Date: 20240806
Docket: CI 20-02-03868
(Brandon Centre)
Indexed as: Blaze et al. v. Rooke et al.
Cited as: 2024 MBKB 119



# COURT OF KING'S BENCH OF MANITOBA
## (GENERAL DIVISION)

**B E T W E E N:**

| | | |
|---|---|---|
| TONY BLAZE, and BERKSHIRE AGRIPOWER LTD., | ) | Margaretha J. Spezzano for the plaintiffs |
| plaintiffs, | ) | |
| - and - | ) | |
| DANIEL ROOKE, PENNY ROOKE, O/A D&P ROOKE FARMS, GEORGE ROOKE AND THE SAID D&P ROOKE FARMS, | ) | Keith Murkin for the defendants |
| defendants. | ) | |
| **A N D B E T W E E N:** | ) | |
| DANIEL ROOKE, PENNY ROOKE, O/A D&P ROOKE FARMS, GEORGE ROOKE AND THE SAID D&P ROOKE FARMS, | ) | Keith Murkin for the plaintiffs by counterclaim, |
| plaintiffs by counterclaim, | ) | |
| - and - | ) | |
| TONY BLAZE, and BERKSHIRE AGRIPOWER LTD. | ) | Margaretha J. Spezzano for the defendants by counterclaim. |
| defendants by counterclaim. | ) | |
| | ) | Judgment delivered: August 06, 2024 |

# LEVEN J.

## SUMMARY

[1] This was a motion by the defendants to dismiss the plaintiffs' Claim on the basis of long delay of three years or more under Rule 24.02 (the "Drop-Dead Rule") of ***The Court of King's Bench Rules***, Man. Reg. 553/88 (the "***Rules***") or, in the alternative, on the basis of inordinate and inexcusable delay under Rule 24.01 (the "Ordinary Delay Rule"). (By way of verbal shorthand, I'll refer to Rule 24.01 and Rule 24.02 as "Both Rules").

[2] For reasons explained below, the Claim and Counterclaim are dismissed on the basis of the Drop-Dead Rule or, in the alternative, on the basis of the Ordinary Delay Rule.

## FACTS

[3] The hearing was held on April 19, 2024. The crucial facts were not in dispute. This is a case of first impression.

[4] The Statement of Claim was filed on July 24, 2020, and served on August 14, 2020. The Statement of Defence and Counterclaim was filed and served on November 20, 2020. The issues were based on contract law and unjust enrichment law. The Claim was for various remedies including general and special damages "in an amount not less than $500,000.00". There was no precise breakdown between general damages and special damages.

[5] Both parties had counsel at all times.

[6] Rule 24.02(2) says the time between the service of the Claim and the service of the Defence should not be counted towards the three years.

[7] On November 25, 2020, defence counsel agreed not to note default on the Defence to Counterclaim, without reasonable notice. This agreement didn't explicitly refer to potential future motions to dismiss for delay. The plaintiffs' counsel emailed the defendants' counsel:

> …I assume that I will have a reasonable extension of time for the purpose of filing our client's Reply and Defence to Counterclaim, and that in any event you will not note default without reasonable notice to us…

[8] The defendants' counsel replied: "…You can certainly have an extension for filing your client's Reply…"

[9] In 2020 and 2021, various steps were taken in relation to a motion for security for costs. On December 2, 2020, the motion was filed. On March 23, 2021, an affidavit in opposition to the motion was filed. On April 5, 2021, Defence Counsel emailed Plaintiff Counsel a memorandum of settlement on the motion. On May 16, 2021, Plaintiff Counsel emailed Defendant Counsel that the memorandum would be executed. There was no evidence before me that it was actually executed.

[10] There were some phone calls and emails between counsel, but no significant steps were taken until July 27, 2023.

[11] On July 27, 2023, the Defendants filed a Motion to dismiss for delay, pursuant to Both Rules ("the Motion"). They served the Motion on July 31, 2023.

[12] It's now obvious that any motion under the Drop-Dead Rule would have been premature on July 31, 2023. Less than three years elapsed between November 20, 2020 (service of the Statement of Defence) and July 31, 2023 (service of the Motion).

[13] In a unique quirk of the case at bar, the plaintiffs filed a pre-trial brief on or about August 2, 2023, but did not serve it until November 27, 2023. The filing of the brief was premature on August 2, because the pleadings were not yet closed. The plaintiffs never explained why they decided to file it so early.

