COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.,* 2024 BCCA 288

Date: 20240807
Docket: CA49049

2024 BCCA 288 (CanLII)

Between:

Plaza 500 Hotels Ltd.

Appellant
(Plaintiff)

And

SRC Engineering Consultants Ltd.

Respondent
(Defendant)

Before: The Honourable Chief Justice Marchand
The Honourable Justice Dickson
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated April 4, 2023 (*Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, Vancouver Docket S177319).

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Place and Date of Hearing: Vancouver, British Columbia
November 22, 2023

Place and Date of Judgment: Vancouver, British Columbia
August 7, 2024

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Butler

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Summary:

This is an appeal from an order dismissing a claim for non-compliance with court orders and want of prosecution. After filing its notice of civil claim in 2017, the appellant took no further steps to advance the litigation aside from renewing and serving the notice of civil claim in 2018. The respondent obtained case plan orders in 2021 and 2022, but the appellant failed to comply with them. In 2023, the respondent obtained a dismissal order on its first application under Rule 22-7. The appellant argues that the judge committed legal errors on both paths to dismissal. Held: Appeal dismissed. The decision to dismiss a claim for non-compliance is discretionary, and the appellant did not establish that the judge erred in applying the proper legal tests. His decision on appeal is entitled to deference.

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Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] This is an appeal from an order dismissing a claim for non-compliance with court orders and want of prosecution. The appellant, Plaza 500 Hotels Ltd., filed the notice of civil claim in 2017, renewed it in 2018, and served it on the respondent, SRC Engineering Consultants Ltd., in 2019. Thereafter, it took no further steps to advance the litigation. In an effort to do so, SRC sought and obtained two case plan orders, but Plaza 500 failed to comply with them. In 2023, SRC sought and obtained the dismissal order on its first application brought under Rule 22-7 of the *Supreme Court Civil Rules*.

[2] Plaza 500 appeals on the basis that the judge committed legal errors on both paths to dismissal. The appeal focuses primarily on the nature and application of the test for dismissal for non-compliance on a first application brought under Rule 22-7, and the extent of the duty to give reasons on an application heard and determined in regular chambers.

[3] In my view, the judge applied the proper legal tests and his reasons are sufficient. For the reasons that follow, I would dismiss the appeal.

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Background

History of the proceedings

[4] In 2013, the parties entered into a written contract in which SRC agreed to provide electrical consulting services to Plaza 500 for a multi-stage construction project. According to Plaza 500, in June 2015 SRC breached the contract.

[5] In August 2017, Plaza 500 filed a notice of civil claim regarding SRC's alleged breach of contract. It renewed the notice of civil claim in August 2018, and served it in June 2019. In October 2019, SRC filed a response to civil claim and a counterclaim. Plaza 500 did not file a response to SRC's counterclaim.

[6] On September 3, 2020, SRC's counsel provided Plaza 500's first counsel with a notice of case planning conference for November 4, 2020. Shortly thereafter, Plaza 500's first counsel served SRC's counsel with a notice of intention to withdraw. SRC's counsel then served Plaza 500 with a notice regarding the November 4, 2020 case planning conference. However, the day before the scheduled conference SRC's counsel and Plaza 500's second counsel agreed to adjourn it on the understanding that procedural deadlines would be set.

[7] Two months later, Plaza 500's second counsel informed SRC's counsel that he could not obtain instructions and would have to get off the record. In response, SRC's counsel asked Plaza 500's second counsel to set down a new date for a second case planning conference. Shortly thereafter, Mr. Azim Popat, a non-lawyer and principal of Plaza 500, wrote to SRC's counsel suggesting the conference be set for April 29, 2021, which he said would give him time to appoint another lawyer. SRC's counsel agreed and filed a notice of case planning conference for April 29, 2021.

[8] On March 31, 2021, Mr. Popat advised SRC's counsel that he was no longer available on April 29, 2021, and asked him to reschedule the case planning conference. SRC's counsel refused. A week later, Mr. Popat provided SRC's counsel with contact information for Plaza 500's third counsel.

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[9] Counsel for both parties appeared before Master Taylor for the case planning conference on April 29, 2021. Pursuant to the terms of the resulting case plan order, the parties were required, among other things, to produce initial lists of documents within 45 days, agree on a 30-day trial date and complete examinations for discovery no later than one year before trial, and deliver witness lists in accordance with the *Rules*. Plaza 500 was also required to file a response to counterclaim within 30 days.

[10] On September 28, 2021, SRC's counsel wrote to Plaza 500's third counsel asking whether he was acting as there had been no communication since Master Taylor made the April 29, 2021 case plan order. He received no response to his inquiry. On November 29, 2021, SRC's counsel wrote again and advised that he intended to set down a further case planning conference. Again, he received no response.

[11] On March 29, 2022, SRC's counsel served a notice of case planning conference for April 28, 2022 on the office of Plaza 500's third counsel. When he later learned that Plaza 500's third counsel no longer acted for Plaza 500, he served the notice of case planning conference directly on Plaza 500. In the exchange of correspondence that followed, Mr. Popat asked that the second case planning conference be adjourned to July 2022 so that Plaza 500 could retain new counsel. SRC's counsel refused, and the second case planning conference proceeded before Justice Hori as scheduled. SRC's counsel appeared on behalf of SRC. Mr. Popat appeared on behalf of Plaza 500.

[12] Following the second case planning conference, Justice Hori made another case plan order. Among other things, he ordered that Plaza 500 "has until May 31, 2022, to retain counsel", the parties provide lists of documents within 45 days from June 30, 2022, and Plaza 500 file a response to SRC's counterclaim within 30 days from June 30, 2022. When SRC's counsel provided him with a draft of the order, Mr. Popat proposed a series of later deadlines that differed from those set by Justice

Hori. SRC's counsel informed Mr. Popat that he was not entitled to change the deadlines set by the court.

