# Court of King's Bench of Alberta

**Citation: Condominium Plan No 7920829 v Academy Contractors Inc (Abalon Construction), 2023 ABKB 244**

**Date:** 20230425
**Docket:** 1003 18358
**Registry:** Edmonton

2023 ABKB 244 (CanLII)

Between:

**The Owners of Condominium Plan No. 7920829**

Plaintiff

- and -

**Academy Contractors Inc operating as Abalon Construction, 355872 Alberta Ltd, Ptarmigan Engineering Ltd and Richard Imai**

Defendants

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**Memorandum of Decision**
**of the**
**Honourable Applications Judge B.W. Summers**

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## Introduction

[1] This Special Chambers hearing involved cross applications: the Defendants applied for summary dismissal under r 7.3 of Alberta *Rules of Court* alleging that the action was not commenced within the limitation period; or alternatively, the action should be dismissed under r 4.31 on the basis that there has been inordinate delay in the action that has significantly prejudiced the Defendants; and the Plaintiff cross applied for summary judgment of its claim, also under r 7.3.

## Background to this Action

[2] In 2002 the Defendant Academy Contractors Inc operating as Abalon Construction ("Abalon") installed concrete friction piles under the foundation of the Plaintiff's building (called Tudor Manor) to stop settling of the building ("Abalon's Work"). Abalon retained the Defendant Ptarmigan Engineering Ltd ("Ptarmigan") to prepare designs for the concrete friction

piles and to conduct periodic inspections throughout the course of Abalon's Work. The Defendant Richard Imai ("Imai") was the principal of Ptarmigan and the engineer who did carry out the inspections.

[3] Abalon's Work was completed on December 12, 2002.

[4] The Plaintiff was advised by Abalon's representative Randy Bilyk to not repair any drywall cracks for 4-6 months following Abalon's Work as the foundation of Tudor Manor would settle on the concrete friction piles over that period of time.

[5] In February of 2003, Ms. Giles S. Kennedy-Pearson ("Pearson"), who was the mother of the owner of a unit in Tudor Manor, wrote to Abalon enclosing a letter from the realtor who would be tasked with selling her son's unit. The realtor's letter stated: "Living room—large horizontal cracks and large crack in corner which runs up to ceiling and along ceiling: Bedroom—cracks around window and closet; Every doorway has a major crack". This same letter was sent to the Plaintiff's board ("Board") in May of 2003.

[6] In May of 2003, Pearson attended a Board meeting at Tudor Manor and complained about cracks in her son's unit. These were to be examined by representatives of the Board.

[7] Marcel Berard, a long time member of the Board and frequent president of the Board, swore an affidavit stating (at paragraph 29 of the Affidavit filed December 14, 2020): "When Pearson reported the cracks in ...(her son's unit) in early 2003, it was my belief that these cracks had occurred in 2001-2002, prior to the underpinning performed by the Defendants or were from the minor adjustments that we were told to expect after the underpinning was completed."

[8] Mr. Berard also stated that the Board repaired the cracks in the common areas (hallways) in the spring or summer of 2003 as the intent was to determine if there was any further cracking after that.

[9] In November of 2004, Pearson contacted Abalon asking for a report or information on Abalon's Work as walls and doors were shifting and her son's unit was developing new cracks. Abalon advised that it would need the permission of the Plaintiff to release any information to Pearson. Pearson's communications were copied to her lawyer and this was noted to Abalon. Mr. Berard's affidavit indicates that the Plaintiff did not become aware of this exchange of emails between Pearson and Abalon "...until production was completed in this lawsuit".

[10] At the 2007 Annual General Meeting of the Board some unit owners suggested that the building was shifting.

[11] Mr. Berard stated in his affidavit that cracking was not brought up again until an emergency meeting held on September 18, 2008. The Minutes of that meeting state:

> Ernest brought up the fact that there are cracks in several of the walls in the condo hallways. Tenants mentioned that they too have cracks in walls in their units. Marcel said there had been an engineer to assess the situation several years ago before we had our foundation fixed the last time. He said that most of the buildings in the neighborhood appeared to have similar problems. He did not seem to feel that we needed to take further action at this point, maintaining that bringing an engineer out again would be very costly. Tenants are all somewhat concerned, but it was unanimously decided that for now, we would simply wait

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> and see if the damage progressed to the point where we would have to take further action.