[14] On August 14, 2023, the Motion was adjourned until August 28, 2023. On August 28, it was adjourned *sine die*.

[15] Between August 14, 2023 and November 27, 2023, the plaintiffs must have realized that preventing dismissal for delay was (or should have been) their most urgent priority. Nevertheless, they did nothing significant until November 27, 2023.

[16] November 27, 2023 was a busy day. The defendants requisitioned the Motion back onto the civil motions list. The plaintiffs finally filed their Reply and Defence to Counterclaim (three years and seven days after service of the Statement of Defence). The plaintiffs finally served their pre-trial brief on the defendants (about three and a half months after filing it). Finally, the plaintiffs requested pre-trial conference dates.

[17] A pre-trial conference was held on March 19, 2024. It became clear that no meaningful settlement discussions could occur, because far too many crucial facts were still unknown.

[18] Trial dates have been set for September 15-19, 2025.

## ACT AND RULES

[19] Section 94 of ***The Court of King's Bench Act***, C.C.S.M. c. C280 (the "***Act***") says:

> **Multiplicity of proceedings**
>
> 94 As far as possible, a multiplicity of proceedings shall be avoided.

[20] The relevant Rules from include:

> **DEFINITIONS**
>
> **1.03** In these rules, unless the context requires otherwise,
> …
> "**action**" means a civil proceeding, other than an application, that is commenced in the court by,
>
> (a) a statement of claim,
>
> (b) a counterclaim,
>
> (c) a crossclaim,
>
> (d) a third or subsequent party claim, or
>
> (e) a petition…
>
> **General principle**
>
> **1.04(1)** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **Proportionality**
>
> **1.04(1.1)** In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:

(a) the nature of the proceeding;

(b) the amount that is probably at issue in the proceeding;

(c) the complexity of the issues involved in the proceeding;

(d) the likely expense of the proceeding to the parties.

…

**Dismissal for delay**

**24.01(1)** The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party. [underlining added]

**Presumption of significant prejudice**

**24.01(2)** If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.

**What constitutes inordinate and inexcusable delay**

**24.01(3)** For the purposes of this rule, a delay is inordinate and inexcusable if it is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case.

**Dismissal for long delay**

**24.02(1)** If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action unless

(a) all parties have expressly agreed to the delay;

(b) the action has been stayed or adjourned pursuant to an order;

(c) an order has been made extending the time for a significant advance in the action to occur;

(d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or

(e) a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing. [underlining added]

**Excluded time**

**24.02(2)** A period of time, not exceeding one year, between service of a statement of claim and service of a statement of defence is not to be included when calculating time under subrule (1).

…

**Procedural order if action not dismissed**

**24.04** If the court refuses to dismiss an action for delay under rule 24.01 or 24.02, it may still make any procedural order it considers appropriate in the circumstances.

**Effect on crossclaim or third party claim**

**24.05** When an action against a defendant who has made a crossclaim or third party claim is dismissed for delay,

(a) the crossclaim or third party claim is deemed to be dismissed with costs; and

(b) the defendant may recover those costs and the defendant's costs of the crossclaim or third party claim from the plaintiff.

**Not a defence**

**24.06(1)** The dismissal of an action for delay is not a defence to a subsequent action unless the order dismissing the action provides otherwise.

…

**Application**

**24.07** Rules 24.01 to 24.06 apply, with necessary changes, to counterclaims, crossclaims and third party claims.



## LAW

[21] Rule 24.02 came into effect on January 1, 2018.

[22] In ***Rempel v. Gentek,*** 2022 MBQB 128 ("***Rempel***"), at paragraph 23, the court commented that, "the preparation and filing of a pre-trial brief would almost always be a significant step in the litigation process". In ***Rempel***, the brief was filed and served on the same day.

[23] ***The Workers Compensation Board v. Ali,*** 2020 MBCA 122 ("***Ali***"), dealt with the Ordinary Delay Rule. At paragraph 87, the court pointed out that the "time has come to stop paying lip service to the phrase 'justice delayed is justice denied'. Unreasonable delays in civil matters can no longer be tolerated for numerous reasons, but chiefly because they undermine access to justice."

