper one to ask. However:

> [36] …In considering that question it may be misleading to approach it by asking whether the plaintiff offered evidence on the point. In most cases, it will only be the defendant who is in a position to offer evidence as to the existence of specific prejudice—as two of the defendants attempted to do in this case. The plaintiff often will be able only to point to the overall circumstances, including the absence of any evidence from the defendant of specific prejudice, as establishing on the balance of probabilities that serious prejudice has not been suffered.

[46] Accordingly, it does not matter who puts forward the evidence of prejudice. The question remains whether, on a balance of probabilities, the absence of prejudice has been established: *Tundra Helicopters* at para. 37. On the facts of *Tundra Helicopters*, the evidence put forward by the defendants to show actual prejudice was so weak that it was found to support the plaintiff's assertion that there was no prejudice: *Tundra Helicopters* at para. 30.

[47] The reasoning in *Tundra Helicopters* was adopted and applied in *0690860 Manitoba Ltd.* at paras. 42–46 and *Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd.*, 2012 BCCA 251 at paras. 11–14.

[48] As is evident from *Tundra Helicopters* and the cases that followed, the force of the presumption of prejudice will vary with the circumstances. The presumption is only a factual inference that could, but not necessarily will, be logically drawn from

the existence of inordinate and inexcusable delay. The strength of the inference may, depending on the facts, be limited. A plaintiff may rebut the presumption without tendering any evidence of prejudice at all. Further, as in *Tundra Helicopters*, the defendant's evidence of prejudice—to the extent that it lacks persuasive force—may itself assist the plaintiff in rebutting the presumption.

The interests of justice

[49] The ultimate consideration on an application to dismiss for want of prosecution is the interests of justice. In *Irving* the Court held that all of the circumstances must be considered at this stage of the analysis: at para. 22. Relevant factors may include the length and reasons for the delay and the context in which the delay occurred: *Wiegert* at para. 33. If an action has no reasonable prospect of success and is bound to fail, this would weigh in favour of dismissing the action: *Ed Bulley* at para. 62.

[50] Although *Irving* indicates that "all of the circumstances" must be considered at this stage of the test, an overriding consideration is, once again, the degree of prejudice to the defendant's litigation position as a result of the delay. As stated by this Court in *Ed Bulley*:

> [59] …If it can be established that the parties would have a fair trial in spite of the delay and prejudice, then the interests of justice require that the litigation go ahead.

See also *Tundra Helicopters* at para. 37.

Critique of the current test

[51] The arguments on appeal focus on the question of whether the current test for dismissal of an action for want of prosecution adequately balances the range of interests at stake where litigation delay is concerned. There is no question that a plaintiff's interest in an adjudication on the merits is deserving of considerable weight in the analysis, as the respondent emphasizes. However, that interest should not have overriding force. Litigation delay impacts the public interest in a justice system that promotes the timely and cost-effective resolution of legal disputes. Defendants

also have an interest in the expeditious resolution of claims against them that goes beyond their ability to defend themselves in the litigation. For the reasons that follow, in my view the existing test fails to adequately account for such interests.

[52] The requirement that a court be satisfied that delay has caused, or is likely to cause, serious prejudice to the defendant's ability to defend the action prevents a court from giving appropriate weight to other factors relevant to the interests of justice. Ongoing inordinate and inexcusable delay is condoned so long as the delay does not result in the risk of serious prejudice to the defendant's ability to defend the action. This creates insufficient incentive for a plaintiff to move a case forward with any sense of urgency. Plaintiffs may ignore the timelines established under the *SCCR* with a reasonable degree of confidence that they will not risk the "Draconian" remedy of an order dismissing their action for want of prosecution.

[53] The effect of this "culture of complacency" towards delay in the justice system (see *Jordan* at para. 4) is evident in the arguments advanced in *Drennan* and on the present appeal. In *Drennan*, the plaintiff/appellant argued that a delay of five years was not unusual in civil actions, and that it would be extraordinary to dismiss a claim for want of prosecution after "only" five years: *Drennan* at para. 60. In the present case, the respondent argues that the four years that has elapsed since the action was commenced without significant progress in moving the case to trial is "normal and not out of the ordinary": Respondent's factum at para. 45. These arguments suggest that delay has become an accepted feature of civil litigation in British Columbia, as long as the lapse of time does not create a substantial risk of an unfair trial.

