Court of King's Bench of Alberta

Citation: Center Street Limited Partnership v Nuera Platinum Construction Ltd, 2024 ABKB 489

Date: 20240809
Docket: 1601 02191
Registry: Calgary

Between:

Center Street Limited Partnership

Plaintiff

- and -

Nuera Platinum Construction Ltd., Over & Above Reno and Contracting Ltd., TLC Roofing Inc., Green Earth Roofing Ltd., Michael Companion, Edwin Dean McGuirk, Lee Down, Trevor Griffin and Patrick Riddler

Defendants

Reasons for Decision
of the
Honourable Justice J.C. Price

I. Introduction

[1] This is an appeal of Application Judge Farrington's ("AJ") order granted on August 10, 2023, that dismissed the applications made by the Defendants, Nuera Platinum Construction Ltd. ("Nuera") and Over & Above Reno and Contracting Ltd. ("Over & Above"), to have the Plaintiff's, Center Street Limited Partnership ("Center Street"), claim against them dismissed for long delay.

[2] Center Street commenced the within Action on February 12, 2016, hereinafter referred to as the "Trades Action". Center Street commenced a separate Action against its insurer, Lloyd's of London ("Lloyd's") on June 13, 2016, hereinafter referred to as the "Coverage Action". Both the Trades Action and the Coverage Action relate to a fire that took place on March 7, 2015, on a construction project in Calgary.

[3] In 2017, Lloyd's applied to consolidate the Coverage Action with the Trades Action. Center Street, Nuera, and Over & Above agreed in writing to oppose the Lloyd's application to consolidate the two actions together. The agreement as written contemplates that if Center Street, Nuera, and Over & Above are successful in opposing the consolidation application, Center Street would pursue the Coverage Action to trial before the Trades Action. Ultimately, they were successful - the Coverage Action was not consolidated with the Trades Action.

[4] After Lloyd's failed consolidation hearing and appeal, the Coverage Action proceeded to questioning for discovery on October 4 and 5, 2018. In December 2019, Center Street went into receivership. On February 19, 2020, a receivership order was granted giving the receiver for Center Street the authority to continue the prosecution of, among other proceedings, the Coverage Action and the Trades Action. The next step taken in the Coverage Action after the questioning that took place in October 2018 was taken on September 30, 2021, when Center Street served its answers to undertakings.

[5] Nuera and Over & Above argued before the AJ and now before me that the Trades Action should be dismissed for long delay pursuant to Rule 4.33(2) of the Alberta *Rules of Court* as no step has been taken to significantly advance the Trades Action since November 30, 2016, when Center Street served its Affidavit of Records. They further argued that the Trades Action and the Coverage Action are not inextricably linked.

[6] Considering the undisputed fact that the parties entered into a tolling agreement on August 31, 2021, and that looking back from that date, more than 3 years have passed since November 30, 2016, when Center Street served its Affidavit of Records in the Trades Action, the issues before me as they were before the AJ are:

(a) Whether the agreement reached between the parties in 2017 to oppose the consolidation of the Coverage Action with the Trades Action was an agreement to suspend the Trades Action such that Rule 4.33(5) applies and the Trades Action should not be dismissed for long delay?

(b) And/or, whether the Trades Action and the Coverage Action are inextricably linked such that a significant advance in the Coverage Action constitutes a step in the Trades Action and that Rule 4.33(2) does not apply because 3 or more years have not passed without significant advance in the Coverage Action?

[7] For the reasons that follow I find that there was an agreement between the parties to suspend the time requiring Center Street to advance the Trades Action, and furthermore I find that the Coverage Action and the Trades Action are inextricably linked. As such, the joint appeal of Nuera and Over & Above is dismissed.

II. Standard of Review

[8] The standard of review of an appeal from an application judge's decision is correctness and the review itself takes the form of a fresh application, a *de novo* application: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 3; ***Steer v Chicago Title Insurance Company***,

2019 ABQB 318 at para 9; ***Western Energy v Savanna Energy***, 2022 ABQB 259 at para 22; and see also ***Lesenko v Wild Rose Ready Mix Ltd***, 2024 ABKB 333.

