IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sisson v. The Owners, Strata Plan KAS 53,* 2024 BCSC 1098

Date: 20240624
Docket: S35551
Registry: Penticton

Between:

Gail Sisson

Plaintiff

And

The Owners, Strata Plan KAS 53 (Strata Corporation K 53)

Defendant

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	J. Heaney
Counsel for the Defendant:	M. Fischer
Place and Date of Trial/Hearing:	Kelowna, B.C. May 16 and June 17, 2024
Place and Date of Judgment:	Kelowna, B.C. June 24, 2024

[1] This is an application brought by the defendant to strike the plaintiff's claim for want of prosecution.

Background

[2] The plaintiff is an owner of a unit within the defendant Strata Corporation, which is a 74-unit townhouse style development in Penticton.

[3] The plaintiff's claim arises from mould issues in the attic area. The plaintiff's claim is for damages, amongst other relief.

[4] The primary issue as to liability is a relatively straightforward one. The question is whether the attic area above the living space in the plaintiff's unit is common property, in which case maintenance and repair would fall to the Strata Corporation, or is part of the strata unit, in which case those obligations would fall to the plaintiff. If the attic is a part of the common property, the court would need to consider issues such as causation, negligence and damages, including mitigation of damages.

Litigation history

[5] The underlying events that gave rise to this claim occurred some 15 to 20 years ago.

[6] The plaintiff originally commenced a Small Claims action, on March 8, 2010, with regard to the issues in this case. On August 10, 2011, Judge Shaw of the Provincial Court struck the plaintiff's claim because it was outside the scope of the Provincial Court's jurisdiction, confirming that the plaintiff's claim would need to be brought in the Supreme Court.

[7] The history of this matter in Supreme Court is as follows:

a) February 1, 2012: notice of civil claim filed;

b) February 24, 2012: response to civil claim filed;

c) May 15, 2012: notice of fast-track litigation filed;

d) October 9, 2012: case planning order made;

e) October 15 and 16 examinations for discovery were scheduled, but were cancelled unilaterally by the plaintiff and were never reset;

f) November 12, 2013: the plaintiff retained counsel in Penticton;

g) February 13, 2014: the defendant sent a letter to plaintiff's counsel inquiring of the plaintiff's wish to proceed with the case;

h) February 25, 2014: counsel for the plaintiff advises that he would be obtaining an expert report;

i) February 26, 2014: defendant requests copies of documents;

j) Spring and summer of 2014: further correspondence from the defendant regarding the status of the litigation;

k) September 16, 2014: plaintiff's counsel advises that the plaintiff has been out of province caring for a sick relative;

l) January 30, 2015: plaintiff files a notice of intention to proceed;

m) February 27, 2015: defendant follows up with plaintiff's counsel to advise that nothing has happened since he took over the file and inquiring as to whether any steps will be taken to move the matter forward;

n) March 15 to January 2016: numerous calls between counsel, although no formal steps taken;

o) October 6, 2016: the defendant filed a notice of application to have the matter dismissed for want of prosecution. The application was adjourned and rescheduled on various occasions;

p) March 10, 2017: by consent of the parties, the defendant's application to dismiss the matter for want of prosecution was dismissed. The dismissal was on the condition that the defendant reserved the right to bring a subsequent application in the event the plaintiff did not proceed expeditiously. As it was explained during submissions, the basis for the dismissal was that counsel for the plaintiff acknowledged that the delay was primarily his responsibility;

q) January 8, 2019: the plaintiff filed a notice of intention to act in person;

r) October 2020: the plaintiff filed an application for summary trial. This was adjourned at the plaintiff's request and never proceeded;

s) October 30, 2020: the plaintiff retains Mr. Trevor Morley from Victoria as counsel;

t) December 2020: discussions between counsel in which Mr. Morley advises that he intends to amend the notice of civil claim and that a draft would be provided in January 2021. This never happened;

u) October 2020 to February 2021: correspondence was exchanged but no steps were taken;

v) April 14, 2022: defence counsel follows up with plaintiff's counsel as to the status of the matter, and points out the matter has already been the subject of a prior application to dismiss for want of prosecution and that five years had passed without any steps having been taken;

w) February 2023: Mr. Morley goes on medical leave;

x) March 2023: Ms. Mary Brenton assumes conduct of the file from Mr. Morley;

y) September 14, 2023: Mr. Morley advises that he has returned. In his letter, he suggests that the matter might more properly belong with the Civil Resolution Tribunal;

z) February 14, 2024: this notice of application to dismiss for want of prosecution is filed.