[13] On June 1, 2022, SRC's counsel wrote to Mr. Popat asking if Plaza 500 had retained counsel, and, if so, for counsel's contact information. On June 8, 2022, Mr. Popat responded that he was "in the process of appointing new counsel" and asked for a copy of SRC's counterclaim. SRC's counsel forwarded a copy of the counterclaim to Mr. Popat the same day.

[14] Plaza 500 did not retain counsel by May 31, 2022, or otherwise.

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Application to dismiss

[15] On March 16, 2023, SRC filed a notice of application to dismiss the action under Rule 22-7 based on Plaza 500's non-compliance with the two case plan orders, and, alternatively, for want of prosecution. In support of the application, it relied on affidavits that set out the procedural history and related correspondence.

[16] In its notice of application, SRC stated that under Rule 22-7 the court may make an order dismissing the proceeding where, without lawful excuse, a person has not complied with a court order, citing *Breberin v. Santos*, 2013 BCSC 560. In support of its request for dismissal of the claim for non-compliance, the notice of application stated:

> 6. The plaintiff has neglected to comply with either case plan order without lawful excuse. In fact, his conduct in response to the April 28, 2022, court order shows, at best, a continued strategy of delay with no intention of advancing his action and, at worst, a willful disregard for orders of the court.
>
> 7. It has been almost one year since the April 28, 2022, case planning conference and the plaintiff has failed to comply with any of the orders made. There is no information suggesting that he has any real intention of complying with the orders and no lawful excuse has been offered. Continued protestations that he is in the process of retaining counsel are no excuse in light of the background of this case. Rather, this appears to be a strategy that the plaintiff employs to further delay and attempt to avoid deadlines. In the circumstances, the defendant submits that the plaintiff's action should be dismissed for non-compliance.

[17] As to dismissal for want of prosecution, SRC referred to the test set out in *Wiegert v. Rogers*, 2019 BCCA 334. In support of its request for dismissal of the claim on that basis, the notice of application stated:

> 10. Once litigation is commenced it is expected to move forward with due diligence. Where a plaintiff fails to do so, it exposes itself to the risk of having its claim dismissed for want of prosecution.
>
> 11. The relevant steps are the formal steps required or permitted by the Rules which move the litigation forward…
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> 12. On the face of the notice of civil claim, the cause of action arose in March 2015. The notice of civil claim was filed on August 4, 2017. Other than renewing the notice of civil claim on August 3, 2018, and serving it in June 2019, the plaintiff has taken no steps to advance his action. In fact, viewed holistically, the plaintiff has repeatedly sought to delay proceedings and has failed to comply with orders obtained by the defendant in an attempt to advance the litigation. In the circumstances, the delay is inordinate.
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> …
>
> 18. Even if this matter were to proceed expeditiously from this point forward, the earliest that the trial of this matter could reasonably be heard is at least two years from now. At that point, the witnesses would be required to recall events that occurred at least 10 years prior. This lengthy delay manifests an enormous difficulty in obtaining reliable witness testimony. The court will not have the best evidence on which to make a just determination.
>
> 19. Moreover, the defendant has made more than reasonable efforts and incurred expense trying to advance the litigation, all of which have been ignored by the plaintiff…
>
> 20. The length and reasons for the delay, and presumption of prejudice to the defendant favour dismissing the action for want of prosecution. This is not a case where the self-represented plaintiff can profess that he is unaware of the delay or unaware of his failure to take any steps to advance the litigation. Indeed, the circumstances suggest that he is solely responsible for the continued delay, failure to advance the litigation, and failure to comply with case plan orders. On the balance, the interests of justice favour the defendant and the action ought to be dismissed.

[18] Plaza 500 did not file any material in response.

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Hearing of application

[19] The dismissal application came on for hearing on April 4, 2023 in regular chambers. Counsel for SRC appeared on its behalf. Mr. Popat appeared on behalf of Plaza 500.

[20] At the outset of the hearing, Mr. Popat requested an adjournment. He told the judge that he had not had enough time to respond to the application "because I'm involved in other litigation regarding Plaza 500 … [which] went into foreclosure rather through some nefarious means". He also stated that he was "dealing with that particular litigation", which "caused insurmountable difficulties", and that he wanted "an opportunity to be able to respond adequately … [and] explain my position".

[21] In responding to Mr. Popat's request, the judge observed that Plaza 500 received the application almost three weeks earlier and asked what he was proposing. Mr. Popat replied that "between March 16th and now I've been involved in other hearings that have occupied a lot of my time", which prompted the judge to ask if he had "prioritized those hearings over this one". Mr. Popat replied that he had tried to get legal counsel, but it was taking time, "[a]nd so I've decided to self-represent myself" and request "some time to respond to this".

[22] The judge told Mr. Popat that "[i]f I do grant an adjournment, I'm going to need a specific plan from you. It's not just simply oh, yeah, we'll adjourn it and then it will come back". He asked again what Mr. Popat was proposing and whether he would be retaining counsel. Mr. Popat replied "if I don't, I will be self-representing", and said that his plan was "basically self-represent Plaza 500" and prepare to proceed "as quickly as possible", which would take "top priority". When the judge asked what he would be preparing and when, he and Mr. Popat had this exchange:

> Mr. Popat: Well, I will coordinate with the defendant's counsel, you know. The case planning, you know, will take top priority to make sure that we move this along as quickly as possible or … as possible.
>
> The Court: So my understanding is that this is an application to dismiss your company's case for want of prosecution. So what's the plan?
>
> Mr. Popat: Well, basically the plan is to continue with the action and –

The Court: But you have no specifics in terms of when – I don't know what stage the action's at. I don't know what you're going to file.