[12] In November of 2008 Randy Bilyk attended at Tudor Manor to assess the situation. Mr. Bilyk's report to the Board dated November 7, 2008 stated, among other things:

> Inspection of the units indicates some minor cracking on the drywall within the interior walls of all main floor suits (sic). Some cracks are also visible in the drywall along the East exterior wall of unit 2 and the North exterior wall of unit 1. In the attic there is a 1 ½ inch space between the roof truss and the West half of the building. As discussed, this should be repaired as soon as possible so the roof shingles/flashing can be repaired. The soil in the crawlspace is extremely dry with large cracks in the soil below the sand. There is no vapour barrier on top of the subgrade.
>
> Cracks in the units appear to be in areas which had previously settled the greatest amount. This is typically caused by the building adjusting itself on the installed pilings. All units are experiencing some cracks on interior walls. As the soils within the crawlspace are drying, the concrete pads which support the beams which support the interior of the building are settling unevenly as a result of this condition.
>
> Abalon underpinned the exterior of the building in 2002. At the time we stabilized the foundation in the position is (sic) was at. Since then, the building appears to have adjusted itself on the installed piles.
>
> ...
>
> An option to consider would be to lift the east half of the building to tighten gaps within the structure and to bring it more into alignment with the West half of the structure. Some interior beams should also be leveled to reduce the interior cracking. The entire crawlspace should be encapsulated to help maintain a uniform (sic) the moisture content of the subgrade soils within this area.

[13] At several Board meetings in late 2008 and into 2009 the Board members discussed various options including having Abalon attend to do further work.

[14] The Minutes of a Board meeting on August 25, 2009 state:

> Aberent was also contacted and for the cost of @$3800 they would inspect/analyse the problem, provide a report and design for repair of the building. As this company seems from several accounts to be reputable it is likely that we will work with this company. However, before that takes place Marcel will speak further with the structural engineer of that company to find out more specifically what services they will provide. He will contact Kevin of that company in about a week. Our goal is to get as much clarification as possible regarding the condition of the building and the solutions that must be undertaken to correct the problems. It was further noted that a soil engineer or geo-tech really could not give us an accurate picture of what is happening with the shifting building and so would not provide a useful service to us.

[15] The Minutes of a Board meeting dated November 26, 2009 stated:

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> Ann asked for this meeting to be called as she had contacted W & R Foundations, to possibly come and do an assessment of the building. This company had done a thorough inspection and report back in 2002 when the building first began to undergo difficulties. At that time, we had decided to go with a cheaper fix and another company. Ann felt that to have W & R back would give us a professional, solid opinion on the new problems and the solutions.

[16] W & R Foundation Specialists Ltd ("W & R") provided a reporting letter to the Board dated February 26, 2010. This very technical report suggested testing of the concrete friction piles installed by Abalon. A conclusion in this letter was:

> Following the determination of the load carrying capability of an individual pile, we should then be able to assist you in determining why the structure is settling and what can be done to remedy the problem.

[17] W & R provided a further reporting letter to the Board dated May 30, 2012. That second letter reported on what was found in W & R's testing. (collectively, the two letter reports shall be described as "W & R Letters"). The author of the W & R Letters was Russ Renneberg.

[18] The cost of remedial work with respect to the ongoing settlement issue was $342,877.50.

**Conduct of the Action**

[19] The Plaintiff commenced this action by Statement of Claim filed on October 27, 2010.

[20] Successive counsel for the Plaintiff provided Affidavits of Records as follows:

> January 8, 2013
> December 2013
> April 4, 2016
> December 2016

[21] From the outset, the Defendants found that the Plaintiff's document production was inadequate and in fact questioned the Plaintiff's representative on the Plaintiff's Affidavits of Records. Some of the later produced documents came as a result of the Plaintiff answering undertakings with respect to questioning on the Plaintiff's Affidavits of Records.

