Court of King's Bench of Alberta

Citation: WestJet v ELS Marketing Inc, 2023 ABKB 408

Date: 20230705
Docket: 1001 00525
Registry: Calgary

Between:

WestJet

Applicant/Cross-Respondent

- and -

ELS Marketing Inc., Core Logistics International Inc., Core Logistics International Inc. Carrying on Business as ELS Marketing Limited Partnership and ELS Marketing Limited Partnership and ELS Marketing Limited Partnership

Respondents/Cross-Applicants

Memorandum of Decision
of the
Honourable Mr. Justice J.T. McCarthy

I. Introduction and Background

[1] Since 2011, I have been case managing the protracted litigation between the Applicant/Cross-Respondent WestJet and the above-listed Respondents/Cross-Applicants (collectively, "ELS"). WestJet now seeks to have the matter dismissed pursuant to Rule 4.31 on the grounds of inordinate and inexcusable delay. ELS seeks to have a litigation plan put into place that would see the matter proceed to trial.

[2] Since delay is the central issue, a chronology of events is important.

[3] WestJet's Statement of Claim was filed in January 2010. ELS filed its Statement of Defence and Counterclaim in February 2010. ELS' pleading was quite brief and WestJet sought further particulars. ELS refused, taking the position that its pleading was adequate.

[4] Affidavits of Records were exchanged later in 2010. Difficulties ensued in scheduling questioning of the parties' representatives. Eventually, on WestJet's application, I ordered ELS to question WestJet's representative on January 10 and 11, 2012. That questioning did take

place, but WestJet says it was required to travel to Edmonton to avoid a further cancellation by ELS.

[5] ELS' corporate representative was questioned on January 10 and 11, 2011. Questioning on undertakings arising therefrom was scheduled for October 26, 2011 but did not occur until November 30, 2011. There were 92 undertakings and WestJet asserts that it was required to apply for three more case management orders to obtain answers to those undertakings. I granted such orders on December 23, 2011, August 10, 2012 and October 26, 2016. WestJet argues that complete answers to the undertakings were not forthcoming until February 19, 2019.

[6] On June 4, 2012, I granted an order permitting WestJet to apply for judgment on its claim by way of summary trial. There was then further wrangling between the parties that included WestJet bringing a contempt motion on January 29, 2013. Ultimately, the summary trial application was heard by Justice Jones on August 28, 2013.

[7] On November 13, 2013, Justice Jones issued his decision granting judgment to WestJet on its main claim and dismissing part of ELS' counterclaim: ***WestJet v ELS Marketing Inc***, 2013 ABQB 666. In the course of his decision, Justice Jones commented at para 52 on ELS' failures to abide by deadlines set out in my case management orders.

[8] ELS appealed Justice Jones' decision. On September 11, 2014, the Court of Appeal issued its decision upholding the judgment in WestJet's favour, but reversing the dismissal of a portion of ELS' counterclaim and permitting the entire counterclaim to proceed to trial: ***WestJet v ELS Marketing Inc***, 2014 ABCA 299.

[9] On May 21, 2015, ELS applied to set its counterclaim down for trial. At that time, ELS took the position that the only step remaining was the exchange of expert reports, that all undertakings had been discharged and that all amendments to pleadings had been filed. WestJet refused to certify that the counterclaim was ready for trial, taking the position that the evidence remained deficient.

[10] On June 11, 2015, at a case management hearing, ELS adjourned its application to set a trial date. That application subsequently was abandoned.

[11] On November 2, 2015, ELS served an expert report from Mr. Stephen Polisuk, a chartered business valuator, indicating that ELS' damages were in excess of $52 million. On December 3, 2015, WestJet objected to that expert report and sought disclosure of the evidence provided to the expert.

[12] On March 3, 2016, ELS again applied to set its counterclaim down for trial, again taking the position that there were no outstanding undertakings or amendments to pleadings. It subsequently adjourned that application *sine die*.

[13] On March 24, 2016, upon WestJet's application, I ordered ELS to post security for WestJet's judgment in the approximate amount of $2.27 million: 2016 ABQB 172.

[14] In August and September 2016, counsel for ELS and WestJet discussed the steps necessary to set the counterclaim down for trial. At a case management hearing on October 11,

2016, I ordered ELS to complete responses to the 2011 undertakings and to produce its controller for questioning with respect to ELS' damages claim.

[15] The controller was questioned on January 18 and 19, 2017. WestJet asserts that the controller was unprepared for the questioning and that ELS' counsel was obstructive. In any event, WestJet argues that the controller acknowledged that there were errors in the information provided to Mr. Polisuk for the preparation of his report.