Legal test

[8] An application to dismiss a claim for want of prosecution is brought pursuant to Rule 22-7(7) of the *Supreme Court Civil Rules*:

> (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.

[9] The test to be applied on such applications was considered and revised by a five-member panel in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*]. Prior to *Giacomini*, the long-standing test to dismiss a claim for want of prosecution was:

a) has there been inordinate delay;

b) is the delay inexcusable; and

c) has the delay caused or is it likely to cause, serious prejudice to the defendant: see e.g. *Wiegert v. Rogers,* 2019 BCCA 334 at para. 31.

[10] Even if all of the conditions were established, it would not necessarily follow that the claim would be dismissed because the court retained a residual discretion to decide whether or not the interests of justice demanded a dismissal.

[11] The Court of Appeal critiqued the previous test from paras. 51–58 of *Giacomini,* observing that prejudice to the defendant had been overemphasized as a factor in the jurisprudence. The effect was allowing ongoing inordinate and inexcusable delay so long as the delay did not result in a risk of serious prejudice to

the defendant's ability to defend the action: para. 52. This reality contributed to a "culture of complacency" towards delay in the justice system: para. 53.

[12] With reference to the often-cited decision in *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52, the Court noted that the generally accepted test when considering the interests of justice was that a claim would generally not be dismissed if a fair trial was still possible notwithstanding delay. As such, the previous test focused unduly on litigation prejudice:

> [57] . . . 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.

[13] The Court went on to determine that a new test ought to be applied, which starts with two questions:

a) First, has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?

b) Second, is the delay inexcusable?

[14] Only if both of those questions are answered in the affirmative does the analysis move to the third step. The third and final question is "is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?": paras. 69–70.

[15] As to the factors to be considered under the third part of the test, at para. 71 of *Giacomini,* the Court adopted the non-exhaustive factors set out by the Saskatchewan Court of Appeal in *International Capital Corp. v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45. Those factors are the following:

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 delay; and

h) the public interest in having cases that are of genuine public importance heard on their merits.

[16] Finally, the Court added a ninth factor, which is the merits of the plaintiff's claim: para. 71.

Discussion

[17] I will now review the circumstances of this case with regard to the test as outlined in *Giacomini*.

Has there been an inordinate delay?

[18] The BC Supreme Court matter was filed in February 2012. As such, this application was brought 12 years after the Supreme Court matter was filed. The Supreme Court matter was filed after an earlier attempt to proceed in Provincial Court was dismissed.

[19] The parties exchanged lists of documents shortly after the claim was filed, and following the case planning order, examinations for discovery were scheduled. The discoveries never proceeded because they were cancelled by the plaintiff.

[20] Although there have been discussions between counsel from time to time, the fact is that no substantive steps have been taken for over a decade. There can be no doubt that the delay has been inordinate.

Is the delay inexcusable?

[21] It should be self-evident that in the case of inordinate delay, the burden falls to the plaintiff to show that there are reasonable excuses for that delay.

[22] I accept that the delay up until 2016 when the defendant brought its first application to dismiss for want of prosecution was explained by the plaintiff's former counsel acknowledging that he was responsible for that delay. A court will always be reluctant to dismiss an action for reasons other than the merits of the claim when fault lies at the feet of counsel as opposed to the party.

[23] Over seven years have now elapsed since the earlier notice of application to dismiss for want of prosecution was resolved.

[24] A curious aspect of this application is that the plaintiff has chosen to tender almost no evidence. The correspondence on file makes reference to Mr. Morley's illness, and I accept that some delay would result from his absence from the office. In so saying, I do note that another lawyer was brought in to take over the caseload but it is understandable that little would happen during this period of time.

[25] From what I have been able to ascertain from the evidence put into the record by the applicant and also from counsel’s submissions, which I accept, this amounts to approximately six months or so of more recent delay that I consider reasonable and explained.

[26] As for evidence, I have little else except as set out below.

[27] In support of the defendant's application is an affidavit from a paralegal at counsel for the defendant's firm that includes correspondence between counsel’s offices. Examples include the following:

> Fischer & Company [counsel for the defendant], Matthew Fischer letter to Mr. Morley dated April 14, 2022
>
> We’re not sure why we haven’t heard from you since February of 2021. In April of 2021 we responded to your document request and provided documents, and I had understood that Pacific Quorum as the management

agents for the Strata have continued to provide other requested documents over time.

. . .