[24] A leading Manitoba case is ***Buhr v. Buhr,*** 2021 MBCA 63 ("***Buhr***"). The unique issue in ***Buhr*** arose because, after a three-year gap in the litigation, the plaintiff took a significant step forward. Instead of immediately filing and serving a motion under the Drop-Dead Rule, the defendant's lawyer wrote to the plaintiff's lawyer, expressing surprise about the plaintiff's movement after a long delay, indicating his availability for a pre-trial conference in a specific month, and reserving his right to make any interlocutory motions that might be required. Three months later, the defendants filed their motion under the Drop-Dead Rule. The appeal court ruled that the motion should succeed. In short, plaintiffs can't beat the Rule by taking a fresh step forward after the three-year gap but before defendants make their Drop-Dead Rule motion. Relying on Alberta case law, at paragraph 72, the court endorsed a "functional test" for this Rule. At paragraph 78, the court observed that "the functional test is a broad-based inquiry into whether an advance in an action 'moves the litigation forward in a meaningful way considering the nature, value, importance and quality of the action'."

[25] ***WRE Development Ltd. v. Lafarge Canada Inc.***, 2022 MBCA 11 is another leading Manitoba case about the Drop-Dead Rule. The court endorsed

the "functional approach" mentioned in ***Buhr***. At paragraph 10, the court referred to the anti-delay philosophy in the new Rules as a "culture shift".

[26] ***Krasulja v Manaigre***, 2021 MBQB 131 was probably the first Manitoba decision about Rule 24.02(1)(a) (the exception where "all parties have expressly agreed to the delay"). In that case, there was a three-year gap in the litigation, but during the gap, defendant's counsel emailed plaintiff's counsel on July 9, 2018: "I believe you required some time to file Defence to the Counterclaim and I hereby grant you an indefinite extension of time for that purpose." After that, nothing happened until the defendant filed the motion to dismiss under the Drop-Dead Rule. The court ruled that this email was good enough to bring Rule 24.02(1)(a) into play. However, the court added that

> [35] Practice under Rule 24.02 is in an embryonic stage and undoubtedly will develop over time. It would be prudent in future for counsel to turn their minds to the rule and specifically address it in any agreement to delay proceedings. But agreements that pre-date the rule should be interpreted with some regards to past practice…

[27] ***Knight v. Daraden Investments Ltd. et al.***, 2021 MBQB 279 ("***Knight***"), dealt with Rule 24.02(1)(a). The Statement of Claim was served on July 17, 2015. In August 2015, parties exchanged communications, and the plaintiff agreed that the defendants didn't have to file a Statement of Defence yet. Because the litigation predated the Drop-Dead Rule, the court ruled that this exchange was enough to constitute an express agreement under

Rule 24.02(1)(a). Recall that the Drop-Dead Rule only came into effect on January 1, 2018. At paragraph 24, the court observed that:

> Prudence dictates that parties who enter into agreement to delay proceedings for the purpose of Rule 24.02(1) carefully indicate so in their agreement by, for instance, explicitly referring to the Rule. However, agreements like the one made by the parties in this case must be interpreted in light of the obvious fact that they pre-date the long delay rule.



[28] The Manitoba Court of Appeal in chambers denied leave to appeal ***Knight***, at 2022 MBCA 69. The test for leave to appeal an interlocutory order was not met.

[29] ***River Ridge 2 Facility Inc. v. Manshield Construction LP et al.***, 2023 MBKB 61 ("***River Ridge 2***"), marked another phase in the interpretation of Rule 24.02(1)(a). The Drop-Dead Rule came into effect on January 1, 2018. The amended Statement of Claim was served on March 14, 2018. The Statement of Defence and Counterclaim was served on May 29, 2018. There was later a Third Party Claim. On May 30, 2018, plaintiff's counsel asked defendants' counsel not to note default without reasonable notice. Later that day, defendants' counsel agreed not to note default without further notice. Three years went by, and the defendants invoked the Drop-Dead Rule in January 2022. The Master noted the evolving case law on Rule 24.02(1)(a). The Master concluded at paragraph 39 that, if "counsel wish to rely on these types of agreements in the face of this new era, they need to be express and

explicit." The promise not to note default was not enough. The Drop-Dead Rule was applied by the Master.

[30] However, the Master's decision was overturned at 2024 MBKB 38. The court pointed out that, at the time of the exchange between counsel, the Drop-Dead Rule had only been in effect for about six months. Therefore, it was "reasonable that the plaintiff assumed that the defendants would not seek to dismiss its claim for delay." The court added, at paragraph 24, that counsel should turn their minds to the sort of issues that arose in this case. In the future, agreements between counsel should be "express, clear and explicit".