[22] In 2019 counsel for Abalon questioned members of the Board who were indicated in Minutes of Board Meetings to have been involved in the investigation of complaints relating to the foundation. Abalon states that these witnesses could not remember specifics or the timing of events with respect to the foundation and repairs. Abalon asserts that this is a prejudice to their defense of this action for which the Plaintiff is entirely responsible as the Plaintiff's production of Board Minutes identifying these witnesses did not occur until many years after the action had been started and then, when Abalon asked for the witnesses to be produced (in 2017) the Plaintiff was extremely slow to try and locate them and Abalon ultimately had to hire a skip tracer to find some of them.

[23] Abalon filed the affidavit of Randy Bilyk in support of its application for summary dismissal on October 15, 2019 and he was cross examined the next month. Although counsel for the Plaintiff advised that the Plaintiff would be filing its own affidavit, it took the Plaintiff nearly a year to do so.

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[24] Counsel for the Plaintiff advised that he would be bringing a cross application and anticipated providing materials in less than a month. Notwithstanding repeated requests, the Plaintiff's materials were not provided for over a year, and then only after a chamber's application was brought to force the issue.

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**The Plaintiff's Cross Application for Summary Judgment**

[25] I will deal with the Plaintiff's cross application for summary judgment first because it may be dealt with in short order.

[26] The Plaintiff does not have an expert's report to provide an opinion on the duties of care of the respective Defendants, whether the duties of care of the respective Defendants were breached and if so whether those breaches caused the damages claimed by the Plaintiff. Without that opinion evidence the Defendants cannot be found liable in tort.

[27] The Plaintiff asserts that the W & R Letters that have been put into evidence provide a factual basis for which the Defendants may be found liable. That is, those letters reported that the pilings were not directly placed under the foundation to Tudor Manor, there was insufficient contact between pilings and the foundation to achieve a safety factor of 3:1 and there were other failings. It is asserted that these were breaches of contract on the part of Abalon.

[28] Even were that so, and at this stage I do not think that these breaches have been established, the Plaintiff needs expert evidence that the remedial work was needed due to the breaches of contract committed by Abalon. Without the requisite expert report, that causation has not been proven.

[29] The Plaintiff's application for summary judgment is dismissed.

**The Defendants' Application for Summary Dismissal under Rule 7.3**

[30] The application of the Defendants for summary dismissal is based upon the argument that the Plaintiff's action, commenced on October 27, 2010 was commenced after the limitation period expired for the Plaintiff's cause of action. More specifically, the Defendants argue that the limitation period for the Plaintiff's cause of action started before October 27, 2008.

[31] The operative part of the *Limitations Act* is as follows:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1, 3.2 and 11, if a claimant does not seek a remedial order within
>
> > (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> >
> > > (i) that the injury for which the claimant seeks a remedial order had occurred,
> > >
> > > (ii) that the injury was attributable to conduct of the defendant, and
> > >
> > > (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
> >
> > or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[32] Counsel for Abalon refers to the following passage from the decision of the Supreme Court of Canada in ***Grant Thornton LLP v New Brunswick,*** 2021 SCC 31 ***("Grant Thornton")*** as the test for the degree of knowledge to trigger the running of the limitation period:

> [42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the LAA.

[33] In the very recent decision of ***Aseniwuche Winewak Nation of Canada v Ackroyd LLP,*** 2023 ABCA 60 our Court of Appeal considered the application of the ***Grant Thornton*** decision in this province. Although the Court noted that the New Brunswick legislation did not have an equivalent to our s 3(1)(a)(iii) the Court did state (at paragraph 13):

> [13] After the decision of the applications judge, ***Grant Thornton LLP v New Brunswick***, 2021 SCC 31, 461 DLR (4th) 613 discussed the New Brunswick *Limitation of Actions Act*, SNB 2009, c. L-8.5, which is similar to the Alberta statute. The Supreme Court held that time begins to run when the claimant has actual or constructive knowledge, through the exercise of reasonable diligence, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. Mere suspicion of a claim is not enough, but certainty of liability is not required to start the clock running. The statute requires knowledge of the material facts, not complete knowledge of the legal implications of those facts.

[34] Putting all of this together, the question to be answered is: Have the Defendants established to the requisite standard that the Plaintiff's Board did have knowledge, constructive or actual, before October 27, 2008, through the exercise of reasonable diligence, of the material facts upon which a plausible inference of liability on the part of the Defendants could be drawn?

