Court of King's Bench of Alberta

Citation: Quikcard Benefits Consulting Inc v MP Benefits Inc, 2024 ABKB 367

Date: 20240625
Docket: 1803 24938
Registry: Edmonton

Between:

Quikcard Benefits Consulting Inc, Quikcard Solutions Inc and Lyle Best

Plaintiffs (Defendants by Counterclaim)/Respondents

- and -

MP Benefits Inc and Lori-Anne Power

Defendants (Plaintiffs by Counterclaim)/Applicants

Memorandum of Decision of the Honourable Applications Judge L.A. Smart

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Introduction

[1] The Defendants MP Benefits Inc and Lori-Anne Power (Applicants) have applied for dismissal of this action under r 4.31 on the basis that there has been delay and actual prejudice primarily resulting from the death of an employee witness of the Plaintiff companies (Quikcard Benefits Consulting Inc and Quikcard Solutions Inc) (collectively Quikcard and later when combined with the Plaintiff Lyle Best, the Respondents).

Chronology

[2] Below is the chronology set out in the Respondents Brief with some minor modifications.

2016

[3] On June 6, Quikcard Benefits Consulting Inc commenced a Provincial Court action against the Applicants (PC Action) alleging the Applicants improperly retained insurance sales commissions mistakenly paid to them and otherwise breached a non-solicit agreement.

[4] On July 13, the Applicants filed a Dispute Note and Counterclaim making similar allegations and seeking $40,000 in damages.

[5] On November 4, Quikcard filed a Statement of Claim against the Applicants in action 1601 14826 (the Original Action) alleging defamation, unlawful interference with economic and contractual relations conspiracy to divert customers.

[6] On December 19, the Applicants filed a Statement of Defence and Counterclaim in the Original Action, alleging breach of contract and duty of honest performance, information, interference with economic relations, conspiracy, abuse of process, and damages for loss of clients.

2017

[7] On February 21, Quikcard filed a Statement of Defence to the Counterclaim.

[8] On April 3, Quikcard served their Affidavit of Records (AOR) in the Original Action.

[9] On June 26, the Applicants served their AOR.

[10] On October 27, three days before questioning, the Applicants served a Supplementary AOR with 39 new documents and propose an Amended Counterclaim together with a proposed Consent Order in that regard.

[11] October 30 – 31 Ms. Power was questioned in the Original Action and gave 11 undertakings.

[12] November 1 – 2 The Applicants questioned Shawn Stals, the corporate representative of Quikcard who gave 35 undertakings.

2018

[13] On March 29, Quikcard provided partial answers to Stals' undertaking responses.

[14] On April 23, a Consent Order was granted transferring the PC Action to King's Bench (action 1801 07134).

[15] On July 3, the Applicants served Quikcard with a Second Supplementary AOR.

[16] On August 14, Quikcard filed another action that included Lyle Best as a party alleging defamation as against him and that the Applicants were improperly competing with the Respondents in regard to travel insurance (Calgary Action).

[17] On September 19, the Court granted a Consent Order permitting the Respondents to file an Amended Statement of Claim and for the Applicants to file an Amended Counterclaim.

[18] On September 24, the PC Action was consolidated with the Original Action.

[19] On September 28, the Applicants filed a Statement of Defence in the Calgary Action.

[20] On December 20, the Respondents filed and served an application in the Original Action seeking summary dismissal of all or part of the Applicants' Defence (Summary Dismissal Application) returnable January 14, 2019.

[21] On December 21, the Applicants filed their Amended Counterclaim in the Original Action alleging the Respondents breached their privacy by monitoring the work email account of Ms. Power and using confidential information therein.

2019

[22] On January 9, the Amended Counterclaim was served.

[23] On January 11, Applicants advised of their intention to bring a partial summary dismissal application in the Calgary Action and proposed both summary applications proceed and be heard together.

[24] On February 7, the Respondents filed their Amended Statement of Claim adding allegations of wrongful competition, malicious prosecution, and added particulars of the existing allegations of defamation.

[25] On February 19, the Applicants served Ms. Power's affidavit sworn in opposition to the Summary Dismissal Application.

[26] On March 5, Ms. Power and Lyle Best were each cross-examined on their affidavits.

[27] On March 13, the Applicants filed an Amended Statement of Defence in the Original Action.

