IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *New Rightway Contracting Ltd. v. 0790792 B.C. Ltd.,* 2023 BCSC 216

Date: 20230215
Docket: S154924
Registry: New Westminster

Between:

New Rightway Contracting Ltd.

Plaintiff

And

0790792 B.C. Ltd. and Onni Contracting Ltd.

Defendants

Before: The Honourable Madam Justice Girn

Reasons for Judgment

Counsel for the Plaintiff:	J. Corbett
Counsel for the Defendants:	T. Patel
Place and Date of Hearing:	New Westminster, B.C. November 29, 2022
Place and Date of Judgment:	New Westminster, B.C. February 15, 2023

Table of Contents

INTRODUCTION

[1] The defendants, 0790792 B.C. Ltd. and Onni Contracting Ltd., have brought an application for dismissal of the plaintiff's, New Rightway Contracting Ltd., claim against them for want of prosecution.

[2] The underlying dispute involves a claim relating to an agreement entered into in December 2012 between the parties for supply and installation of electrical at a construction site in Pitt Meadows, British Columbia. The plaintiff alleges the defendant is in breach of the agreement and owes the plaintiff the sum of $122,847.90 for the supplies and work as agreed upon. The defendant alleges the plaintiff breached the agreement and is not entitled to payment. The plaintiff commenced this action in 2013. Since then, as detailed below, little has been done to move this action along.

[3] The defendants argue that a delay of nine years is inordinate and inexcusable, and they have suffered serious prejudice warranting a dismissal of the claim.

[4] The plaintiff concedes there has been a delay of nine years but argues that it is not inordinate and explainable. They also argue that the defendants are partly responsible for some of the delay. The plaintiff submits that the defendants have not provided evidence of serious prejudice. Finally, the plaintiff submits that even if the Court finds the delay to be inordinate and inexcusable and serious prejudice has been found, it is not in the interests of justice to dismiss the claim.

[5] For the reasons that follow, while the delay is inordinate and inexcusable, I find the defendants have not suffered serious prejudice. As well, it would not be in the interests of justice to dismiss the claim. Accordingly, the defendants' application to dismiss the claim for want of prosecution is dismissed.

PROCEDURAL HISTORY

[6] As I have outlined above, the parties entered into a written contract in December 2012. While the plaintiff did perform work for the defendants, a dispute

arose over the quality and completion of the work and payments. On August 14, 2013, the plaintiff filed a claim of lien pursuant to the *Builders Lien Act,* S.B.C. 1997, c. 45 in the amount of $122,847.90.

[7] On September 17, 2013, the plaintiff filed a notice of civil claim and a certificate of pending litigation. On October 11, 2013, the defendants filed their response, denying that $122,847.90 was due and payable to the plaintiff or that any other amount was due and owing under the agreement. The defendants also counterclaimed against the plaintiff for the costs and expenses to remedy and complete the plaintiff's work. The plaintiff filed a response to the counterclaim. The builder's lien and related certificate of pending litigation were subsequently discharged when the defendants posted security in the same amount.

[8] On October 31, 2013, the defendants delivered their list of documents to the plaintiff. On December 16, 2013, the plaintiff delivered its list of documents to the defendants. In April 2014, the plaintiff amended its list of documents. It appears nothing else occurred until July 2015, when the plaintiff changed counsel and retained Deepak Gautam [Mr. Gautam].

[9] For the next three years, attempts were made to schedule examinations for discovery. On July 27, 2015, the plaintiff scheduled an appointment to examine the defendants' representative, Mr. Swan on December 3, 2015. Two days before the scheduled examination, it was adjourned because the defendants advised that Mr. Swan was no longer an employee of the defendants and was difficult to locate. They offered another representative, Mr. Almas, for examination.

[10] In communications in July and August, 2016, the plaintiff proposed dates in September 2016 to examine Mr. Swan despite the fact that Mr. Swan was no longer employed by the defendants and were having difficulties locating him and another representative from the company was being offered for examination. It appears the defendant did not respond to the plaintiff's letter.