[54] This concern with the requirement that a defendant show serious prejudice in order to succeed on an application to dismiss for want of prosecution is not a new one. In *Busse*, this Court held that the object of the *Rules* is undermined by a requirement that the defendant must demonstrate serious prejudice even after inordinate and inexcusable delay is established. However, the solution adopted in *Busse*—a rebuttable presumption of prejudice—has its own difficulties, as evidenced by the further development of the law in *Tundra Helicopters.* Given the reality that it

is often only the defendant who will possess evidence relevant to prejudice, it may not be in the interests of justice to dismiss an action on the basis of delay simply because the plaintiff is unable to marshal evidence to rebut a presumption of serious prejudice. At the same time, there may be other cases in which, in light of the nature and length of the delay, it is in the interests of justice to dismiss an action despite the absence of evidence of serious prejudice to the defendant. The requirement for the defendant to show serious prejudice acts as an impediment to a full and flexible consideration of the impact of inordinate and inexcusable delay on the interests of justice, which includes the public interest in an efficient and cost-effective justice system.

[55] The manner in which the interests of justice test is applied in British Columbia adds to these difficulties. While the language of the "interests of justice" suggests a broad consideration of relevant circumstances, it is generally accepted, as stated in *Ed Bulley*, that the interests of justice require that a proceeding continue if a fair trial is still possible despite the delay: at para. 59. Consequently, the focus of the analysis remains on the prejudice flowing from the delay to the defendant's ability to defend the claim. Thus, if a fair trial is still possible, an application to dismiss for want of prosecution may fail despite the existence of inordinate and inexcusable delay that is likely to cause serious prejudice to the defendant: see for example *Osprey Park Operations Mid-Island Ltd. v. British Columbia*, 2023 BCSC 1811 at paras. 35–40; *Frans Wynans Fine Art Inc. v. The Andy Warhol Foundation For The Visual Arts Inc.*, 2019 BCSC 498 at paras. 59–60.

[56] The emphasis on the impact of delay on trial fairness can be traced to the speech of Diplock L.J. in *Allen*, which is quoted at paragraph 7 of *Irving*. Lord Diplock stated that the "public interest in the administration of justice" demands that an action be dismissed once there is a substantial risk that a fair trial of the issues will no longer be possible. However, the weight of modern authority is not consistent with the view that the public interest in the administration of justice is limited to ensuring that a defendant receives a fair trial. Canadian courts have increasingly recognized that unreasonable delay in the prosecution of an action in itself

undermines public confidence in the justice system, regardless of whether the delay results in serious prejudice to the defendant's ability to defend the litigation. Court delay leads the public to believe that they cannot expect the courts to provide timely and cost-effective justice, which in turn undermines access to justice: *Drennan* at paras. 60–62; *Hryniak* at paras. 23–25; *The Workers Compensation Board v. Ali*, 2020 MBCA 122 at paras. 85–87; *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at paras. 40–41; *Jacobs v. McElhanney Land Surveys Ltd.*, 2019 ABCA 220 at paras. 70–72. An effective test for dismissal for want of prosecution should account for the public interest in this broader sense. The existing test in British Columbia does not.

[57] Finally, the narrow focus on *litigation* prejudice to the defendant under the existing test also fails to adequately account for the impact of unreasonable delay on the interests of defendants that go beyond an ability to defend themselves in the action. There is some limited room within the existing test for broader consideration of the defendant's interests. In cases where the plaintiff advances serious allegations, such as fraud, that may damage the defendant's personal reputation, this may affect the assessment of whether the plaintiff's delay is inordinate: *Sun Wave* at para. 25. Otherwise, the only prejudice to the defendant that the existing test accounts for is prejudice to the defendant's ability to defend the litigation. However, the reality is that litigation frequently, perhaps invariably, negatively impacts the personal, professional, or business interests of defendants. Undue delay in the resolution of litigation prolongs, and may exacerbate, such negative impacts.