I note that this proceeding was the subject of an Application to Strike for want of prosecution in 2017, after very little progress had been made since the original small claims proceeding was filed in 2010, and the Supreme Court action had been filed in 2012. It has now been a further 5 years since the last application to strike, without any meaningful progress, and to the continued prejudice of the Strata Corporation which must disclose this litigation to every prospective purchaser within the strata plan.

I had understood that you planned to bring this matter to a hearing as soon as possible after filing supplemental materials and providing us a reasonable opportunity to do likewise in response.

. ..

Please take this letter as fair notice that if this matter does not proceed with reasonable efficiency, the Strata Corporation may direct that there be a further application to direct this matter either to a hearing, or to be struck.

Matthew Fischer email to Mary Brunton and Terry Kerr [a paralegal at plaintiff's counsel's office] dated July 26, 2023

. . . I note that absent constructive and timely progress to a settlement to be concluded before September, 2023, I do expect to receive instructions to proceed with an application to strike the matter for want of prosecution. . . .

Matthew Fischer letter to Mary Brunton dated September 12, 2023

. . .

Thirdly, your clients' August 22nd letter does not constitute a substantive step in the proceeding, and I would go so far as to say that there has been no meaningful progress of any kind since your firm was engaged, or for a long time previously. This dispute is far more than a decade old, and there is no sign of proximate resolution.

As a result, I have instructions to apply to strike this proceeding for want of prosecution and I have begun preparing those materials. If there is an intention to engage in immediate substantive efforts to establish a proximate trial date or otherwise resolve this matter this year, then I may be able to persuade my client to work towards that process instead or concurrently.

. . .

Finally, and as noted above, unless we have a substantive reply to our prior letter, or substantive steps are taken in the proceeding, within 7 days of the date of this letter, we will be continuing with efforts to bring an application to strike the proceeding for want of prosecution as previously indicated.

[28] The following communications are in Ms. Jolley's affidavit that originate from counsel for the plaintiff:

> Email from Terry Kerr to Matthew Fischer dated March 23, 2023
>
> My apologies for the delay in response as we confirmed instructions with our client which has been further compounded with the absence of Trevor. Trevor has been away from the office on medical leave since the beginning of February and, at this time, we are uncertain of his return date. Mary Brunton, asked me to send you her greetings and let you know she has returned to practice after a short period of retirement in order to assist Trevor and the firm while he is away. This is why the attached letter is over her signature.
>
> Email from Mary Brunton to Amanda Jolley dated August 30, 2023
>
> Thank you for your email. I am away from the office for an extended period and will not return until the end of October. If you would like assistance with a strata matter, please connect with Suzanne, our administrator in the [strata] law department, at sbyfieldmalcolm@reedpope.ca . . .
>
> Letter from Trevor Morley to Matthew Fischer dated September 14, 2023
>
> Thank you for the courtesy of your correspondence.
>
> We will definitely inform our client that they should not be communicating directly with legal counsel for the Strata Corporation (regardless of whether the correspondence is related to BCSC Matter 35551).
>
> I have located your correspondence dated April 14, 2022 and received May 2, 2022 by our office. There has been some preliminary analysis done regarding the appropriate venue to continue this matter.
>
> That analysis is not complete, but our initial review indicates that section 16.4(1) of the *Civil Resolution Tribunal Act* requires this matter to be put before the Civil Resolution Tribunal and only if the tribunal refuses to exercise jurisdiction can it be continued in the Supreme Court.
>
> Regarding your query about who has conduct of this matter, I have returned from my medical leave and have now resumed conduct. I appreciate your patience while I was on leave and a minor extension to permit me to understand what has transpired in this matter since my absence in February of this year.

[29] This last letter from Mr. Morley to Mr. Fischer dated September 14, 2023, is significant because the plaintiff argues Mr. Fischer never responded, and the next thing to occur was the filing of the application to dismiss. The letter is also important because the plaintiff says the proper remedy in this case is that the matter ought to be referred to the Civil Resolution Tribunal (“CRT”). She argues that she could be put on strict timelines for the matter to be transferred, and although the CRT did not

exist at the time the claim was filed, this is a matter that falls squarely within its jurisdiction.

[30] She argues that the timelines for CRT procedures are such that the dispute would be resolved on its merits in less than a year. I will return to this letter later.

[31] The only evidence from the plaintiff's counsel's firm is an affidavit from an associate lawyer that indicates that there were eight other pieces of correspondence. Although the correspondences are listed by date, they are not attached and therefore there is no information about either who sent them or the contents.