[11] The plaintiff then scheduled a date to examine Mr. Swan for January 25, 2017. However, the day prior to this date, counsel for the plaintiff advised they were no longer able to attend the discovery. Although the defendant says the plaintiff unilaterally cancelled this date, there is communication between the parties on January 24, 2017 in which it confirms the defendant agreed to cancel the examination for discovery given counsel's illness. Since then no further dates for examination for discovery have been scheduled by the either party.

[12] On July 31, 2017, the defendants wrote to the plaintiff's counsel advising that they intend to examine a representative from the plaintiff company. The defendants also wrote that they were still trying to locate Mr. Swan and would advise with availability dates and suggested that examinations be completed in the same week and before trial dates are scheduled. From July 2017 to September 2018, no action was taken by the plaintiff or the defendants.

[13] In September 2018, after the plaintiff tried to schedule further dates to examine Mr. Swan, the defendants' counsel advised the plaintiff of their intention to apply to dismiss the action for want of prosecution. The plaintiff says any delay was due to canvassing the availability of the first representative, Mr. Swan. The defendants take the position that an alternative representative was offered but the plaintiff did not examine him. The plaintiff says Mr. Swan was the only suitable representative as he was the one that had direct dealings with the plaintiff's principal. I note that the correspondence from the defendants consistently indicated they were still trying to determine Mr. Swan's availability. In response to the defendants' intention, the plaintiff proposed new dates in October and November 2018 for examination for discovery of Mr. Swan. They also provided proposed trial dates offered by the Court for 2019.

[14] In November 2018, the defendants told the plaintiff that Mr. Swan was not the defendants' nominated representative and also provided availability for trial dates. In January 2019, the plaintiff served a Notice of Trial commencing November 25, 2019 for ten days.

[15] In January 2019, the defendants made a third representative, Mr. LeRoss, available for examination. The plaintiff then served an appointment for the examination for discovery of Mr. LeRoss in July 2019. However, this examination also did not occur. In May 2019, defendants' counsel advised that he was not available and requested that the examination be rescheduled for August 2019.

[16] In his affidavit, Mr. Gautam, deposes that he instructed an associate to schedule examinations for discovery in the summer of 2019 but that did not happen. With no examinations having taken place, in October 2019, the trial dates were vacated.

[17] Mr. Gautam also deposes that nothing substantive was done on the file from October 2019 to the end of 2020 because he was busy with other matters, his firm was short of staff, and he did not turn his mind to moving this matter forward. He instructed a junior counsel in his office to do the work, who in turn delegated it to an assistant. Neither of them did anything. Mr. Gautam acknowledges he did not closely supervise his associate or the assistant. He deposes the file essentially "slipped through the cracks" and accepts full responsibility for the delay.

[18] Kirandeep Singh Khatkar is the principal of the plaintiff company. In his affidavit, he deposes that he routinely followed up with Mr. Gautam and urged him to proceed as quickly as possible. Mr. Khatkar says that in May 2021 he realized examinations for discovery nor trial dates had been set. He also deposes that due to illnesses and his vulnerability to COVID-19, he did not leave his home during the pandemic. In May 2021, he says Mr. Gautam told him that he was taking care of scheduling examinations for discovery and trial dates, so Mr. Khatkar did not make any further inquiries after that time. He insists that it has always been his intention to proceed with this action.

[19] To date, no examinations for discovery have been held and no trial date is set.

LEGAL FRAMEWORK

Dismissal for Want of Prosecution

[20] Rule 1-3 states the objective of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*] is to secure the just, speedy, and inexpensive determination of every proceeding on its merits in a manner that is proportional to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding.

[21] Rule 22-7(7) provides:

> 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.