III. Relevant Background of the Proceedings in the Trades Action and the Coverage Action

[9] On March 7, 2015, a fire took place in Calgary during the construction of a four-storey commercial project owned by Center Street. Nuera was the construction manager, and Over & Above was the roofing and waterproofing contractor. The individual defendants named in the Trades Action were the roofers on the project. The fire was reported by Center Street to Lloyd's who denied the insurance claim.

[10] Center Street commenced legal proceedings against the trades and against its insurer in two separate actions as earlier defined as the Trades Action and the Coverage Action.

[11] As mentioned in the introduction, Lloyd's applied to have the Coverage Action consolidated with the Trades Action but was not successful. That application was heard on April 20, 2017, and reasons for decision were issued by Master Roberson on April 28, 2017: ***Center Street Limited Partnership v Lloyd's Underwriters***, 2017 ABQB 295 [***Lloyd's Underwriters***]. Lloyd's appealed Master Robertson's order and that appeal was dismissed by Justice Jeffrey on November 3, 2017.

[12] Just prior to the hearing before Master Robertson, Center Street, Nuera, and Over & Above entered into a letter agreement. That agreement will be later discussed in full.

[13] It is uncontroverted that the only steps taken since Center Street's, Nuera's and Over & Above's successful opposition to the Lloyd's application to consolidate the Coverage Action with the Trades Action are steps in the Coverage Action. The steps taken to advance the Coverage Action are as follows:

Date	**Steps Taken to Advance Action**
December 20, 2017	Center Street served its supplemental Affidavit of Records.
May 28, 2018	Center Street served its second supplemental Affidavit of Records.
October 4, 2018	Questioning of Lloyd's' corporate representative.
October 5, 2018	Questioning of Center Street's corporate representative.
September 30, 2021	Center Street serves its answers to undertakings.
December 29, 2021	Lloyd's serves its answers to undertakings.
January 17, 2022	Questioning of Lloyd's' corporate representative on undertakings.

[14] Other dates of significance that involve these parties are:

- December 2019: Center Street went into receivership.

- February 19, 2020: Justice K.M. Horner issued a Receivership Order appointing a receiver and manager for Center Street. The Receivership Order empowered and authorized (but did not require) the receiver to initiate, prosecute, and continue the prosecution of any and all proceedings including the Coverage Action and the Trades Action.

- March 27, 2020: Center Street's assets were sold to and vested in another corporation, 10460010 Canada Inc.

- July 14, 2021: Nuera put Center Street on notice that it intended to seek dismissal of the Trades Action for long delay, as no step had been taken to advance the Trades Action for over 3 years.

- Effective August 31, 2021: Center Street, Nuera, and Over & Above agreed to a temporary tolling agreement to temporarily toll all unexpired time periods under the Alberta *Rules of Court* and the *Limitations Act*.

- The tolling agreement was eventually terminated and Nuera and Over & Above filed in April 2023 their respective applications seeking to dismiss the Trades Action for long delay.

[15] The applications to dismiss the Trades Action for long delay were heard by the AJ on August 10, 2023. The AJ dismissed both applications. Although he did not find that the April 20, 2017, letter was a standstill agreement, he found that the Trades Action and the Coverage Action were inextricably linked. The AJ stated in his brief oral reasons the following:

> When I go through the matter and when I study the matter, I agree to a certain extent with the defendants, that this was not a formal standstill agreement because that's not what was going on at the time. The parties weren't addressing their minds, based upon what I saw, to the effects of delay and those sorts of things.
>
> But I think what the agreement was, in my view, is very much something that contractually connected the two actions together to the extent that they became inextricably linked.
>
> ...
>
> So there was a negotiated result. And, in my view, that was sufficient to connect the two actions because everybody was in support of that, and everybody was on side with that. Nobody wanted to go through a complicated construction lien action, a trades action, if they didn't have to. And that's something that was negotiated. That's something that everybody was content with. And, in my view, that was sufficient to connect the two actions.

[16] The parties appeal the decision of the AJ. The issues as previously fully described can be summarized as follows: A) was there an agreement to suspend time?; and/or B) were the actions (Trades Action and Coverage Action) inextricably linked?