[58] In summary, I am persuaded that a revision to the existing test for want of prosecution is justified by the concerns that I have described. The current test is unduly focussed on litigation prejudice to the defendant, at the expense of consideration of the broader impacts of delay on defendants and the justice system more broadly.

How should the existing test be revised?

[59] In their submissions on appeal, the appellants proposed two, alternative, revisions to the existing test for dismissal for want of prosecution: (1) collapse all

elements of the test into a single inquiry of whether it is in the interests of justice to dismiss the action, or (2) establish a "hard cap", in the sense of a rule that civil cases will be automatically dismissed if they have not proceeded to trial within a set time. I am not persuaded that either of the appellants' proposed revisions is appropriate.

[60] The appellants' first proposal—a single-criterion interests of justice test—is not rationally connected to their critique of the existing test. The difficulty with the existing test is not the requirement that the defendant must establish inordinate and inexcusable delay in the plaintiff's prosecution of the action. Indeed, the existence of inordinate and inexcusable delay provides the bedrock for an application to dismiss for want of prosecution. The issue of controversy is what analysis ought to be undertaken by a court in deciding whether to permit an action to proceed once inordinate and inexcusable delay is established. A test comprised of a single inquiry as to what is in the interests of justice would leave judges with no structure or guidance as to how to balance the relevant considerations in exercising their discretion on an application to dismiss for want of prosecution.

[61] The appellants' second, and alternative, proposal for a "hard cap" is inconsistent with the wide discretion provided by the *SCCR* to dismiss an action for want of prosecution. I note that a number of jurisdictions in Canada have enacted civil rules that mandate the dismissal of the action where there is a lengthy period of delay. See, for example: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 48.14 (unless the court orders otherwise, the registrar must dismiss an action if it has not been set for trial within five years); *Alberta Rules of Court*, Alta. Reg. 124/2010, R. 4.33(2) (the court must, on application, dismiss an action where three or more years have passed without significant advancement and neither of the exceptions apply); *Court of King's Bench Rules*, Man. Reg. 553/88, R. 24.02(1) (the court must, on motion, dismiss an action if three years have passed without significant advancement and none of the exceptions apply). In other jurisdictions, the civil rules provide for a court-initiated process once delay has reached a certain threshold. See, for example: *Rules of Court*, N.B. Reg. 82-73, R. 26.05 (a clerk must determine whether a status hearing should take place if an action is not set down for trial within

a year); *Rules of Civil Procedure*, P.E.I., R. 48.11 (the case management coordinator must serve a status notice if an action is not set for trial within a year).

[62] Such mechanisms may be an effective means of addressing delays in the civil justice system, but they are not currently provided for in the *SCCR*. It is not open to this Court, under the guise of revising the common law test, to replace the court's discretion in R. 22-7(7) to dismiss an action for want of prosecution with a "hard cap" that mandates the dismissal of an action, or the initiation of a status hearing, if a certain threshold of delay is passed. Such a change would require an amendment to the *SCCR*.

[63] There is a less dramatic change to the existing test that could be achieved by judicial revision, and which would be responsive to the inadequacies of the existing test. That is, the test could be revised to remove serious prejudice to the defendant as a discrete criterion that is a pre-requisite to an order dismissing an action for want of prosecution.

[64] There is precedent for this revision in the judgment of the Saskatchewan Court of Appeal in *International Capital Corporation*. Applications to dismiss for want of prosecution in Saskatchewan were formerly governed by the same test that currently applies in British Columbia. In *International Capital Corporation*, the Court found that test to be lacking:

> [40] … Experience has revealed the need for a more effective and nuanced way of giving expression of the interest which defendants have in the timely resolution of civil disputes. The circumstances underpinning this appeal could be a case study of why some modification in the *Carey v. Twohig* line of analysis is necessary. Simply put, no defendant should have to wait 15 years for a trial. *Magna Carta* itself specifically obliged the King not to "…delay right or justice".
>
> [41] Delays of the sort underpinning this appeal frustrate not only litigants. They also undermine public confidence in the justice system as a whole. …

[65] Under the modified test in *International Capital Corporation*, the question of prejudice is not a stand-alone criterion. Rather, prejudice is considered within the assessment of whether it is in the interests of justice for the case to proceed to trial

notwithstanding the existence of inordinate and inexcusable delay: *International Capital Corporation* at para. 45.