[22] In determining whether a proceeding ought to be dismissed for want of prosecution, the relevant factors for consideration are set out in *Wiegert v. Rogers*, 2019 BCCA 334:

> [31] On an application to dismiss for want of prosecution, it must be shown that there has been inordinate delay, that the inordinate delay is inexcusable, and that the delay has caused, or is likely to cause, serious prejudice to the defendant. In addition, the final and decisive question, which encompasses the other three, is whether, on balance, justice requires a dismissal of the action: *Azeri v. Esmati-Seifabad*, 2009 BCCA 133 at para. 9; *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at paras. 27–28.
>
> [32] Inordinate delay is delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question: *Azeri* at para. 8; *Sahyoun v. Ho*, 2015 BCSC 392 at para. 17. As Justice Saunders explained in *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at para. 25, the concept is relative: some cases are naturally susceptible of fast carriage or call for more expeditious prosecution than others. Although there is no universal rule as to when time starts to run, the date of commencement of the action is typically identified as the point from which delay is measured. The delay should be analysed holistically, not in a piece-meal fashion, and the extent to which it may be excusable is highly fact-dependent: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38; *0690860* at para. 29.
>
> [33] Once a defendant establishes that delay is inordinate and inexcusable, a rebuttable presumption of prejudice arises: *Busse v. Chertkow*, 1999 BCCA 313 at para. 18. The concern is with the prejudice that a defendant will suffer in mounting and presenting a defence if the matter goes to trial: *0690860* at para. 27. Relevant matters could include failing

> memories, unavailable witnesses and the loss or destruction of physical evidence. As to the final consideration — whether, on balance, justice requires dismissal of the action — again, the determination is highly fact-dependent. Relevant matters could include the length of 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): *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45; *0690860* at para. 29.

[23] Dismissal for want of prosecution is a draconian order that should not be made lightly: *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145 at para. 37 [*Tundra*].

ANALYSIS

Has there been an Inordinate Delay?

[24] In *Callan v. Cooke*, 2020 BCSC 290 at para. 74, Chief Justice Hinkson explains the phrase "inordinate delay" to mean "one that is uncontrolled, immoderate or excessive". The delay to be considered is the delay in prosecuting an action from the time that it was commenced: *Callan* at para. 75.

[25] In assessing delay, the Court must also view the steps that a party has taken to advance the claim. In *Kelly v. Dyno Nobel Canada Inc.*, 2016 BCSC 1601, Master Keighley considers what constitutes a "step" in a proceeding:

> [19] As to what constitutes a "step" in a proceeding, the defendant says that the type of step contemplated is a formal one, namely one that is required or permitted by the Rules which moves an action forward: *Ellis v. Wiebe* 2011 BCSC 683 (SC) at para. 12.
>
> [20] *Ellis, supra*, also stands for the proposition that a Notice of Intention to Proceed, as it does not actually move the proceeding forward, is not a step in the litigation process: *supra,* at para. 12.
>
> [21] Neither are exchanges of correspondence or various communications between counsel formal steps as they are not expressly required or permitted under the Rules: *Easton v. Cooper* 2010 BCSC 1079 (SC) at para. 10.

[26] While the plaintiff concedes that there has been a delay of nine years since the commencement of the claim, they say that it falls short of being inordinate in all of the circumstances and can be explained.

[27] While it does not appear that the issues to be decided on the action are complex, the parties nevertheless set down 10 days for the trial. Having reviewed the list of documents attached to the affidavit filed by the defendants in this application, it appears to me that the case will be for the most part document driven.

[28] The plaintiff argues that the delay is not inordinate given the various steps undertaken during the last nine years. I do not agree. While there was some movement in the action from September 2013 to April 2014, no meaningful steps were taken to move the proceeding forward after April 2014.