IV. Law and Analysis

[17] Nuera and Over & Above submitted a joint brief. As set out in their brief, they appeal the decision and order of the AJ pronounced August 10, 2023, and seek dismissal of the within action for long delay pursuant to Rule 4.33 of the Alberta *Rules of Court*. Rule 4.33 states in part:

> Dismissal for long delay
>
> 4.33(1) In this rule,
>
> (a) "applicant" means a party to an action who makes an application to dismiss the action for delay as set out in this rule;
>
> (b) "respondent" means a party who has filed a commencement document;
>
> (c) "suspension period" means, in subrules (5) to (9), a period that ends on
>
> (i) a specific date, or
>
> (ii) the happening of a specific event.
>
> (2) If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless
>
> (a) the action has been stayed or adjourned by order, an order has been made under subrule (9) or the delay is provided for in a litigation plan under this Part, or
>
> (b) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.
>
> ...
>
> (5) If a respondent and an applicant agree in writing to a suspension period, the period of time under subrule (2) does not include the suspension period agreed to.

[18] It is uncontroverted that over three years have passed since Center Street took its last significant step in the Trades Action. The Defendants argue that none of the exceptions to Rule 4.33 apply and they argue that there was no agreement between the parties to suspend the time periods as contemplated in Rule 4.33(5). The Plaintiff argues otherwise, it argues that the April

20, 2017, letter agreement the parties entered into before the consolidation application was an agreement to a "suspension period" under Rule 4.33(5).

A. Was the Agreement between Center Street, Nuera and Over & Above an agreement to suspend the Trades Action to permit the Coverage Action to proceed to trial first?

[19] The issues in this case revolve around the interpretation of the letter agreement that was entered into between Center Street, Nuera and Over & Above entered on April 20, 2017 ("Agreement"). The Agreement was entered right before the special chambers hearing before Master Robertson to determine the Lloyd's application to consolidate the Coverage Action with the Trades Action. The Agreement states in full:

> Center Street Limited Partnership (**Center Street**), Nuera Platinum Construction Ltd. (**Nuera**), and Over & Above Reno and Contracting Ltd. (**Over & Above**) have reached an agreement whereby Nuera and Over & Above will support Center Street in opposing Lloyd's Underwriter's Application that will be heard in Master's Special Chambers on Thursday, April 20, 2017, on the following terms and conditions:
>
> 1. Center Street agrees that if Action Number 1601-07825 (the **Coverage Action**) proceeds to trial before Action Number 1601-02191 (the **Trades Action**) (which is its current intention, assuming that Lloyd's Underwriters Application is dismissed), Center Street will not in the Trades Action:
>
>   a) Seek to use a transcript of the evidence led or findings of fact made at the trial of the Coverage Action concerning the hot works issues, which for greater certainty include any facts regarding how close the workers were working to combustible materials and the duration or sufficiency of the fire watch performed by the roofers; or
>
>   b) Raise an issue estoppel against Over & Above.
>
> 2. Center Street agrees that it will sign and file a consent dismissal order of the Trades Action as against Over & Above and Nuera if Center Street obtains a final, non-appealable, judicial determination requiring Lloyds [*sic*] Underwriters to provide coverage or indemnify Center Street, in whole or in part, under the policy.
>
> 3. Nuera agrees that it will also be bound by 1(a) and (b) above.

[20] The standard required for an agreement to suspend time, often referred to as a "standstill agreement", has been set out in recent caselaw that follow the leading Court of Appeal case of ***Bugg v Beau Canada Exploration Ltd***, 2006 ABCA 201 [***Bugg***]. Although this case was heard pursuant to the predecessor *Rules*, the principles pertaining to standstill agreements remain on point. A standstill agreement must be express. The intentions of the parties must be clear and not left to inference. Furthermore, a standstill agreement cannot be implied from conduct and at

minimum the elements of a standstill agreement must include "the identity of the parties to the contract, when the standstill began and its essential terms.": see paragraphs 8 and 9 of ***Bugg***.