[32] The entirety of the affidavit is as follows:

> 1. I am an associate lawyer with Reed Pope Law Corporation, and as such, I have personal knowledge of the facts stated in this affidavit except where stated to be known on information and belief, and where to stated I verily believe them to be true.
> 2. I have reviewed the Notice of Application and the Second Affidavit of Amanda Jolley both filed on February 14, 2024.
> 3. In addition to the correspondence described and attached to Ms. Jolley's affidavit, I have been shown correspondence sent on the dates listed below from our office to counsel for the defendant:
>
> a. July 19, 2022
> b. August 5, 2022
> c. February 15, 2023
> d. March 23, 2023
> e. April 19, 2023
> f. May 9, 2023
> g. May 15, 2023
> h. February 20, 2024

[33] This summarizes the full extent of the evidence before the Court.

[34] I have no evidence from the plaintiff to explain what she may have done in the seven years since the previous application to dismiss was resolved, nor any explanation from plaintiff's counsel to explain the past four years of inactivity, save

and except for the six to seven month period when counsel was ill and away from the office.

[35] It follows that the delay must be inexcusable given that there has been no attempt to provide an explanation.

[36] I have no difficulty in concluding that there has been inordinate delay and that the delay is not excusable.

[37] I now turn to the question of whether it is in the interests of justice to allow the action to proceed despite the existence of the inordinate and inexcusable delay.

a. Prejudice the defendant will suffer in defending the case at trial

[38] There is no prejudice to the defendant here in terms of the ability to defend the dispute as it relates to the question of liability, which is whether maintenance of the attic area is the responsibility of the Strata Corporation or the individual owners.

[39] Since the plaintiff's claim includes a claim for damages, the evidence with regard to her damages will necessarily be very stale at this point, the underlying events having occurred 15 to 20 years ago.

b. The length of the delay

[40] I have already determined that the length of the delay is inordinate. I do note, however, that in addition to the 12 years that this litigation has been extant, the parties were in litigation prior to that, as the matter was before the Provincial Court.

c. The stage of litigation

[41] Notwithstanding the passage of time, the litigation remains in its infancy. The pleadings are closed and documents have been exchanged. Nothing else has occurred.

d. Impact of delay on the defendant's professional business or personal interests

[42] The defendant alleges that it does suffer prejudice as a result of the ongoing litigation. In addition to legal costs that persist because the file remains extant and counsel has periodically attempted to prompt the plaintiff to action, the Strata Corporation is also required to disclose that it is the subject of litigation whenever an owner goes to sell a unit. Further, the defendant argues that it is more difficult to find people who are willing to serve on the Strata Corporation with litigation outstanding.

[43] The plaintiff criticizes the evidence as imprecise and speculative. I agree that it lacks detail but one would not expect there to necessarily be any specific evidence that an owner lost a sale as a result of an ongoing litigation. The litigation, even if successful, would not amount to a large liability on behalf of the Strata Corporation and therefore it is unlikely to be a singular fatal consideration for a prospective purchaser. However, I accept that it stands to reason that a prospective purchaser would always prefer to buy a unit in a strata corporation that is not the subject of litigation with legal fees accruing.

e. The context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed

[44] Counsel for the defendant made it clear to prior counsel of the need to move the matter forward prior to the application to dismiss for want of prosecution in 2016, and there were communications by Mr. Fischer to present counsel for the plaintiff on April 14, 2022, July 26, 2023 and September 12, 2023, all of which made it abundantly clear that the defendant was contemplating a further application to dismiss for want of prosecution unless the plaintiff took steps to advance the claim.

[45] It is important to keep in mind that there is no onus on a defendant to move a matter forward. The plaintiff chooses to proceed with litigation and it is the plaintiff's claim to prove. There can be no suggestion here that the plaintiff was lulled into a false sense of security on the basis that the defendant was acquiescing in the delay. The correspondence from counsel for the defendant is to the contrary, further

evidenced by the defendant’s prior application to dismiss for want of prosecution seven years earlier.

f. Reasons offered for the delay

[46] To reiterate my earlier comments, there are virtually no explanations, certainly after March 2017, when the plaintiff's former counsel acknowledged that the responsibility was his. Counsel for the plaintiff refers to Mr. Morley's illness, and I have accepted that this explains six months of the delay. However, it has been seven years, and the remainder of the time is unexplained.

[47] At this point, I will return to Mr. Morley's letter of September 14, 2023, in which he indicates that the matter should perhaps go to the CRT. To restate that correspondence, Mr. Morley wrote as follows:

> . . .
>
> I have located your correspondence dated April 14, 2022 and received May 2, 2022 by our office. There has been some preliminary analysis done regarding the appropriate venue to continue this matter.
>
> That analysis is not complete, but our initial review indicates that section 16.4(1) of the *Civil Resolution Tribunal Act* requires this matter to be put before the Civil Resolution Tribunal and only if the tribunal refuses to exercise jurisdiction can it be continued in the Supreme Court.
>
> . . .