[29] Despite filling a notice of civil claim in September 2013, the plaintiff took no steps to schedule an examination for discovery until almost two years later in December 2015. Had the examination of Mr. Swan been scheduled earlier, there may not have been difficulties in locating Mr. Swan. In December 2015 when the examination of Mr. Swan was cancelled and another representative was offered by the defendants, the plaintiff still insisted on examining Mr. Swan and proposed another date in January 2017. This date was then cancelled by the plaintiff's counsel one day before the examination due to an illness. The plaintiff took no further steps, other than communications with the defendants' counsel, from January 2017 to September 2018, which I find are not meaningful steps in the proceeding.

[30] The plaintiff also says the defendants caused some of the delay. While the defendants' conduct may be a relevant factor, a defendant has no obligation to advance the action. Mere inactivity, where there have been no steps required of the defendant to comply with the *SCCR*, is irrelevant: *Irving v. Irving* (1982), 32 B.C.L.R. 318 at 322–323, 1982 CanLII 475 (C.A.) quoting *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229 at 258 (C.A.) and *Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd.*, 2012 BCCA 251 at paras. 24, 26.

[31] In September 2018, the defendants put the plaintiff on notice of their intention to apply to dismiss the action for want of prosecution. It was only after that, the plaintiff's counsel set the matter down for a trial to commence in November 2019 and scheduled an examination for discovery of Mr. LeRoss (the third representative

offered by the defendants for examination) for July 2019. In May 2019, the examination of Mr. LeRoss was cancelled because the defendants' counsel was not available. Consequently, the trial date was also vacated by the plaintiff on the basis that no examinations for discovery had been conducted.

[32] In my view, other than exchanging lists of documents, the actions of the plaintiff up to May 2019 do not equate to "steps in a proceeding". Although I must consider all of the delay and not in a piece-meal fashion, in my opinion, the delay from the date of the commencement of the claim to May 2019 alone is inordinate. But that does not end my analysis.

[33] The delay after this period to date is also unacceptable. From July 2019 to date, the plaintiff took no active steps on the action despite a warning by the defendants in September 2018 that they would seek a dismissal for want of prosecution.

[34] Having examined all of the circumstances holistically, I have no difficulty in concluding that a nine-year delay, during which not one individual was examined, is inordinate.

Is the Overall Delay Excusable?

[35] If a plaintiff does not offer any explanation for the delay in prosecuting the action, the court may infer that the delay is inexcusable: *Extra Gift Exchange Inc*. *v. Accurate Effective Bailiffs Ltd*., 2015 BCSC 915 at para. 44. The extent to which the delay may be excusable is highly fact dependent: *Wiegert* at para. 32.

[36] The plaintiff says the delay was not intentional or intended to gain a tactical advantage. I have heard no evidence to conclude otherwise. The plaintiff says it has always been the plaintiff's intention to proceed. The plaintiff has offered two explanations for the delay: repeated inactions of the plaintiff's counsel (at the time) and the effect of the COVID-19 pandemic and Mr. Khatkar's illness.

[37] I will address each of these reasons for the delay.

[38] The plaintiff says the delay was caused by the inaction of its counsel at the time and therefore it is excusable. Mr. Khatkar deposes that he was under the impression the matter was proceeding, although he does concede that he ought to have pressed his counsel more. I note that he does not address the delay from the filing of the notice of civil claim in September 2013 to July 2015 when he terminated his retainer with his previous counsel and retained Mr. Gautam.

[39] Mr. Khatkar deposes that he instructed Mr. Gautam to pursue the matter promptly and that he received periodic updates from Mr. Gautam or someone from the law firm.

[40] Mr. Khatkar also says that from July 2015 to summer 2018, he was receiving periodic updates. By this time, five years had passed since the commencement of the action. I find it difficult to accept Mr. Khatkar's explanation that he was frustrated with the delay and told Mr. Gautam to do his best. I note Mr. Gautam's affidavit does not address the periodic updates that Mr. Khatkar states he received from Mr. Gautam.