[21] Following the Court of Appeal in ***Bugg***, as stated by Justice Campbell in ***Brian W Conway Professional Corporation v River Rock Lodge Corporation***, 2015 ABQB 359 [***Conway QB***] at paragraph 41:

> However, the case law reminds us that there is a distinction to keep in mind. While an express or standstill agreement does not have to be completely in writing, such an agreement must clearly be demonstrated on the evidence provided, without recourse to conduct, intent or inference. That said, there is no requirement for the parties to reference the "drop dead" date or how the agreement would impact the now three-year time period in Rule 4.33, because the court can determine such facts by inference from the words used and the circumstances: *Sucker Creek* at paras 34-35.

Justice Campbell's decision was affirmed in ***Brian v Conway Professional Corporation v Perera***, 2015 ABCA 404 [***Conway ABCA***].

[22] An explanation for what establishes a standstill agreement was also set out at paragraph 17 in ***Flock v Flock Estate***, 2017 ABCA 67 [***Flock***]:

> An agreement to excuse time may be oral, but it cannot be implied, and under rule 4.33(1)(a) must be "express"; so, conduct alone or occasional discussion of settlement, does not suffice. An exchange of correspondence will suffice if it is clear and precise enough; parties, start of period, and essential terms must be spelled out: *Bugg v Beau Canada Exploration Ltd*, 2006 ABCA 201 at paras 9, 17-18; *525812 Alberta Ltd v Purewal*, 2004 ABQB 938 per Slatter J (as he then was) at paras 13-17.

[23] In ***Flock***, the Court of Appeal found that there was nothing in the evidence that would lead to an inference of an express agreement under Rule 4.33: ***Flock*** at paragraph 20. Further, although there was a letter suggesting mediation and that litigation be put on hold, this was never acquiesced to: ***Flock*** at paragraphs 21-22. The Court in ***Flock*** highlights at paragraph 25 that:

> Rule 4.33 must be read in light of the foundational rules – rule 1.2(2)(b) stipulates that the Rules of Court are intended to facilitate the quickest means of resolving a dispute at the least expense on the merits. Those rules apply to both parties: rule 1.2(3). Rules 4.1 and 4.2 make this clear. For example, rule 4.2(b) provides that all parties are to "respond in a substantive way and within a reasonable time to any proposal for the conduct of an action. Although "a defendant is obliged, pursuant to the foundational rule 1.2, not to engage in tactics that obstruct, stall or delay an action that the plaintiff is advancing," [*Jenstar Homes Ltd v Elbow Valley West*, 2016 ABCA 417 at para 26; *Turek v Oliver*, 2014 ABCA 327],"a plaintiff bears the ultimate responsibility for prosecuting its claim": *XS Technologies Inc* v *Veritas DGC Land Ltd* at para 7.

[24] In considering the factors for a standstill agreement, the parties to the Agreement are clearly identified, namely Center Street, Nuera and Over & Above. The date of the Agreement is April 20, 2017, and from its writing I find that the Agreement is to continue until a resolution to the Coverage Action occurs so long as it goes to trial first.

[25] Nuera and Over & Above argue that the Agreement was simply to separate the Trades Action from the Coverage Action; they argue that Center Street wanted it so as to avoid consolidating the matters; and that the Agreement is not sufficiently clear what date the standstill agreement would run through. In particular Nuera and Over & Above emphasize that there is no mention of the words "standstill" or "tolling" agreement, nor other typical terms such as "abeyance". The Court of Appeal has been clear that such terms are not necessary to find that an agreement to delay the application of Rule 4.33 has occurred, however, it is still good practice to make such intention clear in the agreement itself: see ***Conway CA*** at paragraph 32.