[31] ***Papasotiriou-Lanteigne v. Tsitsos***, 2023 MBCA 66 (***Papasotiriou-Lanteigne***) is a recent decision by the Manitoba Court of Appeal about the Drop-Dead Rule and Rule 24.06(1) (dismissal under the Drop-Dead Rule is a not defence to future actions unless the court specifies otherwise). At paragraph 41, the court observed that the "era of civil claims being allowed to drone on interminably by the courts in sorry fashion is over." At paragraph 43, the court commented that "the values of timeliness and proportionality must be considered in the exercise of discretion under r 24.06(1)." At paragraph 45, the court pointed out that:

> Fairness is about more than a plaintiff's interests no matter how serious the claim. A defendant is entitled to closure and should not be twice vexed by the same matter without a good reason….In most cases it will be contrary to the public interest for the same matter to be repeatedly litigated, even where the limitation period has not expired.

[32] At paragraph 70, the court ruled that the dismissal for delay in that case would be a defence to future actions.

[33] ***Duncan v. Magnusson***, 2023 MBKB 33 (***Duncan***) is a recent example of a court's ruling that drop-dead dismissal in a family proceeding is a defence to future actions. At paragraph 61, the court quoted from ***Papasotiriou-Lanteigne*** with approval.

## ARGUMENT

[34] The defendants argued that the Claim should be dismissed under the Drop-Dead Rule or, in the alternative, under the Ordinary Delay Rule. They argued that the steps involving security for costs did not break the three-year period and reset the three-year clock. They argued that filing (without serving) the pre-trial brief did not reset the three-year clock. Finally, they argued that the Motion was not void *ab initio*. The relevant dates were November 20, 2020 (when the Statement of Defence and Counterclaim was served) and November 27, 2023 (when the Reply and Defence to Counterclaim was filed). More than three years elapsed between these dates. They argued that the promise not to note default without reasonable notice was not an agreement to delay under Rule 24.02(1)(a).

[35] The plaintiffs argued that three years never elapsed. Firstly, the steps regarding security for costs reset the three-year clock. Secondly, the filing of the pre-trial brief reset the three-year clock. The plaintiffs relied on ***Rempel***. Thirdly, the Motion was void because it was filed less than three years after the

Statement of Defence was served. The defendants should have withdrawn the Motion and filed a new motion after November 20, 2023. Finally, the promise not to note default was an agreement to delay under Rule 24.02(1)(a).

[36] The defendants argued that they should be entitled to costs.

[37] The plaintiffs argued that each party should bear its own costs. In the alternative, costs should be in the cause.



## **DECISION**

*Was the motion for security for costs a "significant advance in the action"?*

[38] Not every step in the litigation process represents an "advance" in the action. For example, some communication between counsel might relate to the litigation, but might do nothing to advance the litigation (e.g. counsel might exchange emails about when they might both be free to talk on the phone, or similar mundane matters).

[39] Not every "advance" in the litigation process is a "significant" advance. For example, counsel might replace a blurry photocopy of an important document with a clear photocopy. That step might arguably represent a step forward, but it would be such a trivial advance that it would not be a "significant" advance.

[40] The motion for security for costs and the related steps (the filing of an affidavit, the drafting of a settlement memorandum) certainly did nothing to *frustrate* the action. I am not certain if the memorandum was executed, but nothing will turn on that. Depending on all the relevant facts, there might be

occasions when reaching agreement about security for costs makes it easier for parties to settle a dispute (bringing about the end of the action by settlement rather than litigation). For purposes of this Motion, I will give the plaintiffs the benefit of the doubt and assume that the steps relating to security for costs represented an "advance" in the action.

[41] In this case, there have been no meaningful settlement discussions, because the parties have not yet shared crucial facts with each other.

[42] Therefore, even giving the plaintiffs the benefit of the doubt, on the facts of this case it is impossible to say that the security-for-costs steps represented a "significant" advance in the action. Therefore, the steps taken in 2020 and 2021 did not serve to "reset the three-year clock", in the context of the Drop-Dead Rule.

*Was the filing (but not serving) the pre-trial brief a "significant advance in the action"?*

[43] The plaintiffs relied on ***Rempel.*** At paragraph 23, the court commented that, "the preparation and filing of a pre-trial brief would almost always be a significant step in the litigation process". In ***Rempel***, the brief was filed and served on the same day.