[16] On July 18, 2017, ELS' counsel announced that he was retiring from the practice of law and asked that WestJet "forbear doing anything until contacted by new counsel". On September 20, 2017, WestJet was advised that ELS had retained new counsel.

[17] On January 24, 2018, ELS sought to make significant amendments to its counterclaim. On March 13, 2018, the parties agreed to schedule a case management hearing for April 24, 2018 to discuss the amendment application. On April 20, 2018, ELS adjourned the application. On June 27, 2018, the parties agreed to a further adjournment of the application to October 12, 2018.

[18] On September 11, 2018, ELS served a 71-page affidavit of its corporate representative sworn April 26, 2018 in support of the amendment application. As cross-examination on this affidavit could not be conducted prior to October 12, 2018, the application was again adjourned.

[19] In December 2018, the parties determined that there were no available hearing dates in the first half of 2019. At that point, WestJet gave notice of its intention to bring an application under Rule 4.31 and to seek payment out of Court of the funds held as security for its judgment.

[20] On December 19, 2018, WestJet provided ELS with a proposed litigation plan. ELS proposed certain changes to that plan on January 7, 2019 and WestJet agreed to those changes shortly thereafter.

[21] Cross-examination of ELS' corporate representative took place on February 20, 2019. WestJet asserts that ELS' counsel was again obstructive and that the corporate representative gave evidence undermining ELS' position that the counterclaim was ready for trial.

[22] On October 15, 2019, the parties entered into a consent Order (the "Consent Order") permitting ELS to amend its counterclaim and WestJet to conduct fresh questioning in respect of that amended counterclaim. The terms of the Consent Order are relevant to ELS' position on its application to have a litigation plan put in place.

[23] In late 2019 and the first several months of 2020, there was continuing dispute between the parties in respect of the questioning and ELS' document production. In August 2020, counsel for WestJet proposed scheduling the questioning for January 2021. Counsel for ELS advised they had no availability and proposed March 2021.

[24] Questioning took place on March 15 and 16, 2021 at which time counsel for ELS objected to several questions in respect of financial records and refused several undertakings in respect of those records. WestJet asserts that ELS' corporate representative confirmed in that questioning that certain records had been destroyed. WestJet also contends that responses to undertakings given at that questioning were not forthcoming for over ten months.

[25] On March 18, 2022, ELS proposed a litigation plan that WestJet argues did not contemplate production of the necessary financial records.

[26] WestJet asserts that on November 17, 2022, ELS' corporate representative effectively admitted that any records not already produced had been destroyed.

II. Applications

[27] As noted above, there are two applications presently before me. WestJet applies for two alternative forms of relief. First, it seeks dismissal of ELS' counterclaim pursuant to Rule 4.31 on the grounds of inordinate and inexcusable delay. Alternatively, it seeks to have the counterclaim struck pursuant to Rule 3.68(4)(b) on the basis of ELS' alleged failure to produce an accurate Affidavit of Records. For its part, ELS seeks this Court's direction in setting a litigation plan to move the counterclaim to resolution.

[28] Clearly, these applications are antithetical. Finding in WestJet's favour will obviate the need to consider ELS' application. Accordingly, I will proceed first with the application for dismissal.

III. Rule 4.31 Application

[29] Rule 4.31 provides as follows:

> 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.

[30] As pointed out by the Court of Appeal in ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2019 ABCA 276 at para 2, under either subsection (1) or (2), "significant prejudice" is a precondition to dismissal for delay. If the delay is found to be inordinate and inexcusable, significant prejudice is presumed and it is incumbent upon the non-moving party to rebut that presumption. If the delay is not inordinate and inexcusable, the moving party still may obtain dismissal if it can prove significant prejudice.

A. The Test

[31] WestJet cites ***Humphreys v Hanne***, 2017 ABCA 116, in which the Court of Appeal set out the following six question test at paras 150-156:

> 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?
>
> Second, is the shortfall or differential of such a magnitude to qualify as inordinate?
>
> Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
>
> 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?
>
> 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?
>
> 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).

[32] WestJet acknowledges, however, that the Court of Appeal in ***Transamerica*** at para 16 cautioned that while ***Humphreys*** "might be helpful in many cases ... it is not the only way to analyze delay." The fundamental questions remain whether there has been delay, whether such delay has been inordinate and inexcusable so as to engage the presumption and, if not, whether actual significant prejudice has been established. I will analyze this matter on that basis.