[26] Despite this, the Agreement that has been made in this case in my view fits the categories. As described in ***Conway QB***, and now as Rule 4.33(1)(c) provides, the suspension period can be the happening of a specific event, it need not necessarily be a specific calendar date. Further, although this was an agreement in part so as to avoid the consolidation, some other aspects of it make very little sense to treat as solely pertaining to that. The reference in the Agreement to "a final, non-appealable, judicial determination" regarding the Coverage Action encapsulates a potentially very long period of time with several appeals and interlocutory motions. This would render it nearly impossible to set a calendar date, bearing in mind the significant burdens on judicial resources. It would have been preferable and good practice to add more details to the Agreement, such as revisiting the Agreement at a certain date, but the suggested term (determination of the Coverage Action) although as it so happens has taken quite some time, reflects in writing a "suspension period" as that term is defined in rule 4.33.

[27] The Agreement also brought significant benefit to both parties as was noted by the AJ in his oral reasons, in particular for the defendants as they had only to wait in the wings to see what might occur. It was suggested during the argument before the AJ that no application under Rule 4.33 would have been brought had there been more movement, but this limitation is found nowhere within the Agreement and implies that indeed it was meant to await the determination of the Coverage Action.

[28] I come to this view in part as I consider the counterfactual. It was suggested by counsel for the Defendants that nothing in the letter actually prevented Center Street from also prosecuting the Trades Action. Although this is superficially true, it calls into question then why such an agreement would be made. The advantages that are derived for the parties and highlighted by Master Robertson in his reasons in ***Lloyd's Underwriters*** of the judicial economy and the potential to avoid costly litigation altogether are illuminating. Master Robertson states at paragraphs 34-37:

> Nuera and Over & Above submit that it is not just a question of Lloyd's acknowledging that it might have to participate in difficult and lengthy construction litigation – they argue that if the claim against Lloyd's is successful, the construction defendants may not have to take part in any trial at all.

> This is because Center Street argues forcefully that although its pleading in the construction claim was filed before the insurance claim, it is Center Street's second choice for an actual trial. It would only proceed if it is unsuccessful as against Lloyd's. That is, it is not a certainty that there will be two trials if they are not tried together, even if neither are settled. An outcome favourable to Center Street in the insurance claim may end both matters.
>
> Center Street, Nuera and Over & Above argue that this is a direct answer to the "judicial economy" argument that Lloyd's advances. Neither Lloyd's nor the construction claim defendants would enjoy the benefits of a trial together, especially if the claim against Lloyd's is successful. The best outcome in the interests of judicial economy would be for a successful outcome for Center Street in the insurance claim.
>
> The construction defendants would not save resources with a trial together, and neither would Lloyd's. It is only Center Street that would possibly enjoy the benefits of a trial together, and it is not asking for it.

[29] Although the Agreement was not brought to Master Robertson's attention, Master Robertson's decision highlights the intent of the parties – Center Street intended to pursue the Coverage Action first and Nuera and Over & Above in the Trades Action were in agreement, as it benefited them to not have to expend time and money to defend themselves in the Trades Action. They could wait for the outcome of the Coverage Action that would determine whether they were going to have to defend at all.

[30] As the Agreement provides, Center Street has agreed in contract with Nuera and Over & Above to dismiss the Trades Action if there is a judicial determination that Lloyd's is required to provide even some coverage or indemnification to Center Street. There would be no reason to enter into the Agreement if the assumption was simply that Center Street would still be prosecuting the Trades Action (and the defendants would be just as incentivised to slow walk such litigation to avoid incurring significant litigation expenses and to ensure the Coverage Action gets a final determination). The words used in the Agreement and the circumstances, including the circumstance that the next logical step to advance the Trades Action was for Nuera and Over & Above to prepare and serve their respective Affidavits of Records, and they did not, satisfies me that the Agreement was effectively a standstill agreement.

[31] In sum, although not as clearly drafted as a standstill agreement should be, I find that the Agreement – the April 20, 2017, letter agreement between the parties, contains the essential terms required to signify that the parties agreed to suspend the application of Rule 4.33(2) on the Trades Action pending the outcome of the Coverage Action.

B. Are the Coverage Action and the Trades Action inextricably linked?

[32] For the purposes of Rule 4.33, if another action is determined to be inextricably linked to the action in which a Rule 4.33 application has been filed, then a significant advance in the related action would prevent the mandatory operation of Rule 4.33(2).