[28] On April 16, the Applicants provided the answers to undertakings given by Ms. Power at the March 5 cross-examination.

[29] On May 17, Applicants questioned an employee of Quikcard, Aaron Best.

[30] On June 18, the Applicants filed their application for partial summary dismissal in the Calgary Action.

[31] On July 5, Applicants served a notice of appointment for further questioning of Aaron Best, and a former employee of Quikcard, John Campbell.

[32] On July 15, the Respondents agreed to a Partial Consent Dismissal of portions of the Statement of Claim in the Calgary Action.

[33] On July 25, the Applicants continued questioning of Aaron Best and questioned John Campbell. They also served an unsworn Third Supplementary AOR.

[34] On October 9, counsel for the Respondents closed his questioning of the Applicants.

2020

[35] Ms. Power provided her undertaking responses from her October 30-31, 2017, questioning and provided an unsigned Fourth Supplemental AOR on March 13. Counsel for the Applicants advised he anticipated receiving instructions to compel the Respondents to answer questions objected to by their Counsel at questioning.

[36] On July 17, The Respondents served partial answers to Lyle Best's undertakings.

2021

[37] On January 19, the Respondents served some of Aaron Best's undertaking responses.

[38] On January 20, the Respondents served John Campbell's undertaking responses.

[39] On June 2, a Consent Consolidation Order for the Original and Calgary Actions was granted.

[40] From June 15 to August 19, Counsel exchanged communications regarding proposed Mediation, demanding answers for questions objected to and iteration that objections would not be withdrawn, and a draft Form 37 by the Respondents was tendered.

[41] On September 3, the Respondents provided Stals' updated undertaking response.

[42] On September 21, the Respondents served a Supplemental AOR, and a Notice to Admit. Respondents Counsel asked for a litigation plan.

[43] On September 22, Applicants' Counsel replied that no litigation plan was necessary and suggested a JDR was preferable to mediation. He observed that there were many steps to be taken before a trial could be scheduled.

[44] On October 17, the Applicants responded to the Notice to Admit.

[45] On October 15, Respondents' Counsel asked about discussing further litigation tasks and his objections at questioning. He didn't think questioning on undertakings would be necessary, suggested the parties set dates to exchange expert reports, further interlocutory steps and a JDR.

[46] On October 20, Applicants' Counsel suggested the Respondents prepare a litigation plan and advised he wanted to question on undertakings.

[47] On October 29, the Applicants served revised answers of Ms. Power's undertakings from her 2017 questioning and served an unsworn Fifth Supplemental AOR.

[48] On November 4, 12 and 19, Counsel exchanged communications regarding dates for questioning on undertakings and the setting down of various applications.

[49] On November 25, the Applicants set down an application for better answers to undertakings, compelling answers to questions objected to at the questioning of Stals and Campbell returnable January 14, 2022, but subsequently adjourned sine die.

[50] On November 26, the Respondents filed an application seeking a procedural order for a litigation plan and directing the parties to attend a case conference.

2022

[51] On January 7, the former employee of the Respondent, John Campbell passed away unexpectedly.

[52] Between January 21 and April 15 there were exchanges between Counsel to attempt to resolve five of seven of the objections to questions.

[53] May 16 the Applicants set down an application for leave to proceed with a Summary Trial returnable July 6 and adjourned to July 15.

[54] On June 15, the Respondents provided further undertaking responses.

[55] On July 15, the Applicants indicated they would be bringing a r 4.31 application and the Summary Trial application was adjourned to August 11 and later adjourned to August 22.

[56] On July 22, the Respondents served the final undertaking responses for Stals.

[57] On August 8, the r 4.31 application was filed.

[58] In December a two-day Case Conference was held with a number of directions made for completing questioning, preparation of an agreed statement of facts and a trial plan.

2023

[59] Since the Case Conference, the Respondents cross-examined Ms. Power on her affidavit in support of this application. The Applicants questioned Mr. Stals and Lyle Best on undertakings and also questioned Aaron Best for the third time. Mr. Stals and Mr. Cooper (Respondents' Counsel) swore affidavits in opposition to this application on February 13. The Applicants questioned Mr. Stals on his affidavit filed in support of the Respondents' application for a litigation plan. Mr. Stals and Mr. Cooper were questioned on their February 13 affidavits. The Respondents provided answers to undertakings requested by Applicants at the January questioning.