[41] In his affidavit, Mr. Gautam deposes that he delegated rescheduling of examinations to his associates and did not follow up with them, that he was short staffed and that he was busy with other files. Mr. Gautam deposes that his instructions from the plaintiff was to proceed with the action promptly and accepts full responsibility for the delay.

[42] Mr. Khatkar deposes that he fell ill in the summer of 2018 and was housebound until November 2018. There is no evidence that he was incapable of instructing his counsel in other ways, such as speaking to Mr. Gautam on the telephone.

[43] He then travelled to India on at least two occasions to take care of a sick relative. Once again, there is no evidence that he was unable to speak to his counsel. Even after the trial was adjourned in October 2019, Mr. Khatkar said he was frustrated but did nothing.

[44] He also deposes that during the COVID-19 pandemic he did not take many steps to ensure the matter was progressing. Mr. Khatkar says his health issues required him to isolate in his home. Surely, concerns around the pandemic and his health did not limit his ability to telephone his counsel and direct that the matter move forward substantively nor did it prevent him from seeking new counsel if he was unhappy with Mr. Gautam's work.

[45] In May 2021, eight years after the action was commenced, Mr. Khatkar deposes that he was once again frustrated but did nothing. From May 2021 to date, Mr. Khatkar deposes that he did not follow up with Mr. Gautam on the status of the file but provides no explanation as to why. These actions are not indicative of someone who wishes to pursue the matter promptly.

[46] I agree with Justice Rogers comments in *Morice v. Toronto-Dominion Bank*, 2014 BCSC 380, that no reasonable person would unquestioningly accept a delay of a relatively simple action measured in these many years. Mr. Khatkar's responsibility as a litigant included a responsibility to maintain some degree of control over the process. Mr. Khatkar ran a business that successfully entered into a contract worth over $300,000 to provide supply and installation of electrical work for a large construction site. There is no evidence that Mr. Khatkar was legally incompetent or unable to instruct his counsel.

[47] Given the length of time the file remained stagnant, it should have been obvious to Mr. Khatkar that Mr. Gautam was mishandling the file.

[48] Where a plaintiff is aware of a delay that is being caused by their counsel's negligence or dilatoriness, the delay will not be excused: *Crispin v. Sidney (Town),* [1994] B.C.J. No. 142, 1994 CanLII 575; *Shields v. Nishin Kanko Investments Ltd.,* 2008 BCSC 36 at paras. 32–40.

[49] Justice Rogers' comments in *Morice* are instructive:

> [31] In my view, there comes a point when a client must take action – either by giving clear and unequivocal instructions to his lawyer or by taking the file to another solicitor – in order to protect his interests. In the present case I find

> that the delay passed that threshold and I find that Mr. Morice failed to act reasonably in the face of that delay.

[50] In my view, the plaintiff has also failed to act reasonably in the face of the lengthy delay. The responsibility for moving this action along rests with the plaintiff, not his counsel. In my opinion, the delay is inexcusable.

Has the Delay Caused or is it Likely to Cause the Defendant Serious Prejudice?

[51] Recently, the Court of Appeal in *Drennan v. Smith*, 2022 BCCA 86, reaffirmed that a dismissal for want of prosecution based on delay requires a finding that the delay has caused, or is likely to cause, serious prejudice to the defendant.

[52] Where there has been inordinate delay, without reasonable excuse, a rebuttable presumption of prejudice arises. In these circumstances, the onus shifts to the plaintiff to establish on a balance of probabilities that the defendant has not been seriously prejudiced: *Busse v. Chertkow*, 1999 BCCA 313 at para. 38.

[53] As I have found that the delay has been inordinate and inexcusable, there is now a rebuttable presumption.