[66] At paragraph 45 of *International Capital Corporation*, the Court set out a non-exhaustive list of factors that are relevant to the court's assessment of the interests of justice: (a) the prejudice the defendant will suffer defending the case at trial; (b) the length of the delay; (c) the stage of the litigation; (d) the impact of the delay on the defendant's professional, business, or personal interests; (e) the context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed; (f) the reasons offered for the delay; (g) the role of counsel in causing the delay; and (h) the public interest in having cases that are of genuine public importance heard on their merits.

[67] I note that the framework of analysis adopted in *International Capital Corporation* is now reflected in the Saskatchewan civil rules of court: Sask., *The King's Bench Rules*, 2013, R. 4-44. However, in the first instance the revision to the law was achieved by judicial modification.

[68] The revision to the test for dismissal for want of prosecution set out in *International Capital Corporation* is responsive to the concerns I have identified in relation to the test in British Columbia. In my view, a similar approach ought to be adopted in this jurisdiction. This approach would change the existing test in two respects: (1) serious prejudice to the defendant arising from delay is not a discrete element of the test, but rather a factor to consider at the interests of justice stage of the analysis, and (2) the impact of the delay on trial fairness is not, invariably, the overriding factor in considering whether it is in the interests of justice to permit a claim to continue.

The revised test

[69] For clarity, I will summarize the revised framework of analysis that, in my view, should govern applications to dismiss actions for want of prosecution in British Columbia. The first two questions are:

(1) Has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?

(2) Is the delay inexcusable?

[70] These two questions are to be answered in accordance with the law that has developed in British Columbia under the existing test. If both questions are answered in the affirmative, the court should move to the third and final question:

(3) Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[71] The non-exhaustive list of factors set out at paragraph 45 of *International Capital Corporation* provides a useful starting point for assessing the interests of justice. To that non-exhaustive list, I would add one further factor: the merits of the action. While a judge should not engage in any searching examination of the merits on an application to dismiss for want of prosecution, if the action is bound to fail then the interests of justice favour its dismissal: *Ed Bulley* at para. 62.

[72] Under this framework of analysis, the prejudice to the defendant's ability to defend the action remains a relevant, and indeed important consideration. However, prejudice to the defendant is not a pre-requisite to an order dismissing a claim for want of prosecution. At the interests of justice stage, the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.

[73] By way of concluding comments, I make three further points.

[74] First, in my view, it is not helpful to characterize the remedy of dismissal for want of prosecution as "Draconian", to the extent this label implies the remedy is excessively harsh or punitive. It must be remembered that a plaintiff faces the risk of dismissal of an action only once they are guilty of inordinate and inexcusable delay. Undue litigation delay undermines public confidence in the justice system, and should not be countenanced. Generally speaking, a plaintiff who has filed a civil claim should be expected to get on with it. If, having regard to the circumstances, it

is not in the interests of justice to allow an action characterized by such delay to continue, then the remedy of dismissal is not excessively harsh or punitive. Rather, it is justified.

[75] Second, the preceding comment, and the revision of the test that I propose, should not be taken to signal an invitation to defendants to bring applications for dismissal for want of prosecution as a matter of routine. A plaintiff's interests in a trial on the merits remains an important consideration. The revised test is simply intended to provide a more nuanced balancing of the competing considerations of the interests of defendants, and the justice system as a whole. An application will succeed only if the court is persuaded that the interests of justice justify depriving the plaintiff of their presumptive entitlement to an adjudication on the merits.

[76] Third, it should not be forgotten that there are avenues available to defendants concerned about the pace of litigation, including setting timelines for pre-trial steps through the terms of a case plan order. Put simply, the plaintiff's delay does not tie the hands of a defendant who is motivated to bring the case to its conclusion. There is, of course, no obligation on the defendant, who has involuntarily been brought into a lawsuit, to take any steps to move the plaintiff's case forward. However, the defendant's inaction in the face of lengthy delay by the plaintiff may weigh against dismissal of the action at the interests of justice stage of the analysis.