Mr. Popat: Well, I think the defendant's counsel has got – you know, I think we will discuss the case planning and I think that has been – has been dealt with. So we just need to – ideally, I'd like to move this to mediation because it's an issue with factual – with facts rather than legal, you know.

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[23] The judge denied Mr. Popat's request for an adjournment and proceeded with the hearing.

[24] SRC's counsel began his submissions by outlining the background and reviewing the affidavit materials. Then he discussed the legal basis for the non-compliance aspect of the application. He directed the judge to the notice of application, gave him a book of authorities, and summarized Rule 22-7. After confirming that SRC was relying on Plaza 500's breaches of the case plan orders, he stated that "the court may make an order dismissing the proceeding if its order has not been complied with without lawful excuse", and that Mr. Popat had failed, without lawful excuse, to comply with either order.

[25] SRC's counsel went on to summarize paragraphs 6 and 7 of the notice of application, submitting that Mr. Popat's "conduct in response to the April 28th, 2022 court order shows, at best, a continued strategy of delay with no intention of advancing his action". He reiterated SRC's position that Mr. Popat's protestations appeared "to be an unfortunate strategy that Mr. Popat is employing to further delay this and … attempt to avoid deadlines". He also emphasized that Mr. Popat had responded to the dismissal application "with no plan and … no lawful excuse as to why he has failed to comply with those court orders or move his action forward", and stated "on that basis, Mr. Justice, we say the action should be dismissed for non-compliance".

[26] Turning to the want of prosecution aspect of the application, SRC's counsel referred to the test outlined in *Wiegert*. He submitted Plaza 500's delay was inordinate, stating that "[o]nce an action is commenced, it's expected that the person who commences the action will move it forward with due diligence". He also

reviewed the history of the claim, asserted that "viewed holistically, the plaintiff has repeatedly sought to delay proceedings and has failed to comply with orders obtained by the defendant in an attempt to advance the litigation", and emphasized the absence of an excuse and the presumption of prejudice. He went on to submit that the interests of justice favoured dismissal for the reasons set out in paragraph 20 of the notice of application.

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[27] For his part, Mr. Popat stated "there was never an attempt to deliberately delay this particular proceeding", but that Plaza 500 "ran into a lot of difficulty through its own shareholders conspiring and intimidating and causing the foreclosure of Plaza 500" in 2019, which led to "about three proceedings that are currently running in the courts". He also stated that Plaza 500 had "a very strong claim", which assertion he based "on the information we got from our architect and our project manager at that time".

[28] When the parties finished their submissions, the judge advised them that he would reserve his decision over the lunch break. He returned at 2:00 p.m. and gave oral reasons dismissing Plaza 500's claim.

Oral Reasons for Judgment

[29] At the outset of his reasons, the judge briefly described the claim, the pleadings, and the dismissal application. He noted that Plaza 500 had not moved the claim forward since October 2019, had been represented by three different counsel since commencing the action, and was represented by Mr. Popat on the application (paras. 1–5). He also noted that Plaza 500 had not complied with the procedural deadlines in the case plan orders or filed any application materials (paras. 6–10). Moreover, he observed, Mr. Popat had sought to adjourn the application without proposing a specific plan or any deadlines (para. 11).

[30] Next, the judge summarized the parties' positions. He noted that Mr. Popat acknowledged Plaza 500's non-compliance and delay, but claimed the latter related to "internal issues that resulted in foreclosure" and that Plaza 500 was involved in other litigation. In addition, he observed, Mr. Popat asserted that Plaza 500 had a

strong claim against SRC, but provided no supporting evidence and no plan for moving forward with the claim (paras. 12–14).

[31] Turning to his analysis, the judge said this:

> [15] On my assessment of the evidence in the application record, and after having heard submissions from counsel for SRC and from Mr. Popat on behalf of Plaza 500, I am persuaded that an order dismissing Plaza 500's action is justified, on both bases advanced by SRC.
>
> [16] There is no dispute that Plaza 500 has failed to comply with the orders of Master Taylor and Justice Hori. Plaza 500 has not presented any reasonable basis for a finding that there was a lawful excuse for this non-compliance. No evidence has been presented to explain the non-compliance, and Mr. Popat's suggestion that the financial difficulties experienced by Plaza 500 may explain its delay rings hollow when apparently Plaza 500 is able to proceed with its other litigation claims against other parties.
>
> [17] Therefore, the conditions precedent for an order dismissing Plaza 500's action against SRC for non-compliance with court orders under R. 22-7(2) have been met.
>
> [18] While not strictly necessary, I am also of the view that this is a case where dismissal for want of prosecution under R. 22-7(7) is justified in accordance with the well-established test set out by our Court of Appeal in *Wiegert v. Rogers*, 2019 BCCA 334 at paras. 31 to 33. The current claim relates to a cause of action that apparently arose in 2015, almost eight years ago. The notice of civil claim was filed in 2017, and, other than renewing the notice in 2019 and serving it that year, Plaza 500 has taken no steps to advance it. Plaza 500's apparent difficulties with retaining and maintaining counsel has not been adequately explained to justify this inactivity. In the circumstances, Plaza 500's delay is inordinate, inexcusable, and prejudicial. On balance, the interests of justice favour SRC, and Plaza 500's action deserves to be dismissed.

On Appeal

[32] Plaza 500 contends the judge erred in dismissing its claim for non-compliance by failing to apply the proper legal test and consider relevant factors, namely, the factors which determine whether the court should, not may, exercise its discretion under Rule 22-7(6). He also erred, it says, in dismissing its claim for want of prosecution by finding the procedural delay started when the cause of action arose and providing insufficient reasons.

[33] Plaza 500 acknowledges that it must demonstrate reversible error on both paths to dismissal to succeed on the appeal.