Delay Events

[60] The Applicants do not generally take issue with the chronology but have argument pointing to 10 "events" that they say delayed the action. The first event surrounds the delay in closing of questioning of Ms. Power from October 30 and 31, 2017. Final questioning took place on October 9, 2019 for about five minutes. No substantive questions were asked with one undertaking request made for further production.

[61] The second issue arises from delay in providing undertaking responses of Stals, Aaron and Lyle Best, and John Campbell. Indeed, some undertakings were not completed until the spring of 2023. The Applicants set out the chronology in support of this contention which omitted other activities that occurred in the litigation, at least in part, on the basis that they lacked merit.

[62] The third event is said to be for delay in provision of relevant and material records particularly in relation to the Respondents claim for damages. It would appear following the December Case Conference that an expert's report on this issue is being prepared for the Respondents.

[63] The fourth event is the filing of the Calgary Statement of Claim which the Applicants say was frivolous. Although much of the claim was struck on consolidation with the Original Action there was nonetheless some allegations preserved.

[64] The fifth event is alleged to be the frivolous filing of a Summary Judgment application, which after filing of affidavits and cross-examination, would appear to have been abandoned by the Respondents.

[65] The sixth event being delay in housekeeping matters arises in part out of the issuance of the Calgary Claim, requiring steps to be taken by the Applicant to have it moved to Edmonton and despite an agreement on the consolidation of the Calgary and Original Actions, the taking of more than two years to formalize it by way of a Consent Order. In addition, when a Consent

Order permitting the Respondents to amend the Statement of Claim was given in September 2018, it took until February 7, 2019 to file the Amended Statement of Claim.

[66] The seventh event arises from the alleged failure to cooperate in scheduling questionings. The Applicants' arguments complain of their frustration with the pace of litigation and further, points to difficulties encountered in the first half of 2019. Finally, it is observed that the Applicants became frustrated in light of events 1-7 and determined they would back off pushing the substance of the litigation and let the Respondents choose the pace of the litigation that they preferred.

[67] The eighth event is a failure of the Respondents to respond to correspondence from the Applicants making various requests for a response within approximately one month. Apparently, the requests were not satisfactorily responded to until August 2021.

[68] The ninth event is the refusal to cooperate with the Applicants' procedural rights. The Respondents requested cooperation in setting a Litigation Plan but the parties were unable to reach an agreement and communication in that regard ceased. The Applicants filed an application to resolve outstanding matters which was adjourned to permit an affidavit to be filed in opposition and schedule cross examinations.

[69] The Respondents filed an application for a case conference and other relief the day following the Applicants' application mentioned above. The 10th event arises from the adjournment of that application multiple times until it was heard in December 2022.

Rule 4.31

[70] Rule 4.31 reads as follows:

> 4.31(1) If delay occurs in an action, on application the Court may
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> (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
>
> (b) make a procedural order or any other order provided for by these rules.
>
> (2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.
>
> (3) In determining whether to dismiss all or any part of a claim under this rule, or whether the delay is inordinate or inexcusable, the Court must consider whether the party that brought the application participated in or contributed to the delay.

[71] The Applicants rely upon r 4.31(1)(a) which states that "if delay occurs in an action, on application the Court may dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party". There is no suggestion or argument that the delay is inordinate or inexcusable. The grounds upon which this application is made is that as a result of the delay of the Respondents, the Applicants have suffered significant prejudice.

[72] As noted by the Applicants, there is scant law addressing delay *simpliciter*. They have provided a number of authorities that would support the contention that the length of time that has passed in this action arguably constitutes "delay". Most of the guidance provided by the

courts in applying this rule has been in the context of delay having been characterized as inordinate with the balance of the rule then coming into play.