[54] In *Tundra*, the Court of Appeal provides guidance in regards to the nature of the presumption:

> [35] I also regard it as error in principle to dispose of the issue of prejudice by asking whether the plaintiffs had rebutted 'the presumption of prejudice that arises in the circumstances' and by going on to answer that question in the negative. The "presumption of prejudice" is not a presumption of law. It can be termed a presumption of fact but only in the sense, as it is put in Sopinka and Lederman "*The Law of Evidence in Civil Cases*", 1974 at p. 378:
>
> > The term "presumption of fact" is used in many instances in which it is desired merely to shift the secondary burden to a particular party. When used in this sense, it means that the facts are such that a certain inference should, but need not, be logically drawn.
>
> [36] It is in that sense that the word "presumption" is employed in *Busse v. Robinson Morelli Chertkow, supra*. In considering whether the presumption of prejudice has any application in a particular case, the question properly to be asked, as stated by Goldie J.A. in para. 27 of *Busse*, is:

> > ... has 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?
>
> 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.
>
> [37] In this case, much of the evidence which tends to prove absence of prejudice was put in the record by those defendants who sought to establish that the case against them is a weak one. It matters not who puts forward the evidence. The question remains whether, on a balance of probabilities, absence of prejudice has been established. In considering that, it must be borne in mind that in all contested law suits there is likely to be sufficient passage of time that memories erode to some extent, records may be lost, witnesses may disappear. It is no light matter to dismiss an action for want of prosecution. As Diplock L.J. said in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, *supra*, at p. 259:
>
> > The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It 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.
>
> In this case the plaintiffs should have been given an opportunity to remedy their default. Had that been done, the case by now could have been tried or, more likely, resolved by settlement. In all the circumstances, there was virtually no risk, much less a substantial one, that a fair trial of the issues would not have been possible.

[55] In regards to rebutting the presumption, relying on *Tundra*, the plaintiff argues that the defendants are the ones in a position to offer evidence on the existence of specific prejudice and they can only point to the overall circumstances, including the absence of any evidence of specific prejudice, as evidence that serious prejudice has not been suffered. The plaintiff also submits that it is nearly impossible to rebut the presumption of prejudice without some evidence from the defendants as to what

the prejudice is. For this proposition they rely on *Tri-City Contracting Ltd. v. Leko Precast Ltd*., 2016 BCSC 623 at paras. 35–36.

[56] I will address the evidence offered by the defendants to support that they have suffered serious prejudice, namely the affidavit of Julie Gaydar, counsel for Onni Group, of which the defendant is part.

[57] In regards to prejudice, she deposes that at trial, it will be increasingly difficult for the parties and witnesses who will be required to recall details of the allegations made by the plaintiff given that the underlying dispute began over nine years ago.

[58] Specifically, Ms. Gaydar notes that their memories will likely fade in regards to the deficiencies, quality and timeliness of the plaintiff's work and equipment; the original scope of work contemplated by the agreement, the dispute and what work was unfinished by the plaintiff; the costs associated with the agreement and remedying the unfinished work; and the conduct of the parties, the obligations of the parties and the discussions between the parties. I surmise that much of this evidence is likely already documented in writing.

[59] Although the plaintiff argues there is no evidence that memories have faded, the Court accepts that prejudice includes fading memories of witnesses and no evidence needs to be led on that particular point: see *Ellis* at para. 16.

[60] Finally, Ms. Gaydar deposes that with the passage of time, the defendants "may not" be able to locate witnesses for their defence as various witnesses no longer work for the defendant. The plaintiff says that there is no evidence that witnesses are no longer available. Absent from Ms. Gaydar's affidavit is what actual steps have been taken to locate the relevant witnesses. As well, although the defendants communicated an intention to conduct an examination for discovery of Mr. Khatkar, to date that has not occurred.

[61] The plaintiff argues that the defendants have been aware of the claim since 2013. In terms of witnesses, they were employees of the defendants and as such would have been in a position to secure the evidence of their own witnesses. They

also point out that if the defendants' witnesses are not available or memories have faded, that will impact the plaintiff's ability to prove its cases rather than the defendants' to establish their defence. On this point, I agree with the plaintiff.