B. Delay

[33] In its brief, ELS argues, albeit somewhat obliquely, that there has not been delay in pursuing its counterclaim, using phrases such as "potential delay" and "any delay". In my view, this position is insupportable. Both WestJet's Statement of Claim and ELS's Statement of Defence and Counterclaim in this Action were filed more than 13 years ago. I have been case managing this Action for approximately 12 of those years. The Court of Appeal's decision to reinstate ELS' counterclaim following its partial dismissal was made the better part of nine years ago. The Consent Order permitting amendments to ELS' counterclaim was entered into more than three and a half years ago.

[34] In the first four years or so, this litigation proceeded at a reasonable, if unimpressive, pace. As set out above, pleadings were filed, documents were exchanged and questioning occurred. I was appointed as case management justice. The matter proceeded to a summary trial and to appeal.

[35] Thereafter, the matter stalled and seems never to have regained momentum. Eight months after the Court of Appeal's decision, ELS took the position that its counterclaim was nearly ready for trial, only to abandon that application. It did the same thing again some ten months later. In my view, these applications were ill-considered. The first was brought nearly six months

before Mr. Polisuk's report was served and the second in the face of WestJet's objection to that report and request for further disclosure. Both applications were made on the basis that no further amendments to pleadings were required, a position ELS subsequently reversed.

[36] Further, ELS changed counsel some five and a half years ago. Much of the time since then has been occupied with issues of document production and questioning. The matter appears to me to be little, if any, closer to readiness for trial than it was prior to the change in ELS' counsel.

[37] There is no question in my mind that there has been delay. As the Court of Appeal stated in ***Transamerica*** at para 24:

> An examination of the progress of this litigation leads to the inescapable conclusion that there has been delay. There is no need to draw theoretical comparisons to a prototypical action of the same type to reach this conclusion.

[38] This, then, leads to the question of whether that delay has been inordinate and inexcusable.

C. Inordinate Delay

[39] The test for determining what constitutes inordinate delay has been expressed in a variety of ways. The Court of Appeal in ***Humphreys*** discussed the term "inordinate" at para 120:

> Webster's Third New International Dictionary of the English Language Unabridged presents this possible meaning of "inordinate": "exceeding in amount, quantity, force, intensity or scope the ordinary, reasonable or prescribed limits: extraordinary". In this context inordinate means that the differential between the norm and the actual progress of an action is so large as to be unreasonable or unjustifiable.

[40] In ***Transamerica***, however, the Court of Appeal criticized this approach, saying at paras 19 and 20:

> Parts of the test in [***Humphreys***] may be difficult to apply to particular cases. This is particularly true of the first step, whether "he plaintiff has 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". There is such a wide variety in the detail of particular claims, and in the procedural journeys that particular litigation may follow, so as to make this test untenably theoretical.
>
> At the end of the day, there is no scientific method of determining what "point on the litigation spectrum" a reasonable litigant would have reached. Delay must always be a matter of degree. Secondly, the differential between the theoretical standard and any particular case is incapable of precise definition. As noted in ***Allen v Sir Alfred McAlpine & Sons Ltd.***, [1968] 2 QB 229 at p. 268, [1968] 1 All ER 543 at p. 561 (CA):

> It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case...

The first and second steps of the proposed analysis in [***Humphreys***] may merely give an artificial air of certainty to the simple question: "Has there been delay?".

[41] The Court also made these comments at paras 18 and 21:

There have been many other judicial formulations of the test. Some of them were cited in ***Arbeau v Schulz***, 2019 ABCA 204 at para. 36:

> Whether delay is "inordinate" is "to be determined in light of all of the circumstances of a particular case": ***Kuziw v Kucheran Estate***, 2000 ABCA 226 at para. 30. Inordinate delay is that which is "much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case": ***Kuziw*** at para 31 (emphasis added). "As a rule, until a credible excuse is made out, the natural inference would be that (inordinate delay) is inexcusable": ***Lethbridge Motors Co v American Motors (Canada) Ltd***, 1987 ABCA 150 at para 12, quoting ***Allen v Sir Alfred McAlpine & Sons Ltd***, [1968] 1 All ER 543 at 561 (CA).

As noted, ***Kuziw v Kucheran Estate***, 2000 ABCA 226 at para. 31, 89 Alta LR (3d) 232, 266 AR 284 confirmed that inordinate delay simply means "much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case".

...