[44] The court in ***Rempel*** made no comment about a hypothetical scenario in which a pre-trial brief might be *filed* within a three-year window but *not served* within the three-year window.

[45] The court in ***Rempel*** certainly made no comment about a hypothetical scenario in which a brief might be filed within the window, but not served until three and half months later.

[46] I am forced to conclude that the court in ***Rempel*** meant "filing and serving a pre-trial brief". Filing a brief without serving it does nothing to advance the litigation. If the defendants are unaware of the plaintiffs' brief, the plaintiffs' brief serves no useful purpose. The mere filing of the brief without service does not hasten the setting of a trial date. The mere filing of the brief without service does nothing to hasten potential settlement discussions.

[47] There might be cases where a brief is officially filed but only an unofficial copy is served. There might be an argument that giving the other party an opportunity to read one's brief does advance the litigation. But that hypothetical scenario will have to wait for another day.

[48] As a practical matter, the pre-trial brief is not even provided to the person who will become the pre-trial judge until a pre-trial conference date is set (which did not happen until November 27, 2023 or later).

[49] The filing (but not serving) of the pre-trial brief was not a "significant advance in the action".

*Was the premature filing of the Motion fatal?*

[50] The Motion was filed on July 27, 2023, and served on July 31, 2023. Firstly, the Motion referred to Both Rules. The Ordinary Delay Rule does *not* require that a specific number of days elapse before the Rule can be invoked.

Therefore, this aspect of the Motion was *not* mathematically premature. The delay between the service of the Statement of Defence and Counterclaim (November 20, 2020) and the service of the Motion (July 31, 2023) was substantial. As explained below, I find that this delay was inordinate and inexcusable.

[51] The Drop-Dead Rule *does* require that three years elapse, and three years had *not* elapsed as of July 27 or July 31, 2023.

[52] The plaintiffs essentially argued that the Motion (filed too early) was void *ab initio*. If the defendants wanted to invoke the Drop-Dead Rule on November 27, 2023, they should have withdrawn the Motion and filed a brand new motion on November 27, 2023.

[53] As mentioned above, what the defendants actually did was to adjourn the Motion *sine die*, and then requisition it back onto the civil motions list on November 27, 2023.

[54] If nothing else, requiring a defendant to withdraw a motion and then file essentially the same motion a few months later would not be in keeping with the spirit of Rule 1.04 (proportionality).

[55] Out of abundance of caution, I will add that the filing of the Motion and the rapid adjournment *sine die* of the Motion do not break the three-year period. The Motion and its adjournment did nothing at all to *advance* the action. On the contrary, they were the first steps in the *termination* of the action.

[56] In this case, the principles of equity favour the defendants. Neither the Drop-Dead Rule nor the Ordinary Delay Rule require the party invoking the Rule to give the other party advance warning that they are about to invoke it.

[57] That is effectively what the defendants did. By filing and serving a motion for delay too early, and then adjourning it for a few months, they gave the plaintiffs extremely generous warning that the clock was ticking and that they (the plaintiffs) were in imminent danger of having their action dismissed. For reasons never explained, the plaintiffs did absolutely nothing until November 27, 2023 (after the three-year window had closed).

[58] It is a maxim of equity that "equity rewards the diligent, not those who sleep on their rights". That is effectively what the plaintiffs did. They knew for over three months that the Drop-Dead Rule was hanging over their heads, and still they did nothing. They were far from diligent, and they are the authors of their own misfortune.

[59] The fact that the Motion was filed and served before the three-year window had closed, then adjourned, then requisitioned back onto the civil motions list, was not a legal bar to invoking the Drop-Dead Rule on November 27, 2023.

*Can the Claim be saved by Rule 24.02(1)(a)?*

[60] This Rule says:

> **24.02(1)** If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action unless
>
> (a) all parties have expressly agreed to the delay…

[61] When the plaintiffs agreed not to note default without further warning, did that serve to invoke Rule 24.02(1)(a)?