[35] At this stage, I must consider what is the requisite standard required for summary dismissal.

[36] The often quoted test for summary judgment set out in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49** is as follows:

> [47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do

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> uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.
>
> ***("Weir-Jones Test")***

[37] The Defendants point to the complaints of cracking made by Pearson in 2003. They point to the complaints of cracking and shifting described in Board Minutes in 2007 and 2008. They say that this is sufficient information for the Plaintiff to make a plausible inference of liability on the part of the Defendants. They emphasize that certainty of liability is not required.

[38] For the Plaintiff, Marcel Berard responds that the Plaintiff thought that the cracking identified by Pearson was due to shifting before Abalon's Work or as the foundation was shifting onto the concrete friction piles and that the cracking was minor (as stated by Randy Bilyk in his report of 2008). The Plaintiff states that it could not have made a plausible inference of liability on the part of the Defendants until W & R had uncovered two of the concrete friction piles and discovered the fault identified.

[39] In my view, there is a genuine issue requiring a trial as to whether the Plaintiff's Board, did exercise reasonable diligence that could have or did provide actual or constructive knowledge of facts that would have allowed for a plausible inference of liability on the part of the Defendants. Before October 27, 2008 the Plaintiff's Board knew that there were cracks in the hallways and in the units. There is certainly a question as to the extent of the cracking. One point

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of fact that certainly raises doubt is that the Minutes of the September 18, 2008 Meeting indicate that ".... most of the buildings in the neighborhood appeared to have similar problems".

[40] The Abalon report to the Board dated November 7, 2008 certainly makes no acknowledgement of liability on the part of Abalon and in fact suggests reasons other than Abalon's Work for the settling. In particular, that report states:

> The soil in the crawlspace is extremely dry with large cracks in the soil below the sand. There is no vapour barrier on top of the subgrade.
>
> ...
>
> All units are experiencing some cracks on interior walls. As the soils within the crawlspace are drying, the concrete pads which support the beams which support the interior of the building are settling unevenly as a result of this condition.

[41] With the evidence before me on this application, I cannot accept the Defendants' suggestion that the Plaintiff had actual or constructive knowledge of facts that the Plaintiff could have reasonably inferred liability on the part of the Defendants before October 27, 2008. The minutes of the Board meetings reflect that the Board did not know what the cause of the problem was and they were considering various investigations to find out.

[42] The Defendants stress that a plaintiff does not need to have certainty of liability for the limitation clock to start running. That is true. However, there must be more than mere suspicion. In the Minutes of the Board dated September 18, 2008 it is stated that most buildings in the neighbourhood had similar problems. Although Randy Bilyk's report is dated November 7, 2008, eleven days after October 27, 2008, there is a clear statement within that report that the problem is something other than Abalon's Work (ie soil drying in the crawlspace causing uneven settling of the interior).

[43] Given the cracking in Tudor Manor between 2003 and 2008, I do have some question as to whether the Plaintiff did exercise reasonable diligence in acquiring knowledge of facts to determine whether liability on the part of the Defendants could be inferred.

[44] The aim of legislation on limitations of actions is to strike a balance between not allowing a cause of action to linger and not requiring lawsuits to be commenced prematurely. Where that balance lands in this particular case is something to be determined at trial.

[45] The Defendants, as moving parties, have not met the ***Weir-Jones Test*** in so far as establishing that the Plaintiff's action ought to be dismissed on the basis that the Plaintiff had constructive or actual knowledge before October 27, 2008 that a plausible inference of liability on the part of the Defendants could be drawn. In my view, there is a triable issue as to whether the Plaintiff commenced this action within the limitation period.

[46] The Defendants' applications for summary dismissal on this particular ground is dismissed.

## Dismissal for Delay under Rule 4.31

[47] Abalon's application for dismissal (including for delay) was filed on October 19, 2020. At that point in time r 4.31 stated:

> Application to deal with delay

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4.31(1) If delay occurs in an action, on application the Court may

(a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or

(b) make a procedural order or any other order provided for by these rules.