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

[42] WestJet argues that the delay in proceeding with ELS' counterclaim is inordinate and cites various alleged failings, refusals and delays on ELS' part, both before and after the change

of counsel in 2017. The following are some of the examples WestJet enumerated in respect of the period prior to ELS' change of counsel:

> ELS repeatedly and persistently failed to meet procedural deadlines for pleadings, evidence and briefs, both pursuant to the *Rules of Court* and lawful Orders of this Honourable Court.
>
> ELS made frivolous use of valuable Court resources, repeatedly refusing to cooperate and compelling WestJet to bring motions which should not have been necessary, only to consent at the last minute or in chambers before the Court, and by ELS' own hopeless motions which could only serve to delay the litigation and had no relation to advancing it.
>
> ELS aggressively refused to plead particulars of their Counterclaim, and certified to the Court on multiple occasions that they would not amend, thereby forcing WestJet to litigate based on vague and deficient pleadings.
>
> ELS repeatedly canceled questioning and Court proceedings on short notice.
>
> ELS have been unreasonable in scheduling Court proceedings, setting down applications on short notice without first consulting WestJet's counsel as to their available dates, seeking and obtaining courtesies and refusing to reciprocate in circumstances where there would have been no prejudice to ELS in granting the courtesy. Those actions served to delay rather than advance ELS' counterclaim.
>
> ELS' counsel repeatedly refused to sign Court Orders and a judgment in the face of transcript evidence and reasons for judgment proving they accurately reflected the relief granted.

[43] WestJet contends that ELS' pattern of delay continued following the retainer of new counsel in 2017, including the following examples:

> ELS have delayed the litigation of interlocutory applications by agreeing to motion hearing dates and then failing to serve their motion materials in time, necessitating adjournment.
>
> ELS have sworn a motion affidavit and then waiting more than four and a half months to serve it, necessitating a further adjournment.

[44] One of WestJet's primary delay complaints is in respect of ELS' document production. WestJet alleges that ELS has refused to produce relevant and material records, destroyed relevant records, put forth witnesses who were unprepared and either refused undertaking requests or significantly delayed in responding to them. More specifically, WestJet argues that ELS amended its counterclaim to seek $52 million in damages, but has refused to provide the records necessary for WestJet to test those allegations. WestJet also asserts that, under ELS' current counsel, responses to undertakings continue to be long in coming and evasive when they arrive.

[45] For its part, ELS directs the Court's attention to three time periods. First, it points to the period between Justice Jones' summary trial decision and ELS' successful appeal, asserting that

"it was entirely reasonable that ELS was not capable of advancing its condensed Counterclaim." While I agree that ELS could not be expected to advance its counterclaim pending the appeal of the partial dismissal thereof, the fact remains that the Court of Appeal's decision was made the better part of nine years ago. Twice in the two years subsequent to the Court of Appeal decision, ELS sought to certify its unamended counterclaim as ready for trial only to seek substantial amendments to it following the change of counsel.

[46] ELS then argues that part of the responsibility for the delay in this matter lies with WestJet's unwillingness to agree to the amendments to the counterclaim. ELS first proposed the amendments in January 2018. They were agreed to only in October 2019 on the eve of a case management meeting. While ELS is correct in arguing that the bar for obtaining amendments to pleadings is low, WestJet's reluctance is perhaps not surprising given that the amendments were proposed some eight years after the initial pleadings and after ELS had repeatedly refused to amend its counterclaim. Further, as this matter was in case management, ELS could have brought an amendment application before me earlier than it did.

[47] Finally, ELS refers to delays caused by the Covid-19 pandemic. While there is no doubt that the pandemic caused upheaval and delays in litigation everywhere in Canada and elsewhere, I note that the pandemic began in March 2020 and ELS' corporate representative was questioned pursuant to the Consent Order in March 2021. Thus, this accounts for no more than one year of the delay in question.

[48] In assessing whether the delay in this matter has been inordinate, I have considered the time elapsed, the fact that WestJet's claim already has been resolved and the various steps that have been taken. In many cases where long delay has been alleged, the evidence shows that the matter has lain largely dormant. That is not the case here. However, notwithstanding that there has been a great deal of activity and arguments between counsel, I find that much of that activity has done little to advance this matter toward resolution. As this Court held in ***Alston v Haywood Securities Inc***, 2020 ABQB 107 at para 37, Rule 4.31 must be applied in light of the foundational rules that mandate that claims are to be "resolved in or by a court process in a timely and cost-effective way". I take from this that mere activity in an action that does not move it toward resolution is not sufficient to forestall a finding of inordinate delay.