[33] The factors that the Court considers when determining whether there is an inextricable link between two actions are those set out by Justice Mahoney in ***Angevine v Blue Range Resources Corp***, 2007 ABQB 443 [***Angevine***] at paragraph 41:

> (1) Are the two actions inextricably linked in the sense that the result in the related action would be "legally or factually determinative" of the issues in the primary action?
>
> (2) Will the issue determined in the related action be "relevant and binding" in the primary action?
>
> (3) Does the related action materially advance the primary action?
>
> (4) Could the decision in the related action be a "barrier in law" to the Court's adjudicating the primary action? [citation omitted]

[34] As helpfully described by Justice Jones in ***Danek v Levine***, 2016 ABQB 422 [***Danek***] at paragraphs 21-24:

> I am not convinced that a correct reading of ***Angevine*** (or of the decision in ***Malcolm v Canada (Minister of Indian Affairs & Northern Development)***, 2006 ABQB 152 upon which it draws), leads to the conclusion that establishing any one of the four *indicia* of inextricable linkage is sufficient to establish such a link in every case. Similarly, I am not convinced that all four must be present for inextricable linkage to be found.
>
> ***Angevine*** tells us to consider the four factors set out. It does not state that any one is more important than any other. It does not tell us, for example, if the result in the related action must be legally and factually determinative of all of the issues in the primary action, or just some of them or just the more important issues.
>
> It does not tell us precisely how a determination of issues in the related action must be relevant and binding in the primary action and to what particular questions. It does not tell us how we are to measure the materiality of any advance it brings to the primary action.
>
> These comments are not a criticism of the discussion in ***Angevine***. Rather, they are a recognition of the importance of viewing the four ***Angevine*** factors together to see if they collectively and cumulatively point to a consistent conclusion that two actions are not only linked, but inextricably so.
>
> [emphasis in original]

[35] This extract makes clear that the ***Angevine*** factors should be considered in a functional and not formalistic way, in alignment with the Court of Appeal's general instructions regarding Rule 4.33: ***Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc***, 2016 ABCA 123 at para 14; ***Ursa***

Ventures Ltd v Edmonton (City), 2016 ABCA 135 at para 18; ***Flock*** at para 17; ***Moman v Bradley***, 2024 ABKB 351 at para 13.

[36] In ***Calgary (City of) v Chisan***, 2000 ABCA 313, the plaintiff was convicted of bylaw infractions and ordered to comply. The City then applied for contempt based on the plaintiff's refusal to comply which was adjourned *sine die*. The plaintiff appealed the conviction of the bylaw infraction and exhausted those appeals in June of 1994. The City proceeded with the contempt application and in June 1999 the plaintiff sought to have it dismissed under the old dismissal rule - Rule 244.1, which allowed for a five-year limitation period. The Court found that the contempt action could not proceed until the plaintiff's right of action under the bylaw appeal had run its course, these actions were inextricably linked as one was a condition precedent to the advancement of the other.

[37] In ***Field, Field & Field Architecture-Engineering Ltd v Temp Construction (2000) Ltd***, 2015 ABQB 471, the plaintiff applied to strike the defendant's counterclaim under Rule 4.33. The action brought by the plaintiff was for debt owed under a contract. The defendant claimed deficiencies and set-off. The defendant counterclaimed seeking damages for negligence and breach of contract, loss of revenue, increased construction and management costs and other loss and damage. Separate law firms represented the plaintiff in each action. The Court found that both actions related to the same parties and contract. The existence of the contract, its terms, and the plaintiff's performance of it were live issues in both actions. The counterclaim expressly incorporated the claim for set-off from the statement of defence in the first action. It was found to be inextricably linked.

[38] In ***Danek***, the plaintiff sought damages against the City for suffering injuries in a bus accident. Subsequently the plaintiff brought a second action against her lawyer alleging negligence and breach of retainer agreement after another action related to the same accident was dismissed for long delay. Justice Jones found that although a determination in the bus action could provide assistance with the determination of damages against her lawyer, it would not be determinative or necessary. Regardless of the determination in the first action, the plaintiff could still pursue costs and expenses from the defendant due to negligence. Justice Jones found that there was a conditional link between the two actions, but it did not rise to an inextricable link.