[62] The plaintiff contends that the presumption of prejudice is also rebutted by the nature of the litigation. The claim involves the breach of a written contract between two corporate entities and is very much a document case where the necessary evidence has been readily available to the parties: see *Taylor Ventures Ltd. v. Sterling,* 2008 BCSC 736 at paras. 66–68.

[63] A written contract was signed by the parties for the work that was to be performed. The plaintiff says he performed the work that was agreed upon and was also required to do additional work, which was also documented in writing. Both parties have had the others' list of documents since 2014 and have had ample time to take the necessary investigative steps to protect their interests. I have reviewed the list of documents. It reveals many communications between the defendants' representatives and the plaintiff's principal and representatives in relation to the work performed.

[64] The defendants argue that the substance of this litigation relates to the quality and timeliness of the plaintiff's work. Presumably, the defendants would have communicated with the plaintiff in regards to these issues and more importantly, documented these deficiencies. I have not heard any concerns from the defendants that relevant documents have been lost or destroyed as a result of the delay.

[65] The defendants further submit that there has been serious economic prejudice because the delay. In October 2013, the defendants paid $122,847.90 into trust as security, which they argue has caused serious prejudice to their economic interests. They have been unable to use these funds, which could have been put to productive uses. They argue that the longer the action is delayed, the longer the defendants do not have access to these funds.

[66] The plaintiff argues this type of prejudice only arises if they ultimately succeed in their defence of the claim entirely. Even then, any such prejudice could be remedied by an award of interest. On this point, I agree with the plaintiff. Accordingly, I am not convinced that the defendants have suffered serious economic prejudice.

[67] In answering the question, “has the plaintiff established on a balance of probabilities that the defendant has not suffered prejudice”, I have considered all of the circumstances in this case. Accordingly, I answer in the affirmative.

Does the Balance of Justice Require that the Action be Dismissed?

[68] In the event that I am wrong in my conclusion concerning “serious prejudice”, I will consider the interests of justice.

[69] The “final and decisive question, which encompasses the other three, is whether, on balance, justice requires a dismissal of the action”: *Wiegert* at para. 31. In considering this question, the court may consider the merits of the proceeding: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 62.

[70] The plaintiff argues that even if the Court were to find that the delay is inordinate and inexcusable which has caused serious prejudice, it is not the interests of justice to dismiss the action.

[71] The plaintiff submits they have a viable cause of action and the defendants have had ample notice of particulars of the claim. The plaintiff provided services to the defendants and there is a dispute about whether the plaintiff breached the agreement. In this respect, the plaintiff’s claim has merit.

[72] I also recognize that the remedy of dismissal is draconian. In all of the circumstances, I am of the view that the parties can have a fair trial notwithstanding the delay and some prejudice. This action is very much a document case and there has been no concerns regarding loss or destruction of documents because of the

delay. I have also found that the delay has not been intentional or to gain an advantage. In all of the circumstances, the interests of justice require that the action be allowed to proceed.

[73] Because this remedy is to be used sparingly, the plaintiff will be given further opportunity to move this action forward. However, the plaintiff is put on notice that any further delay will, in all likelihood, result in the action's dismissal before trial. As well, I caution the plaintiff that their failure to set the matter down for trial expeditiously will likely be a factor that will favour dismissal for want of prosecution in any further applications.

CONCLUSION

[74] I conclude that the interests of justice weigh against the dismissal of this action for want of prosecution.

[75] The defendants' application is dismissed.

[76] Should the defendants believe it will be beneficial for the Court to make directions on timelines for conducting examinations for discovery and setting of trial dates, I will hear submissions in that regard.

COSTS

[77] Although the defendants were not successful on this application, I am of the view that it was the plaintiff's conduct that prompted the appearance before the Court. Accordingly, the plaintiff will pay to the defendants costs in any event of the cause forthwith. The costs are fixed at $2,000, inclusive of disbursements.

"Girn J."