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[34] SRC responds that the judge applied the correct legal tests in dismissing the action and made no other reversible errors. Accordingly, it says, his conclusions are entitled to appellate deference. In addition, it says, the judge's reasons, read fairly and in context, are sufficient for appellate purposes, and the record supports dismissal of the action in any event.

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[35] The issues for determination are:

a) Did the judge err in dismissing the action based on Plaza 500's non-compliance with the case plan orders, and, if so, how?

b) Did the judge err in dismissing the action for want of prosecution, and, if so, how?

Discussion

Standard of Review

[36] A decision on whether to dismiss an action under Rule 22-7 is discretionary in nature. In other words, the decision depends on the judge's assessment, within set boundaries, of what is fair and just in a particular case given the facts and the law: *Rise & Shine Grocery & Gas Ltd. v. Novak*, 2016 BCCA 483 at paras. 35–36; *Barrie v. British Columbia (Forests, Land, and Natural Resource Operations)*, 2021 BCCA 322 at para. 86.

[37] Discretionary decisions are entitled to a high degree of appellate deference. An appellate court will not interfere with a judge's exercise of discretion simply because it might have exercised the discretion differently. Rather, an appellate court will only interfere where, in exercising the discretion, the judge erred in principle, gave no or insufficient weight to relevant considerations, made a palpable and overriding factual error, or made a decision that is so clearly wrong as to amount to an injustice: *Rise & Shine* at para. 37; *Barrie* at para. 87; *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 at para. 25.

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[38] Appellate courts take care to distinguish between allegations that a legal test was altered when applied and allegations that a legal test, when applied, should have resulted in a different outcome. The former raises a question of law subject to correctness review; the latter, a question of mixed fact and law, subject to review for palpable and overriding error: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 45; *Capital One, National Association v. Solehdin*, 2020 BCCA 182 at paras. 24, 28.

[39] A failure to provide reasons that are sufficient to permit appellate review is an error of law reviewable on a standard of correctness: *Hague v. Hague*, 2022 BCCA 325 at para. 15. However, a judge's reasons "should not be held to an abstract standard that is foreign to the realities of the case": *R. v. G.F.*, 2021 SCC 20 at para. 67. In *Hague*, Justice Marchand, as he then was, explained that judges are presumed to know the law and need not expound on its uncontroversial features. He also explained that if reasons are ambiguous, interpretations consistent with a correct application of the law are to be preferred: *Hague* at para. 22.

Did the judge err in dismissing the action based on Plaza 500's non-compliance with the case plan orders?

Legal Framework

[40] The object of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits: Rule 1-3(1). This includes, insofar as is practicable, conducting proceedings in ways that are proportionate to the amount involved, the importance of the disputed issues, and the complexity of the proceeding: Rule 1-3(2).

[41] The civil justice system relies on the assumption that parties will respect court orders, comply with the *Rules*, and work together to resolve claims by trial or settlement: *Breberin* at para. 65. If a party fails without lawful excuse to comply with their litigation obligations, sanctions may be imposed under Rule 22-7. Moreover, although the predominant objective of the courts is to address claims on their merits, persistent and unexcused non-compliance may frustrate the pursuit of a just and

efficient outcome based on the merits to a point where it is unattainable. In such cases, a judge may decide that dismissing the claim or striking the defence serves the interests of justice: *Breberin* at para. 65; *Barrie* at paras. 104–105.

[42] More specifically, under Rule 22-7 a judge may decide to dismiss a proceeding or strike a defence if a party has, without lawful excuse, refused or neglected to comply with the requirements of the *Rules* or a direction of the court.

[43] Rules 22-7(2), (5) and (6) provide, in relevant part:

> **Powers of court**
>
> (2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may
>
> …
>
> > (d) dismiss the proceeding …, or
> >
> > (e) make any other order it considers will further the object of these Supreme Court Civil Rules.
>
> …
>
> **Consequences of certain non-compliance**
>
> (5) Without limiting any other power of the court under these Supreme Court Civil Rules, if a person, contrary to these Supreme Court Civil Rules and without lawful excuse,
>
> …
>
> > (d) refuses or neglects … to make discovery of documents, or
> >
> > …
> >
> > then
> >
> > (f) if the person is the plaintiff or petitioner, a present officer of a corporate plaintiff or petitioner or a partner in or manager of a partnership plaintiff or petitioner, the court may dismiss the proceeding, and
> >
> > (g) if the person is a defendant, respondent or third party, a present officer of a corporate defendant, respondent or third party or a partner in or manager of a partnership defendant, respondent or third party, the court may order the proceeding to continue as if no response to civil claim or response to petition had been filed.
>
> **Failure to comply with direction of court**
>
> (6) If a person, without lawful excuse, refuses or neglects to comply with a direction of the court, the court may make an order under subrule (5)(f) or (g).

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[44] An order dismissing a claim for non-compliance is a “blunt tool, to be used sparingly”. On a dismissal application based on non-compliance, judges are “required to consider proportion in weighing the degree of the delict with the degree of sanction imposed”, and limit the sanction imposed to a proportionate response: *House of Sga’nisim v. Canada (Attorney General)*, 2007 BCCA 483 at paras. 26–28. Nevertheless, in “the most egregious of cases” an order dismissing a plaintiff’s claim for non-compliance may be justified: *Homer Estate v. Eurocopter S.A.*, 2003 BCCA 229 at para. 4. For example, in *Rise & Shine*, this Court upheld a dismissal order based on the plaintiff’s multiple, flagrant, and unexcused breaches of the *Rules* and court orders.