[62] As quoted above, the plaintiffs' counsel emailed the defendants' counsel:

> …I assume that I will have a reasonable extension of time for the purpose of filing our client's Reply and Defence to Counterclaim, and that in any event you will not note default without reasonable notice to us…

[63] The defendants' counsel replied: "…You can certainly have an extension for filing your client's Reply…"

[64] We must examine the case law. Recall that the Drop-Dead Rule came into effect January 1, 2018. Counsel had been giving each other routine promises not to note default until further notice, since time immemorial. The time limits in the Rules for filing Statements of Defence and Replies to Counterclaims are fairly short. Plaintiffs realize that if they give defendants a little flexibility about filing their Statements of Defence, defendants will reciprocate by giving plaintiffs a little flexibility for filing their replies.

[65] When the Drop-Dead Rule was new, Manitoba courts took a cautious approach to promises not to note default until further notice. However, they began to warn parties that courts would soon begin to require more notice. Courts would begin to require express, clear and explicit agreements not to invoke delay rules.

[66] In ***Krasulja, River Ridge 2*** and ***Knight***, the courts told Manitoba counsel that they must adjust their practices to the new reality of the new delay Rules, but that they would have a short grace period or transition period.

[67] Recall the facts. In ***Knight***, the Statement of Claim was filed in July 2015 and the promise not to note default was made in August 2015. In ***Krasulja***, the Statement of Claim was filed in June 2016 and the promise not to note default was made in July 2018. In **River Ridge 2**, the Statement of Claim was filed in March 2018 and the promise not to note default was made on May 30, 2018.

[68] In the case at bar, the Statement of Claim was filed on July 24, 2020 (two and a half years after the Drop-Dead Rule took effect), and the promise not to note default was made on November 25, 2020 (almost three years after the Rule took effect). The promise was obviously not an express, clear and explicit promise not to invoke the Drop-Dead Rule until further notice.

[69] It is not necessary to draw a bright line between the old era and the new era. The case law suggests that any such line would be after July 2018.

[70] I will give the plaintiffs the benefit of a very generous approach. I will assume (without deciding) that any bright line would extend as far as January 1, 2020 (two full years after the new Rule took effect). Even if I were to use that very generous approach, the plaintiffs would still have missed the boat. The defendants' promise not to note default (made on November 25, 2020) is not sufficient to meet the requirements of Rule 24.02(1)(a).

[71] In the event that I have erred, I rely on the unique facts of the case at bar. The defendants filed and served the Motion several months prematurely. The practical effect of the Motion was to give the plaintiffs clear warning that the defendants had run out of patience and that the Drop-Dead Rule was now hanging over the plaintiffs' head. If the promise not to note default had somehow been enough to meet the requirements of Rule 24.02(1)(a), that promise came to an end on the day the Motion was served.

[72] As noted above, the plaintiffs never did explain why they did absolutely nothing from the day the Motion was served (July 31, 2023) until the day they finally filed their Reply to Counterclaim (November 27, 2023).

[73] Therefore, the exception in Rule 24.02(1)(a) does not assist the plaintiffs.

[74] Other than the explicit exceptions within the Rule, the Drop-Dead Rule leaves the court no discretion (the operative word in the Rule is "must"). For the reasons above, I must dismiss the Claim for a delay of more than three years.

*In the alternative, should the Claim be dismissed under the Ordinary Delay Rule?*

[75] As quoted above, this Rule says:

> **Dismissal for delay**
>
> **24.01(1)** The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party. [underlining added]
>
> **Presumption of significant prejudice**
>
> **24.01(2)** If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.
>
> **What constitutes inordinate and inexcusable delay**

> **24.01(3)** For the purposes of this rule, a delay is inordinate and inexcusable if it is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case.



[76] It is now trite law that this Rule does give the courts a limited discretion (the operative word in the Rule is "may").

[77] The action was a claim in contract and unjust enrichment. The quantum of damages is unspecified (although the plaintiffs say that it is over $500,000). The pleadings outline the basics of the dispute, but the parties have not yet shared crucial details about the facts. On the face of the pleadings, the dispute does not appear to be particularly complex. It does not appear to raise any novel legal issues.

[78] There is no evidence of any unique prejudice because of the delay in this case. For example, there is no evidence that any specific witnesses have died or become unavailable, or that any specific documents have been lost or destroyed.

[79] However, that is not the requirement under this Rule. Rule 24.01(3) says that the "delay is inordinate and inexcusable if it is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case."

[80] In plain language, "inordinate and inexcusable" means "too long and for no good reason".

[81] In relation to this subrule, parties to litigation are not held to a standard of perfection. If a step in the litigation could be finished within 30 days, no one will fault a party for finishing that step in 35 days.