Issue (2): Should the respondent's claim be dismissed for want of prosecution?

[77] The final question to be addressed is whether an order dismissing the respondent's action for delay is warranted under the revised test. I consider it unnecessary to remit the matter to the court below to address this issue. The evidence and the submissions of the parties on appeal are sufficient to permit this Court to undertake the necessary analysis.

[78] The respondent argues that the judge erred in finding the delay in this case to be inordinate and inexcusable. They invite this Court to correct the alleged errors as an avenue to uphold the chambers judgment. It is not necessary to address this

argument in order to resolve the issue on appeal. Even accepting the chambers judge's characterization of the respondent's delay as inordinate and inexcusable, it is in the interests of justice in the circumstances to allow the action to proceed notwithstanding the delay.

[79] As found by the judge, the delay has not prejudiced the appellants' ability to defend the action. The appellants did not challenge this finding on appeal. The absence of prejudice in this sense remains an important consideration, even if not a conclusive one. The judge did accept that the appellants had suffered other forms of prejudice in the form of ongoing stigma to its business reputation. However, the appellants' evidence of business-related prejudice is, as the respondent points out, largely impressionistic and lacking in concrete detail. There is no evidence of prejudice that takes the appellant's situation outside of that of any defendant facing an action in negligence or breach of contract for supplying or installing allegedly defective products.

[80] The length of the delay is concerning, as is the respondent's submission that a period of four years between the commencement of the action and the close of pleadings is to be expected in construction litigation. Undoubtedly a party should accede to reasonable requests from an opposing party for an extension of time to comply with the filing requirements of the *SCCR*. However, in this case the respondent appears to have simply acquiesced in open-ended requests by other defendants served with the notice of civil claim that the respondent not take default judgment without prior notice. The appellants, having filed their response to civil claim in September 2020, were entitled to assume that it would take considerably less than two and a half years for the pleadings to close and the case to proceed towards a trial date.

[81] At the same time, the respondent's excuse for the delay must be considered within the specific circumstances of this action. It is clear from the respondent's evidence that there was activity relating to the litigation occurring during the time between the commencement of the action and the filing of the appellants' second application to dismiss. There was ongoing investigation into the cause and extent of

the damage at the MC2 Development, which in turn identified additional defects. In other words, this is not a case in which the plaintiff filed an action, and then left it dormant for many years with no apparent intention to move the matter forward. The ongoing investigation provides context to the respondent's failure to press the other defendants to file responsive pleadings. The fact remains that the pleadings had not closed by the time the defendant filed their second application for want of prosecution in January 2023.

[82] The communication between counsel in May 2021 that preceded the filing of the application to dismiss is also of significance to my mind. Counsel for the appellants proposed adjourning their first application to dismiss for want of prosecution on the condition, among others, that the respondent file an amended notice of civil claim within one month. However, counsel for the respondent did not agree to that condition, but rather stated that he would "get back to you shortly with respect to amendments/timing". The appellants adjourned their first application on that basis. There was no further direct exchange of correspondence between the parties before the appellants served their second application to dismiss for want of prosecution in January 2023. Without condoning the respondent's delay after May 2021, I do observe that it would have been open to the appellants to insist on a deadline for the filing of an amended notice of civil claim, or to follow up with respondent's counsel about timing.

[83] In summary, the delay in issue in this case occurred within the context of a complex, multi-party action involving construction defects that required some time to investigate. The delay has not caused the appellants any prejudice in their ability to defend themselves in the litigation, and there are only generalized complaints of prejudice to their business interests. The appellants made no effort between May 2021 and January 2023 to press the respondent to commit to timelines for steps in the litigation. While the appellants argue that the respondent's claim against them lacks merit, this is not a case in which it can be said that the claim is bound to fail.

[84] On balance, I consider that it is in the interests of justice to allow the claim to proceed to trial.

Disposition

[85] I would dismiss the appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Voith"