[49] Taking all of the foregoing into account and keeping in mind the test articulated in ***Kuziw*** as cited by the Court of Appeal in ***Transamerica*** that inordinate delay simply means "much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case", I find that the delay in prosecuting ELS' counterclaim has been inordinate.

D. Inexcusable Delay

[50] Having found that there has been inordinate delay in this action, I must now consider whether that inordinate delay is also inexcusable. As Justice Hollins noted in ***John Barlot Architect Ltd v Atrium Square Investments Ltd***, 2017 ABQB 749 at para 32, these are separate criteria. I also agree with Justice Hollins' comment at para 34 that "...once the delay is found to be inordinate, the burden or proving it is nonetheless excusable can and should shift to the non-moving party...".

[51] In this regard, ELS relies in its brief on the same three arguments enumerated above, namely "the unique procedural timeline, the hindrance in getting pleadings amended, and the impact of COVID-19". In my view, none of those arguments provides a sufficient excuse for the delay in this matter.

[52] ELS also notes that it was required to obtain new representation because its previous counsel retired from the practice of law. It seems to take the position that this is somehow qualitatively different from a situation where it chose to change counsel.

[53] WestJet argues that retaining new counsel does not provide an excuse for delay, citing the statement in ***Barlot*** at para 36 that "If new counsel is retained, they take the lawsuit 'as is' and if there has already been significant delay, as here, counsel must be alive to the elevated need to move things forward." Nevertheless, Justice Hollins held at para 35 that a change of counsel "may be a fact to explore in determining whether inordinate delay can be excused".

[54] I agree that a change of counsel is not irrelevant, but it is significant in my view that ELS' current counsel was retained over five years ago and the counterclaim still is not ready for trial. That ELS was obliged to retain new counsel, rather than having chosen to do so, does not change this.

[55] ELS also asserts that the parties' ongoing dispute about document production offers an excuse for the delay in this matter. It argues as follows in its brief:

> WestJet asserts that there is some untold amount of financial records located at the Mississauga offices of ELS which have not been produced.
>
> Based on that assertion, WestJet has been effectively unwilling to permit ELS to advance their Counterclaim.
>
> Notwithstanding WestJet's contention, ELS maintains that they have complied with their obligations under the Alberta Rules of Court. As a result, the parties have gone in circles with an apparent never-ending series of undertakings, responses, and further assertions of deficient production.

[56] In essence, ELS posits that WestJet's conduct provides an excuse for the delay.

[57] The Court of Appeal in ***Transamerica*** held at para 27 that, in appropriate circumstances, the conduct of the defendant is a factor to consider:

> It is correct to say that the plaintiff has the primary obligation in moving the litigation forward. The *Rules of Court* give the plaintiff many tools to ensure that happens. It does not follow, however, that a defendant has no obligation with respect to the pace of litigation. This was confirmed, for example, in ***Sir Alfred McAlpine*** at p. 260:
>
> > Since the power to dismiss an action for want of prosecution is only exercisable upon the application of the defendant, his previous conduct in the action is always relevant. So far as he

> himself has been responsible for any unnecessary delay, he obviously cannot rely upon it...

There is a significant difference between a defendant "doing nothing" in the face of inactivity by the plaintiff, and the defendant failing to discharge its procedural obligations. In ***Calgary General Hospital v Stevenson Raines Barrtt Christie Hutton Seton & Partners*** (1994), 27 CPC (3d) 310 at para. 23 (aff'd (1995), 39 CPC (3d) 293 at para. 5 (CA)), the Court held that:

> ...there is a distinction, in my view, between "letting the dog lie" on the part of the defendants, and failing to comply with steps required by them to be taken by the rules, and failing to cooperate in an effective way with plaintiffs' efforts to move the matter along.

To the same effect is ***Owners Condominium Plan Calgary 8110301 v KJM Developments Ltd***, 1991 ABCA 120 at para 3: "While a defendant may have no duty to hurry up the plaintiff, he can scarcely complain if the plaintiff does not force the defendant to provide steps which the defendant owes."

[58] In my view, this is not of assistance to ELS. I do not see this as a situation in which WestJet has been derelict in taking steps that were its responsibility or in responding to ELS. Rather, WestJet takes a position with which ELS does not agree, namely that further documents ought to be produced. As the Court of Appeal stated, ELS has the "primary obligation" to move forward with its counterclaim. If the parties are, as ELS describes it, going in circles, it was incumbent upon ELS to break the deadlock by bringing the appropriate application before the Court. This is all the more so given that this matter has been in case management for years and I, as case management justice, am very familiar with it and was well-positioned to deal with it.