[82] That being said, the modern approach, as codified in Rule 24.01(3), is to expect parties to move forward with reasonable speed. Rule 1.04 (proportionality) reinforces this general approach. Unlike the Drop-Dead Rule, the Ordinary Delay Rule does not specify a specific number of days or years. Nor does it require that there be a specific gap between significant steps in the litigation. It is conceivable that the Ordinary Delay Rule might apply in a case where the litigation has moved forward at a snail's pace, but the gap between any two steps in the process has been less than three years.

[83] Recall the Court of Appeal's comment in ***Papasotiriou-Lanteigne*** that the "era of civil claims being allowed to drone on interminably by the courts in sorry fashion is over."

[84] In this case, the bottom line is that the Statement of Defence was served on November 20, 2020. As of the Motion hearing (April 19, 2024), the parties had not yet exchanged crucial information about the merits of the litigation. There had been no examinations for discovery. The parties had not yet reached the point at which meaningful settlement discussions could occur. There are no unusual circumstances that might justify this state of affairs (e.g. a series of deaths or illnesses). In simple terms, the situation is unreasonable.

[85] Bearing in mind the case law cited above, the delay has been too long and for no good reason. The delay has been unreasonable. The snail's pace in this litigation is more than sufficient to invoke the Ordinary Delay Rule.

*Should the Counterclaim be dismissed?*

[86] Rule 24.07 says that Rules 24.01 to 24.06 apply to counterclaims.

[87] Rule 1.03 (Definitions) defines "action" as including litigation started by (among other things) statements of claim and counterclaims.

[88] The Ordinary Delay Rule says that courts may "dismiss all or part of an action". The Drop-Dead Rule says that courts must "dismiss the action".

[89] Reading all Rules together, the most reasonable inference is that, where there is both a claim and a counterclaim, and where there is a three-year gap, the court must dismiss both the claim and the counterclaim. This is logical because the Drop-Dead Rule is a blunt instrument. If there is a three-year gap and no specific exception applies, the litigation must end. In terms of fault, the party that filed the claim is no more and no less to blame for the three-year gap that the party that filed the counterclaim. Or, to put it more colourfully, what's sauce for the goose is sauce for the gander.

[90] Neither party made an alternative submission in respect of the Counterclaim. However, given the precise wording of the Rules, I must also dismiss the Counterclaim under the Drop-Dead Rule.

[91] In the event that I have erred in respect of the Drop-Dead Rule, in the alternative, I find that the Ordinary Delay Rule applies to the Counterclaim in this case. The delay in advancing the Counterclaim was unreasonable.

[92] Either way, the Counterclaim is dismissed.

*Defence to future actions*

[93] Rule 24.06(1) says: **"**The dismissal of an action for delay is not a defence to a subsequent action unless the order dismissing the action provides otherwise."

[94] In light of Rule 1.04 (proportionality), it might seem odd if dismissing an action because of delay would be coupled with a ruling the plaintiff could restart the action all over again. That would not end the litigation; it would simply make it more cumbersome and expensive for both parties. At first blush, in most cases at least, dismissal for delay should put an end to the litigation once and for all (or should at least furnish a defence in any hypothetical second round of litigation).

[95] I am bound by ***Papasotiriou-Lanteigne.***

[96] There will certainly be principled exceptions. For example, the delay Rules apply to family litigation, which often includes disputes about parenting time and/or child support. Under both statute and common law, the best interests of children are paramount. Therefore, if family litigation were terminated because of delay, it might be perfectly reasonable for the court dismissing the matter to provide that the parties would be free to begin a subsequent action in respect of

the best interests of one or more children. In theory, there might be other aspects of family disputes that should not be terminated once and for all.

[97] There are no principled exceptions in the case at bar. The parties had a dispute about money. They advanced the Claim and the Counterclaim at a snail's pace, and there was a gap of more than three years in the advancement of the litigation. The dispute is now over. The parties made their beds, and they must now sleep in them. The dismissal for delay will be a defence to any subsequent action.

[98] Both parties made alternative submissions about how Rule 24.04 might apply. In light of the above, that Rule is academic.

## COSTS

[99] The Motion was successful. The defendants are entitled to ordinary (tariff) costs. If counsel for some reason cannot agree on the calculation of costs, they may arrange to see me.

[100] In light of the above, the trial dates will be cancelled.

[101] I thank counsel for being well-organized and courteous.

_____J.