[73] ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd,*** 2019 ABCA 276 at paragraph 21 states:

> [21] The objective of the exercise must be remembered. It is to determine whether the delay is inordinate, inexcusable, or otherwise, has caused significant prejudice to the defendant. Any particular class of proceedings will include some that proceed quickly, some that proceed slowly, and a great many in the middle. In determining the reasonable expectation of progress for the purpose of striking out an action for delay, regard must be had to all categories. Delay is not fatal just because the litigation has not progressed to the point that the "fastest" or even the "average" proceeding of that type would have reached. In order to be struck, the action must generally fall within the slowest examples of that type of proceeding, and it must be so slow that the delay justifies striking out the claim. Further, even very short delays can be grounds for striking the action if significant prejudice has resulted. "Significant prejudice" remains the ultimate consideration.

and at paragraph 50:

> [50] Whether or not to dismiss for delay turns on prejudice, indeed substantial prejudice. That there was delay in this case cannot be denied. That the delay was inordinate likewise cannot be denied. For the purposes of invoking the presumption in R. 4.33(2), the issue was whether the delay was excusable because the appellants contributed to it. As discussed, supra para. 28, a defendant's conduct may render inordinate delay excusable; but in the end, this case turns on whether there was substantial prejudice. The concurrent findings of the Master and the chambers judge that there was no substantial prejudice to the appellants was not unreasonable and ought not to be disturbed.

[74] ***Transamerica*** acknowledges that some matters will proceed quickly, some slowly and a great many in the middle. It expresses the view that in order for a proceeding to be struck it must generally fall within the slowest of examples of that type of proceeding, and it must be so slow that the delay justifies striking out a claim. And then following that makes the somewhat confounding statement that even short delays can be grounds for striking the action if significant prejudice has resulted which "remains" the ultimate consideration.

[75] A question seemingly needed to be answered is where on the continuum must a proceeding be between merely trivial and inordinate delay so as to attract the application of r 4.31(1)(a). After struggling to answer this question, I have concluded that the answer is found in ***Transamerica***, that is, simply put, short delay is sufficient.

[76] Neither party has been perfect in moving this proceeding forward nor would such an expectation be reasonable. Nonetheless, in my view, this action fits into the range of proceedings that are slower than average, and consequently is susceptible to the characterization of "short delay".

Delay

[77] The chronology has been set out above. The Applicants make the observation that many of the entries provided by the Respondents are mere "noise", that is, lacking any substantive advance to the proceedings. That may well be correct, it is nonetheless appropriate that failed attempts at communication or unaccepted proposals including those thought by the Applicants as non-meritorious, be enumerated.

[78] I am mindful of the guidance given in ***Arbeau v Schulz***, 2019 ABCA 204 at para 27 that delay must be considered as a whole, that treating individual delay segments as discrete from one another is an error of law. Regardless, in my view, the Applicants have set out 10 delay events some of which warrant comment. Delay event #3 points to the lack of evidence with respect to the Respondents' damages. Mr. Stals' position was that when the Respondents retained its expert it would then identify the underlying documents necessary for that purpose. As at the date this application was heard, I was informed the Respondents' expert report had not as yet been served on the Applicants. Once delivered along with the underlying documents, the Applicants will have to determine how it will respond including possible further questioning and obtaining of their own expert evidence.

[79] Delay event #4 centres around the issuance of a very similar action in Calgary on August 14, 2018. It added Lyle Best as a plaintiff and made allegations of breach of fiduciary duties by Ms. Power. A defence was filed. The Applicants brought a Partial Summary Dismissal application with filing of affidavits and cross-examination on affidavits required albeit in conjunction with the earlier Partial Summary Dismissal application brought by the Respondents. As noted, the Respondents' application appears to have been abandoned. A Partial Consent Dismissal Order was agreed to on July 15, 2018, removing the contentious aspect of the Calgary Claim but leaving Lyle Best as a plaintiff. Ultimately, on June 10, 2021 the Original and Calgary Actions were formally consolidated pursuant to a Consent Order. I agree with the Applicants that the commencement of the Calgary Action, although perhaps not as egregious as an abuse of process, caused an unnecessary distraction and contributed to delay of the progress in the Original Action.

[80] The Respondents also point to the sending of a draft Form 37 and proposing mediation in correspondence between late spring and late summer as an indicator that they had every intention of proceeding with this action. While I agree with the submission, I must say I don't find it relevant or particularly compelling in relation to this application. Furthermore, it is plain to me that the action was not anywhere near being ready for trial and proceeding with ADR premature.

[81] I would be remiss if the advent of COVID wasn't mentioned. Certainly, delay arose as a consequence for much of 2020. A delay that litigants could not have predicted and beyond their control. Based on my review of the materials available to me, I don't find the other aspects of delay far outside what might be considered the norm of litigation timeline albeit on the slow end of the spectrum.