[45] In *Rise & Shine*, Justice Goepel quoted from the summary of guiding principles on a Rule 22-7 application outlined in *Breberin* by Justice Willcock, then of the Supreme Court:

> [35] In *Breberin v. Santos*, 2013 BCSC 560 Willcock J. (as he then was) summarized the jurisprudence dealing with dismissal applications pursuant to Rule 22–7:
>
>> [52] Several principles identified in the jurisprudence describe and limit the appropriate application of Rule 22-7.
>>
>> [53] The order sought by the defendants is not readily granted. Dismissal is a “blunt tool, to be used sparingly” in response to procedural delay: *House of Sga’nisim v. Canada (Attorney General)*, 2007 BCCA 483 at para. 28 [*House of Sga’nisim*]. The remedy is a “draconian” one, “only to be invoked in the most egregious of cases”: *Homer Estate v. Eurocopter S.A.*, 2003 BCCA 229 at para. 4. It is to be avoided where it is reasonable to do so: *House of Sga’nisim* at para. 30.
>>
>> [54] Where failure to comply with the Rules or failure to comply with the terms of a court order is established, the party at fault bears the onus of proving a lawful excuse for the non-compliance or non-observance: *Balaj v. Xiaogang*, 2012 BCSC 231 at para. 36 [*Balaj*]; *Eisele v. B.A. Blacktop Ltd. et al*, 2004 BCSC 521 at para. 15.
>>
>> [55] In this context, a “lawful excuse” is “one which, in the discretion of the judge acting judicially, is worthy of acceptance”: *United Furniture Warehouse LP v. 551148 B.C. Ltd.*, 2007 BCSC 1252 at para. 24.
>>
>> [56] Because an action may be struck when the lack of production has been occasioned by negligence, the degree of negligence required should be more than moderate on a scale ranging from mere negligence to gross negligence.

> [57] Fundamental failures, such as failure to make appropriate disclosure of documents or records, must be treated as a serious default.
>
> [58] A dismissal order will not usually be granted on a first application for relief arising from procedural delay, even intentional delay. Injustice might result from such a course of action.
>
> [59] A dismissal order will not usually be granted until the plaintiff has been warned that result will follow upon further delay or obstruction.
>
> [60] Lesser sanctions ought to be considered where any are available and appropriate.
>
> [61] A self-represented litigant cannot be held to the same standards as a professional lawyer in terms of compliance with court procedures and rules. That said, a litigant who chooses to represent him- or herself cannot ignore his or her responsibilities with impunity.
>
> [62] A persistent pattern of delay on the part of the plaintiff, as well as a persistent failure to comply with the Rules of Court and court orders, may result in a dismissal order. Defaults must be seen in context. The plaintiff's conduct of the claim from its inception does have a bearing on the seriousness of the default before the court.
>
> [63] When persistent conduct prevents the litigation from progressing at all, and when trial dates are lost through deliberate defaults, the failures may have an irreparable negative effect on the just determination of a case. Failing to comply with an order in a manner that causes an adjournment of trial is seriously prejudicial to the defendants.
>
> [64] Refusal to comply with an order for reasons raised before the court and rejected amounts to an overt and deliberate flouting of the court order: *Balaj*; *House of Sga'nisim*; *Dhillon v. Pannu*, 2008 BCCA 514; *Kemp v. Dickson,* 2006 BCSC 288.

[46] In *Schwarzinger v. Bramwell*, 2011 BCSC 304, Justice Fitzpatrick discussed several factors for consideration on a Rule 22-7 application. For example, she observed that "[t]he punishment must fit the crime" and thus that proportionality must be considered, which "inevitably leads to the question of whether a lesser remedy would cure the default and inspire confidence that the Court's orders will be respected in the future": at paras. 118, 123. She also observed that a party is generally entitled to a "second chance" before a claim will be dismissed or a defence struck on the first application brought under Rule 22-7:

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> [113] Our courts have generally recognized that parties are entitled to a "second chance" before such relief is granted. In *Neeld*, Mr. Justice Taggart stated:
>
> > [28] As I understand it, the usual practice in these matters is that when a motion such as that presented by the plaintiffs comes on for hearing, unless there are unusual circumstances apparent to the Chambers judge, an order is made directing the person subject to examination for discovery to attend at a stipulated time and place. It is usual in the court on such an application for the judge to [indicate] that that will be the last opportunity to avoid such an examination for discovery. If an appearance pursuant to that order is not made, then counsel for the part adverse in interest is generally at liberty to proceed to seek an order for the action against the other party to proceed as if no appearance had been entered and no defence filed. So, the process is really a two stage process.
>
> [114] The usual practice, adopted in *Neeld*, is that a party is first put on notice by the court that an order to strike will likely follow unless there is compliance. Notice is effectively given by dismissing a first application to strike, making certain orders for compliance and, then, if there is still lack of compliance, possibly granting the second application to strike.
>
> [115] The decisions of this Court have generally adopted this approach.

[47] As Justice Fitzpatrick explained, courts usually respond to a first application to dismiss for non-compliance under Rule 22-7(5) by setting deadlines and notifying the non-compliant party that further non-compliance may lead to a successful second application. Nevertheless, every case is fact-driven, and in some cases the "usual approach" is unlikely to be effective. In *Rise & Shine*, Justice Goepel emphasized the discretionary nature of a dismissal order under Rule 22-7. In doing so, he stated that, while dismissal orders are not usually granted on the first application, "a judge is not restrained from ordering dismissal". Rather, "[r]equests for a 'second chance' can be properly rejected where the record establishes that the breaching party has already had multiple opportunities to comply and has provided no excuse for its failure to do so". He went on to uphold a dismissal order granted on the first application brought under Rule 22-7: *Rise & Shine* at paras. 31, 44, 46.