(2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

[48] In 2022 this rule was amended to add the following:

(3) In determining whether to dismiss all or any part of a claim under this rule, or whether the delay is inordinate or inexcusable, the Court must consider whether the party that brought the application participated in or contributed to the delay.

[49] The parties did not specifically address this change in the rule. No suggestion was made that I should ignore subsection (3).

[50] In my view, the rule that was in place when the application was filed is the one for me to consider. However, upon reviewing the cases both before and after the amendment, it seems to me that the amendment was a mere codification of a principle upon which the Court has always applied: whether the Applicant has participated in or contributed to the delay is a relevant factor for the Court to consider. For example, see ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd,*** 2019 ABCA 276 **("*Oakwood*"),** paras 24-31.

[51] Although ***Oakwood*** says that there is no universal mandatory formula for considering delay under r 4.31, it is settled in this jurisdiction that the Court should follow the six part analysis set out in ***Humphreys v Trebilcock,*** 2017 ABCA 116 **("*Humphreys*")** as follows:

> [150] In order to apply r. 4.31 an adjudicator must answer six distinct questions.
>
> [151] First, has the nonmoving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?
>
> [152] Second, is the shortfall or differential of such a magnitude to qualify as inordinate?
>
> [153] Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
>
> [154] Fourth, if the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the moving party so as to justify overriding the nonmoving party's interest in having its action adjudged by the court? Has the moving party demonstrated significant prejudice?
>
> [155] Fifth, if the moving party relies on the presumption of significant prejudice created by r. 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?

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> [156] Sixth, if the moving party has met the criteria for granting relief under r. 4.31(1), is there a compelling reason not to dismiss the nonmoving party's action? This question must be posed because of the verb "may" in r. 4.31(1).

[52] In my view, the Plaintiff has failed to advance this action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review. When Abalon advanced this application, the action was ten years old. It is not that complicated an action. There are only three parties. In my view, this action should have been completed long before now (and long before Abalon filed its application).

[53] Furthermore, the delay is inordinate. As I indicated this action should have been completed years ago.

[54] Counsel for the Plaintiff (who by the way is the Plaintiff's third lawyer) argued that the delay was neither intentional nor willful. That may be so, but it is of little significance in the Court's analysis as to whether there is an adequate excuse for inordinate delay.

[55] Counsel for the Plaintiff also argued that the Defendants contributed to the delay and gave a number of examples: there were problems with service of the Statement of Claim; the Defendants took an inordinately long period of time to retain a skip tracer to locate former Board members of the Plaintiff; and that even now, Mr. Imai has not filed a Statement of Defense to the Third Party Notice.

[56] Counsel for the Plaintiff submitted at the hearing of this matter a letter dated August 26, 2019 that he sent to counsel for Defendants in which he proposed a litigation plan. He indicated this illustrates that the Plaintiff has always intended to proceed expeditiously with its lawsuit. But counsel for Abalon countered with his own letter to counsel for the Plaintiff dated May 10, 2019 in which he advised that he and counsel for Ptarmigan and Imai had instructions to bring an application to strike for inordinate delay. Counsel for Abalon notes that the Plaintiff's proposed litigation plan came in specific response to being advised that an application to strike for an inordinate delay was forthcoming and even then, it took three months.

[57] As noted previously in this Memorandum of Decision, it took the Plaintiff three and one-half years to complete its document production. Even now, the Defendants complain that the Plaintiff's production of documents is not complete. Questioning of the Plaintiff has not occurred. Questioning of the Third Party Plaintiff and Third Party Defendants has not occurred. Expert Reports have not been provided.

[58] Counsel for Ptarmigan and Imai notes that counsel for the Plaintiff refused a defence request to examine Mr. Renneberg because Mr. Renneberg was going to be qualified as the Plaintiff's expert, but then the Plaintiff's counsel apparently changed his mind and indicated that Mr. Renneberg would be just produced as a fact witness.

[59] In my view, considering the foregoing and the other evidence on the prosecution of this action, the Plaintiff does not have an adequate excuse for the inordinate delay that has occurred and the Plaintiff is responsible for the delay.

[60] All counsel agree that the Court's decision on this application turns on whether there has been significant prejudice to the Defendants. Indeed, the cases make it abundantly clear that it is the most important part of the Court's analysis with respect to an application under r 4.31.