[39] In ***Direct Horizontal Drilling Inc v North American Pipeline Inc***, 2018 ABQB 1006, Justice Yungwirth found that the actions in question involved the same parties, contracts, and incorporation of identical set-off claims, and as such although one action was not a condition precedent to the other like in ***Chisan***, the determination of liability for and quantification of damages in one action would play a large role in resolving the second action, and determination of those issues would have the effect of moving both actions forward. As such, they were inextricably linked.

[40] In Considering the ***Angevine*** factors in this case:

(1) Would a decision in the Coverage Action be "legally or factually determinative" of the issues in the primary action? Finding: The issues, although deriving from the same factual scenario, are largely distinct with different defendants.

(2) Will the issue determined in the Coverage Action be "relevant and binding" in the Trades Action? Finding: Based on the Agreement, if it is determined that Lloyd's must provide coverage or indemnify Center Street, in whole or in part, Center Street has agreed to sign and file a consent dismissal of the Trades Action. If it is determined that Lloyd's must provide coverage, then it ends the Trades Action.

(3) Does the Coverage Action materially advance the Trades Action? Finding: Yes, as a result of the Agreement, a determination that Lloyd's must provide coverage for Center Street would determine whether the Trades Action goes forward.

(4) Could the decision in the Coverage Action be a "barrier in law" to the Court's adjudicating the Trades Action? Finding: Based on the Agreement, if it is determined that Lloyd's must provide coverage or indemnify Center Street, in whole or in part, Center Street has agreed to sign and file a consent dismissal of the Trades Action.

[41] The defendants largely rely on ***Danek*** for their argument that the AJ erred in finding that the cases are inextricably linked, and instead that they are conditionally linked. I believe that the interpretation of Center Street is more accurate here, as it is clear from his reasoning that Justice Jones makes his decision based on the fact that the plaintiff in that case may still have pursued the defendant regardless of the outcome of the related action. Unlike in ***Danek***, where regardless of what was determined in the related action, the primary action could still continue with perhaps some issues being resolved, however, in the present case if Center Street is successful in the Coverage Action, it has agreed to sign a consent dismissal order of the Trades Action.

[42] In sum, based on my review of the ***Angevine*** factors and my observations of the link between the Coverage Action and the Trades Action, the AJ was correct in finding that the two actions are inextricably linked. I agree with the AJ and also conclude that the Agreement contractually connected the Trades Action with the Coverage Action such that they became inextricably linked.

V. Summary

[43] Based on my review of the entirety of the record before me, as well as my review of the jurisprudence on the subject matter of standstill agreements and whether actions are inextricably linked, I find that the letter agreement dated April 20, 2017, between the parties was an agreement to suspend the time of the application of Rule 4.33(2) until resolution of the Coverage Action. Furthermore, I find that the AJ was correct in concluding that the Coverage Action and the Trades Action were inextricably linked and that in the result, Rule 4.33(2) does not apply as 3 or more years have not passed since significant advance in the Coverage Action. The appeal is dismissed.

[44] Furthermore, I appreciate that there was discussion at the oral hearing before me regarding the application of Rule 4.31. Rule 4.31 authorizes a court to dismiss an action featuring inordinate and inexcusable delay that has significantly prejudiced the moving party. A party may apply at any time for relief if the non-moving party's inaction constitutes inordinate and inexcusable delay

and causes the moving party serious prejudice. Considering the evidence on the record before me and the oral submissions made of counsel, I do not find that there has been inexcusable delay or significant prejudice in this case. Accordingly, Rule 4.31 does not apply to the facts of this case at this time.

[45] With respect to costs, Center Street is the successful party in this appeal and accordingly are awarded costs. If the parties are not able to agree on the amount, they may provide written submissions on costs as to the issue of the amount, to me via email through my Judicial Assistant, within 60 days of publication of this decision.

Heard on April 17th and 19th, 2024.
Dated at the City of Calgary, Alberta, this 9th day of August, 2024.

J. C. Price
J.C.K.B.A.

Appearances:

T. Nolan and M. Dietrich,
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