[48] The ultimate question in every case is whether the order sought serves the interests of justice: *Barrie* at para. 105; *Schwarzinger* at para. 107. As stated in *Barrie*:

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> [105] … The order granted must be proportionate and the court must consider whether a lesser remedy will cure the default(s) and inspire confidence in future compliance: *House of Sga'nisim* at para. 26; *Schwarzinger v. Bramwell*, 2011 BCSC 304 at paras. 107, 118, 123. In assessing the overall interests of justice, the court must also consider and weigh the relative prejudice caused to the parties if an order dismissing a claim or striking a response to civil claim is granted or denied: *Canreal Management Corporation v. Mercedes-Benz Canada Inc.*, 2010 BCSC 642 at para. 35.

Analysis

[49] In Plaza 500's submission, the judge found, correctly, that the "conditions precedent" for an order dismissing the action were met, namely, non-compliance with the case plan orders and the absence of a lawful excuse. However, it says, that finding does not lead inexorably to a dismissal order. Rather, its unexcused non-compliance with the case plan orders established only that the judge could dismiss the action under Rule 22-7, not that he should dismiss it. Having found the conditions precedent were established, the judge was obliged to go on, apply the *Schwarzinger* framework, and exercise his discretion bearing the *Schwarzinger* factors in mind.

[50] Plaza 500 contends the judge failed to proceed to the second stage of the analysis and apply the proper legal test, as set out in *Schwarzinger*. This is apparent, it says, from the fact that he failed to provide it with a "second chance", conduct a proportionality assessment, or consider imposing a lesser remedy. Instead, Plaza 500 says, the judge found only that SRC had established the conditions precedent for dismissal, and then proceeded, without more, to dismiss the action. In its submission, this was a legal error, and therefore his decision is not entitled to deference on appeal.

[51] In support of its submission, Plaza 500 argues that SRC failed to conduct a *Schwarzinger* analysis in its notice of application or oral submissions. More specifically, it says, SRC did not engage with the necessary questions of whether there were unusual circumstances that justified dismissal without a "second chance", whether dismissing the claim was a proportionate response to its transgressions, or

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whether a lesser remedy could cure them and inspire confidence in future compliance. According to Plaza 500, that failure, coupled with the fact that it was self-represented, might help to explain why the judge also failed to do so, and thus failed to apply the proper test.

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[52] In advancing its submission, Plaza 500 acknowledges that judges are presumed to know the law, which they need not recite, especially in oral reasons delivered in chambers. Nevertheless, it says, even read generously and in context, the reasons show the judge failed to consider the *Schwarzinger* factors that guide the exercise of discretion under Rule 22-7. In Plaza 500's submission, this is particularly apparent from paragraph 17 of the reasons, where the judge described its unexcused non-compliance, stated "[t]herefore, the conditions precedent for an order dismissing Plaza 500's action against SRC for non-compliance with court orders under R. 22-7(2) have been met", and then, without more, moved on to the want of prosecution application.

[53] According to Plaza 500, had the judge applied the proper legal test, he would not have dismissed its claim for non-compliance. It emphasizes this was the first Rule 22-7 application brought by SRC, and argues there were no special circumstances to justify dismissing its claim without first providing it with the usual "second chance" to comply. In its submission, that should have been dispositive in its favour, particularly as it was self-represented.

[54] Plaza 500 concedes that self-represented litigants are obliged to follow the *Rules* and comply with court orders, as stated in *Breberin*. However, it submits, Mr. Popat's inability to articulate a detailed litigation plan for going forward was unsurprising in light of his self-representation. In Plaza 500's submission, that inability did not warrant a dismissal order on a first application. On the contrary, it says, a judicial warning to a self-represented litigant such as Mr. Popat that continued non-compliance could lead to dismissal on a subsequent application would likely have a salutary effect.

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[55] Furthermore, Plaza 500 argues, its non-compliant conduct was significantly less egregious than the conduct of parties such as the plaintiff in *Breberin*, whose claim was dismissed on a first Rule 22-7 application. In contrast, it says, dismissal in this case was a disproportionate punishment for its conduct, which, while frustrating, did not cause the loss of trial dates, put SRC to unreasonable expense, or impact trial fairness. Moreover, Plaza 500 says, lesser remedies such as those imposed in *Hsu v. Klassen*, 2022 BCSC 2194 were both available and appropriate. For example, costs sanctions and a “guillotine order” dismissing the claim unless prescribed steps were taken would adequately address its defaults and ensure its future compliance.

[56] In my view, Plaza 500’s counsel makes an able argument for the exercise of judicial discretion in favour of imposing a lesser remedy for non-compliance on a first Rule 22-7(5) application on the facts of this case. However, it is not for this Court to interfere with a judge’s exercise of discretion simply because it might be persuaded to exercise the discretion differently.

[57] I am not persuaded that the judge failed to exercise his discretion, applied the wrong legal test, or otherwise erred in exercising his discretion. Accordingly, his discretionary determination is entitled to deference on appeal.

[58] To repeat, the ultimate question on a Rule 22-7(5) application is whether the order sought serves the interests of justice, which is an inherently and manifestly discretionary determination: *Barrie* at para. 105; *Rise & Shine* at paras. 36, 44. The factors that guide the requisite exercise of discretion are well-established and have been discussed in several leading authorities, including *Breberin* and *Schwarzinger*. Judges are presumed to know the law: *Hague* at para. 22.

[59] As I understand it, Plaza 500’s essential proposition is that the judge failed to exercise his discretion, and instead erroneously treated the preconditions to its exercise—unexcused non-compliance with a court order—as the test for dismissal for non-compliance. I do not accept this proposition. The reasons, read as a whole and in the context of the record, show the judge understood that SRC was seeking a

discretionary determination that dismissal of the claim for Plaza 500's non-compliance served the interests of justice. They also show that, in making that determination, he accounted for the relevant factors in the circumstances of the case.