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[61] Also of significant importance in relation to this issue is: “Who has the burden of proof with respect to whether or not there was significant prejudice to the Defendants?”

[62] Pursuant to r 4.31(2), as the Defendants have satisfied me that there was inordinate delay without reasonable excuse, I am to presume that there is significant prejudice to the Defendants. However, this presumption is rebuttable.

[63] Counsel for the Plaintiff argues that this puts the Plaintiff in the rather impossible position of having to prove a negative—that the Defendants have not suffered significant prejudice. I agree. However, that is what the rule requires.

[64] What this means is that the Plaintiff must establish, on a balance of probabilities, that the prejudice alleged by the Defendants is not in fact significant or supportable.

[65] In this case the Defendants complain that the witnesses from the Plaintiff Board have memories that are vague at best, due to the passage of time. The examinations conducted of these witnesses very much substantiate this concern.

[66] The Defendants also assert that Mr. Renneberg’s failure to locate and produce a report that he prepared in 2002 on the condition of the building is of significant prejudice. Since Mr. Renneberg was then suggesting remedial steps different than proposed by Abalon (at greater cost), it could be very important in the expert analysis of Abalon’s Work.

[67] Counsel for the Plaintiff complains that these alleged prejudices are ones that still require the Plaintiff to prove a negative. How can the Plaintiff prove that the witnesses would have had better memories if there had not been inordinate inexcusable delay? How can the Plaintiff prove that what was contained in Mr. Renneberg’s 2002 report would not have helped the Defendants?

[68] But proving a negative is something that cuts two ways. How can the Defendants prove that Mr. Renneberg’s 2002 report would have helped them since they do not know what it says? They cannot. How can the Defendants show that the Plaintiff Board members would have had better memories if this action had not suffered from inordinate and inexcusable delay? They cannot.

[69] Unfortunately for the Plaintiff, this issue of significant prejudice regarding “evidence lost or missing” must be decided in this case upon the burden of proof directed under r 4.31(2). That is because the Plaintiff does not have reasonable excuse for the inordinate delay that has occurred in this case, the Plaintiff must rebut the presumption and show that there would not be significant prejudice to the Defendants. But it cannot.

[70] I am also mindful that an issue for trial in this case is whether the Plaintiff’s claim is limitation barred. This is a defense where the burden of proof is upon the Defendants. The Defendants can rightly complain that the inordinate delay causes significant prejudice to them being able to put forward their limitations defense.

[71] The final question to be asked in the ***Humphreys’*** analysis is whether there is a compelling reason to not dismiss the action. In this respect counsel for the Plaintiff stresses that by use of the word “may” in the rule, my decision is purely discretionary. He also correctly characterizes the result of a successful r 4.31 application as an “extraordinarily blunt instrument”.

[72] In response to these arguments, I say two things: firstly, the rule is there for a reason. I cannot just ignore the rule or discount it because the result may be harsh; and secondly, I note

that it is my responsibility to exercise my discretion judicially. The exercise of discretion judicially "... involves a judge directing herself properly in law; calling her own attention to the matters which she is bound to consider, and excluding from her consideration matters which are irrelevant to what she has to consider**: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation***, [1947] EWCA Civ 1, [1948] 1 K.B. 223 at 229": per the Alberta Court of Appeal in ***Dahlseide v Dahlseide,*** 2009 ABCA 375.

[73] I am exercising my discretion, judicially, to apply r 4.31.

**Conclusion**

[74] The application of the Defendants to strike this action under r 4.31 is granted. If costs cannot be agreed upon, they may be spoken to in morning chambers.

Heard on the 3rd day of March, 2023.
**Dated** at the City of Edmonton, Alberta this 25 day of April, 2023.

**B.W. Summers**
**A.J.C.K.B.A.**

**Appearances:**

Randy Langley
Henning Byrne LLP
for the Plaintiff

Peter Gibson
Field LLP
for the Defendant Academy Contractors Inc
carrying on business as Abalon Construction

Tim Smythe and Sarah McFadyen
Bryan & Company LLP
for the Defendants Ptarmigan Engineering Ltd and
Richard Imai

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