[48] With respect, this letter does not require response. Rather, the letter suggests that counsel is still considering the point. If counsel were of the view that its preliminary thoughts were correct, an application could have been made at any time prior to the filing of this application, or indeed subsequently.

[49] Equally significant, Mr. Morley's letter was in response to Mr. Fisher's letter of two days earlier in which Mr. Fisher confirmed that not only was his client contemplating an application to dismiss for want of prosecution, he had already started preparing the application materials. It may be that Mr. Morley's intention was to try to buy a little more time and I accept Mr. Fisher's submission that he had not previously been aware of the nature of Mr. Morley's illness.

[50] However, the defendant did not file this application immediately. Rather, it was not filed until five months after Mr. Morley's letter, and at no point prior did Mr. Morley indicate that he had completed his analysis.

[51] Overall, and with the exception of Mr. Morley's illness, there is no evidence that would explain the reasons for the plaintiff's delay since 2017, some seven years ago, when the prior application to dismiss for want of prosecution was resolved.

[52] There is no other evidence regarding the reasons for the delay since 2017.

g. The role of counsel in causing the delay

[53] As I noted earlier, the plaintiff has chosen not to provide any evidence in response to this application. With the exception of Mr. Morley's illness, which explains approximately six months of delay in the seven years since the previous application, I have no evidence on the role of counsel in causing the delay.

h. Public interest in having cases heard

[54] This is a private law dispute and it is therefore not one of public importance.

[55] As a general proposition, the interests of justice dictate that matters should be determined on their merits as opposed to a party's claim being dismissed for what might be described as more technical reasons.

i. Merits of the action

[56] I am not in a position to assess the merits of the action. However, I was provided with a decision, *Lemire v. The Owners, Strata Plan K 53*, 2022 BCCRT 1051, in which the Civil Resolution Tribunal found in favour of the strata corporation on a similar issue. Decisions of the CRT are not binding, and the *Lemire* decision relates to a different unit, but it is in the same strata development.

Consideration of the factors

[57] In establishing the new test for want of prosecution, the Court of Appeal confirmed that the court needs to consider the interests of justice as a “more

nuanced balancing of the competing considerations of the interests of the defendants, and the justice system as a whole*"*: *Giacomini* at para. 75.

[58] From my review of *Giacomini*, the Court of Appeal was concerned about an overemphasis on litigation prejudice and the ability for the defendants to have a fair trial, as opposed to looking at a broader array of circumstances. The Court stated the following:

> [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.

[59] The Court commented that dismissing a matter for want of prosecution should no longer be perceived as a 'draconian' remedy. After confirming that the analysis regarding the interests of justice only applies once there has been inordinate and inexcusable delay, the Court of Appeal said the following:

> [74] . . . 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.

[60] The Court expressed a concern about the "culture of complacency" in civil litigation at para. 53:

> [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.

[61] In this case, the plaintiff has had every opportunity to proceed with her claim. It was readily apparent in 2016 when the defendant filed its first application to dismiss the claim that the defendant wished to see the matter proceed. In the seven years that have elapsed since that application was resolved by consent, nothing of substance has happened and no explanation has been provided, save and except for the six or seven months when plaintiff's counsel was ill. I accept the defendant's submission that it is difficult to envision that the Court of Appeal's concern about the "culture of complacency" would not apply to these circumstances.

[62] The plaintiff was obligated to advance her case and the defendant has repeatedly reminded the plaintiff of the need to move the matter forward, but to no avail. The plaintiff failed to heed the defendant's warnings that this application would be forthcoming and, in my view, the defendant has been very patient. There comes a time when the defendant is entitled to no longer be the subject of outstanding litigation, whether that litigation is resolved in its favour or not.

[63] I conclude that dismissing the claim at this juncture, some 12 years after it was filed, is not contrary to the interests of justice. While a referral to the CRT would put some parameters around resolution of the dispute as plaintiff's counsel suggests, that process itself is not without further delay. I make no comment on the submission that the Court is not the appropriate forum for this dispute and the matter ought to be transferred to the CRT, but I simply point out that if the plaintiff wished for that to happen, she has had ample opportunity to do so.

[64] The defendant's application to dismiss this claim for want of prosecution is granted, with costs to the defendant.

"Wilson J."