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[60] Specifically, the record shows that SRC cited *Breberin* and provided the judge with a book of authorities at the hearing. It also shows that, in making his submissions, SRC's counsel stated, "the court may make an order dismissing the proceeding if its order has not been complied with without lawful excuse", and argued that Plaza 500's persistent non-compliance with the case plan orders was strategic, willful, and prejudicial as well as unexcused. Moreover, it shows that SRC argued Plaza 500 had no real intention of moving the claim forward, as evidenced by its past disregard of both orders and (non)response to the dismissal application.

[61] Further, the record shows that the judge questioned Mr. Popat about his plans for moving the case forward, and was unsatisfied with his vague answers. In addition, in his reasons, he emphasized that Mr. Popat did not propose "any specific plan or deadlines", and rejected his explanation for the long delay, repeated non-compliance, and extraordinary failure to advance the claim beyond the pleadings stage in nearly four years: at paras. 11, 14, 16. In my view, the judge implicitly found that a lesser remedy was unlikely to ensure Plaza 500's future compliance, and thus that dismissal of its claim was a proportionate response to its repeated transgressions. That implicit finding was reasonable and available on the record. In the circumstances, the judge was not obliged to provide Plaza 500 with another opportunity to meet deadlines and comply with a further court order setting them before it was fair to dismiss the claim.

[62] Given the evidence and submissions, the judge found that dismissal of Plaza 500's claim was "justified" based on both its non-compliance and for want of prosecution: at para. 15. In other words, in my view, he was persuaded that, on balance, the interests of justice favoured dismissal on both bases argued by SRC. This interpretation of his reasons is reinforced by the language of the penultimate

paragraph, where, in discussing the want of prosecution issue, the judge stated: "In the circumstances, Plaza 500's delay is inordinate, inexcusable, and prejudicial. On balance, the interests of justice favour SRC, and Plaza 500's action deserves to be dismissed": at para. 18. Read together with the three paragraphs it followed, I interpret that language as expressing the judge's overall assessment that dismissal of Plaza 500's claim was just and appropriate in all of the circumstances, which circumstances included its repeated non-compliance with its litigation obligations.

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[63] I would not give effect to this ground of appeal.

[64] As Plaza 500 acknowledges, to succeed on the appeal it must establish reversible error on both paths to dismissal. Given that it has failed to do so on the first ground of appeal, it is not strictly necessary to consider the second ground. Nevertheless, in light of the arguments presented, there is value in doing so. Accordingly, like the judge below, I will also deal briefly with the decision to dismiss Plaza 500's claim for want of prosecution.

Did the judge err in dismissing the action for want of prosecution?

Legal Framework

Want of Prosecution

[65] A judge may dismiss a proceeding under Rule 22-7(7) for want of prosecution. Rule 22-7(7) provides:

> **Dismissal for want of prosecution**
>
> (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.

[66] In *Giacomini Consulting*, a five-member division of this Court recently revised the long-standing test for dismissal of an action for want of prosecution described in *Wiegert*. That long-standing test required a judge to be satisfied that: there had been inordinate and inexcusable delay in the prosecution of the action; the delay had caused, or was likely to cause, serious prejudice to the defendant; and it was in the interests of justice to dismiss the action. Speaking for the Court in *Giacomini*

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Consulting, Justice Horsman noted the pattern of delay in civil proceedings in British Columbia, emphasized undue delay undermines public confidence in the justice system, and asked whether the existing test adequately accounted for the full measure of harm caused by delay: *Giacomini Consulting* at paras. 4, 5, 31. She concluded that it did not.

[67] Justice Horsman explained that the long-standing test in this province failed to account adequately for the public interest in a justice system that promotes timely and cost-effective dispute resolution. Nor did it account adequately for the interest of defendants in the expeditious resolution of claims: *Giacomini Consulting* at para. 51. She went on to conclude that a revision was justified because "[t]he current test is unduly focussed on litigation prejudice to the defendant, at the expense of consideration of the broader impacts of delay on defendants and the justice system more broadly": *Giacomini Consulting* at para. 58.

[68] Justice Horsman adopted a revised test for dismissing proceedings for want of prosecution that is similar to the test the Saskatchewan Court of Appeal articulated in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48. In doing so, she described the assessment of the interests of justice articulated in *International Capital Corporation* like this:

> [65] Under the modified test in *International Capital Corporation*, the question of prejudice is not a stand-alone criterion. Rather, prejudice is considered within the assessment of whether it is in the interests of justice for the case to proceed to trial notwithstanding the existence of inordinate and inexcusable delay: *International Capital Corporation* at para. 45.
>
> [66] At paragraph 45 of *International Capital Corporation*, the Court set out a non-exhaustive list of factors that are relevant to the court's assessment of the interests of justice: (a) the prejudice the defendant will suffer defending the case at trial; (b) the length of the delay; (c) the stage of the litigation; (d) the impact of the delay on the defendant's professional, business, or personal interests; (e) the context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed; (f) the reasons offered for the delay; (g) the role of counsel in causing the delay; and (h) the public interest in having cases that are of genuine public importance heard on their merits.

[69] Finally, Justice Horsman summarized the revised test in British Columbia this way:

> [69] For clarity, I will summarize the revised framework of analysis that, in my view, should govern applications to dismiss actions for want of prosecution in British Columbia. The first two questions are:
>
> > (1) Has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?
> >
> > (2) Is the delay inexcusable?
>
> [70] These two questions are to be answered in accordance with the law that has developed in British Columbia under the existing test. If both questions are answered in the affirmative, the court should move to the third and final question:
>
> > (3) Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?
>
> [71] The non-exhaustive list of factors set out at paragraph 45 of *International Capital Corporation* provides a useful starting point for assessing the interests of justice. To that non-exhaustive list, I would add one further factor: the merits of the action. While a judge should not engage in any searching examination of the merits on an application to dismiss for want of prosecution, if the action is bound to fail then the interests of justice favour its dismissal: *Ed Bulley* at para. 62.
>
> [72] Under this framework of analysis, the prejudice to the defendant's ability to defend the action remains a relevant, and indeed important consideration. However, prejudice to the defendant is not a pre-requisite to an order dismissing a claim for want of prosecution. At the interest of justice stage, the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.