[82] At the time the application was brought under r 4.31, this action was about 5 years and 10 months from its original genesis. Nonetheless, in my view, there has been delay sufficient to attract the application of r 4.31 and that the delay although contributed to by all parties, is properly attributed on balance to the actions of the Respondents.

Dismissal of Counterclaim

[83] The Respondent spent considerable time addressing what he understood was the position of the Applicants being that the Respondents' claim be dismissed but not their Counterclaim. Indeed, the suggestion of the Respondents' Counsel that to do so would effectively weaponize the rule is an intriguing analysis and with some merit. Regardless, Applicants' Counsel clarified that if the Respondents' action is dismissed, the Counterclaim must be also dismissed.

Significant Prejudice

Non-litigation Prejudice

[84] Ms. Power was unable to secure business loans to finance litigation and fund MP Benefits business operations although she was able to borrow on her personal lines of credit. This occurred at the early stages of this litigation and no attempts have been made since. It is difficult to conclude that the delay continues to hamper her borrowing capabilities.

Fading Memories

[85] This action is not entirely a documents-based matter and there will definitely be the requirement for viva voce evidence. The passage of time is always a consideration and the approximate 7 years since the events relevant to this action is relevant but based on the documents available, fading memories *per se*, are not a significant consideration in this case.

Loss of Emails

[86] Javier Salazar is a former employee of Quikcard. He was involved in the marketing campaign central to aspects of this action. His emails contained a "Defamatory Letter" and records of who it had been sent to. During the questioning of Mr. Stals in November 2017, he had undertaken to provide the letter and was to identify the people who had received the letter. In December, 2022, the Respondents advised that some records regarding the letter could no longer be produced. These records were deleted when Salazar left his employment in the spring of 2018. The explanation was that at that time there was no retention policy for emails when an employee left. Since then a policy has been implemented so the emails of John Campbell and other former employees are still available. Noting the deletion occurred in early 2018 it is not possible to say that occurred as a consequence of delay. It is aggravating that disclosure of the deletions was not made until the end of 2022. From my perspective, what occurred is more akin to spoliation of evidence although I hasten to add that no one has argued or suggested that the deletion was intentional.

Death of John Campbell

[87] John Campbell an employee of Quikcard passed away unexpectedly about 5 ½ years after these proceedings were commenced. Mr. Campbell had a role in the marketing campaign and creation/distribution of the Defamatory Letter. On questioning Aaron Best and John Campbell there were material differences in the description of Campbell's degree of participation. The Applicants argue that these differences will go to an assessment of the credibility of these two witnesses and that, of course, cannot now happen before a trial judge.

[88] The Respondents have acknowledged Mr. Campbell's evidence as information of the corporations pursuant to r 5.29 with the exception of one material particular. Mr. Stals states that

customer information was not stored on Quikcard Solutions Inc computer system, HMS contrary to what Mr. Campbell said. One of the Applicants' allegations is that there was misuse of confidential information stored on HMS. The ability to clarify this discrepancy between Stals and Campbell has been significantly impaired.

Other Considerations

[89] In this case, the deceased witness, said to be key, was questioned and the transcript is available along with the answers to the undertakings. In addition, the Respondents have adopted that evidence. It strikes me that the Respondents have a conundrum as the evidence of its other employee Aaron Best does not accord with that of the deceased. As noted a key concern is credibility as between those witnesses. The Respondents are not in a position to now impeach the deceased's evidence on the important issue of how customer information was sourced for their marketing program. The Applicants have lost a witness who appears to have been in the best position to shed some clarity on the source of this information which is outside the direct knowledge of the Respondents' corporate representative and other witnesses.

Conclusion

[90] Having regard to the whole of the action, in my view, the loss of John Campbell as a witness, despite his having been questioned, when combined with the loss of material documents (albeit not as a consequence of delay *per se*) and the lack of direct knowledge by the Respondents' corporate representative and other witnesses, has resulted in significant prejudice warranting dismissal. Accordingly, this Action including the Counterclaim is dismissed. Unless there are other considerations that need to be brought to my attention, the Applicants shall be entitled to one set of costs based on Col 4 of Schedule C of the *Rules of Court*.

Heard on the 3rd day of August, 2023.
Dated at the City of Edmonton, Alberta this 25th day of June, 2024.

L.A. Smart
A.J.C.K.B.A.

Appearances:

Stuart Weatherill
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for the Respondents (this Application only)

Greg Weber
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for the Applicant