[70] As Justice Horsman stated, the law developed under the former test continues to govern the first two questions, namely, whether the delay is inordinate and whether it is inexcusable. In *Wiegert*, this Court summarized that law:

> [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.

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[71] In *Kultak Financial Inc. v. Grewal*, 2018 BCCA 94, Justice Willcock emphasized that the goal of an application to dismiss for want of prosecution is to secure the effective and efficient administration of justice. Accordingly, it relates to the proceeding itself, not to the underlying cause of action. For that reason, he stated, it is an error to measure the period of delay from the date the cause of action arose for purposes of determining whether it is inordinate. However, as he also stated, the passage of time itself may prejudice the defendant: *Kultak* at paras. 26–27.

Sufficiency of Reasons

[72] Reasons for judgment serve several important functions. In the context of civil proceedings, they justify and explain the result, tell the losing party why they lost, provide for informed consideration of possible grounds of appeal, and satisfy the public and the parties that justice has been done: *Hague* at para. 18.

[73] Judges are duty-bound to provide sufficient reasons for their decisions. However, the extent of that duty is driven by the circumstances of each case. In *G.F.*, Justice Karakatsanis explained that reasons are to be read functionally and contextually. In other words, reasons are to be read as a whole, in the context of the live issues and informed by the positions of the parties. They are not to be finely parsed in a search for error. The salient question is whether the reasons respond to the live issues and key arguments, and whether the foundations of the decision are discernable: *G.F.* at paras. 68–69; *Hague* at para. 20.

[74] A failure to express reasons well does not provide an independent ground of appeal of the order in question. When an appellate court assesses reasons for sufficiency, it reviews the record in an effort to discern the "what" and the "why" of the decision. If the answers to those questions are clear in the record, there will be no reversible error: *G.F.* at para. 70; *Hague* at para. 21. For example, in *Rise & Shine* it was obvious from the transcript of proceedings in chambers that the judge's exercise of discretion was grounded in the plaintiff's unexcused non-compliance with

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its litigation obligations, and that the claim was dismissed "for the reasons set out in the notice of motion": *Rise* & Shine at paras. 23, 30.

Analysis

[75] Plaza 500 contends the judge erred in law in calculating the relevant period of delay from the date on which the cause of action arose rather than from the commencement of the action, citing *Kultak*. In its submission, he would not have found the less than four-year delay following service of the notice of claim inordinate or excessive had he not erred in this way.

[76] In support of its submission, Plaza 500 emphasizes this was a breach of contract case that depended primarily on documentary, not eye-witness, evidence. It says claims of this kind fall outside the subset of claims in which the court expects extra diligence from plaintiffs, such as cases involving alleged fraud or certificates of pending litigation. According to Plaza 500, although, properly calculated, the period of delay in this case was unfortunate, but for his legal error, the judge would not have found it "immoderate, uncontrolled, excessive and out of proportion to the matters in question".

[77] Alternatively, Plaza 500 contends, the judge provided insufficient reasons for dismissing its claim for want of prosecution. In its submission, the reasons were effectively limited to the judge's conclusory statements in paragraph 18: "In the circumstances, Plaza 500's delay is inordinate, inexcusable, and prejudicial. On balance, the interests of justice favour SRC, and Plaza 500's action deserves to be dismissed".

[78] According to Plaza 500, the judge provided no analysis of whether the delay was inordinate, which is a highly contextual and case-specific determination. Nor did he engage in any analysis of the live issues of prejudice or the interests of justice. In Plaza 500's submission, SRC also failed to provide any such analysis. Accordingly, it says, the reasons deprive it of an opportunity for meaningful appellate review, and therefore the decision cannot stand.

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[79] I am not persuaded by these submissions.

[80] The judge's reasons are undeniably brief and arguably minimal. However, if the "what" and the "why" of a decision are discernible when considered in context, where reasons are delivered orally in regular chambers on the day of the hearing, brevity is a virtue, not a deficit, as it promotes timely and efficient decision-making.

[81] Reading these reasons functionally and in the context of the record, in my view, the "what" and the "why" of the decision are readily discernible and free of legal error. As the judge stated at paragraph 15, he dismissed Plaza 500's claim for want of prosecution based on his assessment of the evidence and the parties' submissions at the hearing.

[82] Bearing in mind that evidence and those submissions, I interpret the judge's observation in paragraph 18 that the cause of action arose in 2015 as referable to the question of prejudice, not to the calculation of the delay period. I note in this regard that, in its notice of application, SRC set out the test in *Wiegert*, including that "the date of commencement of the action is typically identified as the point from which delay is measured". In addition, under the heading "Inordinate Delay", SRC stated that "[o]nce litigation is commenced it is expected to move forward with due diligence", "[t]he relevant steps … move the litigation forward", and Plaza 500 "repeatedly sought to delay proceedings" and failed to comply with its efforts "to advance the litigation". Further, under the heading "Prejudice", SRC referred to the erosion of memory associated with the passage of at least ten years since the events occurred (in other words, since the cause of action arose).

[83] Moreover, I do not accept that SRC failed to provide any analysis of the live issues on the want of prosecution application. On the contrary, as outlined above, it dealt with each element of the then-applicable test in *Wiegert*, factually and legally, in its notice of application and oral submissions.

Conclusion

[84] For all of these reasons, I would dismiss the appeal.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Butler"

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