[59] As stated by Justice Eamon in ***Alston*** at para 40, "The burden of showing a credible excuse for inordinate delay lies on the plaintiff...". ELS has failed to do this and I find that the delay in this matter is inexcusable.

E. Actual Prejudice

[60] As I have found that the delay in this case is both inordinate and inexcusable, the presumption of significant prejudice applies and it is not necessary for WestJet to prove actual significant prejudice. Instead, the burden is on ELS to rebut the presumption.

[61] WestJet cites ***Nahal v Gottlieb***, 2019 ABQB 650 for the proposition that rebutting the presumption may require the non-moving party to establish the availability of evidence; see also ***Royal Bank of Canada v Amor***, 2023 ABKB 12.

[62] The parties presented quite different positions with respect to the availability of documents and witness testimony.

[63] WestJet argues that ELS failed to produce financial records relevant to its counterclaim and admitted that such records have been destroyed. It points to the cross-examination of ELS' corporate representative in 2019 and in 2022. It argues that the corporate representative admitted

that ELS' policy was to keep records for only 5 to 7 years and that any unproduced records older than that have been destroyed. WestJet asserts that Mr. Polisuk's expert report was based on financial records that have not been made available and now have been destroyed.

[64] WestJet also argues that, at the material times, ELS operated a "loose framework of interrelated corporate entities with commingled finances", making it difficult to test ELS' allegation of lost revenue resulting from the termination of its contract with WestJet.

[65] WestJet also contends that this is not solely a documents case and that ELS' counterclaim is based on reasonable expectations and on alleged misrepresentations and misuse of confidential information. Therefore, proof of the counterclaim would depend upon the testimony of the individuals involved, some of whom left their employment with WestJet years ago. Moreover, the passage of years since the events in question means that the memories of witnesses, including ELS' corporate representative, will have faded significantly.

[66] ELS denies that there is any prejudice to WestJet. It disputes that relevant witnesses are unavailable or in failing health and argues that WestJet has not lead evidence to establish that. It argues that the fact that certain witnesses have left their employment with WestJet is not evidence of prejudice in and of itself.

[67] ELS also asserts that WestJet has not established that relevant and material records have been destroyed. It argues that WestJet merely suggests that there should be additional records and that, since no additional records have been produced, they must have been destroyed. It takes issue with WestJet's interpretation of the evidence given by ELS' corporate representative and notes that he specifically swore that ELS has never intentionally destroyed relevant and material documents.

[68] I do not accept ELS' arguments. First, while ELS' corporate representative avers that ELS has never intentionally destroyed relevant and material records, the question of whether full disclosure has been made remains unresolved. In particular, ELS has not answered the question of whether there are financial records that were provided to Mr. Polisuk for purposes of preparing his report that have not been made available to WestJet and now cannot be made available.

[69] Further, I agree with WestJet that the allegations ELS raises in its counterclaim necessarily will require witnesses to speak to representations that were made in the course of contract negotiations. Indeed, ELS does not dispute that much. The amended counterclaim states that the parties entered into a business relationship in 1997 and subsequent agreements in 2006 and 2009. With 13 years having elapsed since the initial pleadings were filed and 14 to 25 years having elapsed since the events in question, I find there can be no question that the witnesses' memories of negotiations and representations will have faded.

[70] Accordingly, I find that the presumption of significant prejudice has not been rebutted. Indeed, I would have found that WestJet had established actual significant prejudice had it been necessary for it to do so.

F. Discretion

[71] Rule 4.31 clearly states that where there has been delay resulting in significant prejudice, the Court "may" dismiss the claim or any part of it. In the alternative, the Court may make a procedural order. ELS asserts in its brief that if I find there has been delay, a procedural order is the appropriate relief. WestJet counters that there is no compelling reason to permit ELS to continue to trial in these circumstances.

[72] I agree with WestJet that there is no compelling reason for me to exercise my discretion in favour of granting a procedural order rather than dismissal. As noted above, this matter has been in case management for some 12 years with numerous case management orders issued over that time. And yet the delays have persisted. Taking all of the circumstances of this matter into account, I find that the appropriate remedy is dismissal of ELS' counterclaim.

IV. Rule 3.68(4)

[73] As noted above, WestJet's alternative ground for dismissal is Rule 3.68(4), which provides that the Court may strike out all or any part of a party's pleadings if that party has failed to serve an affidavit of records in accordance with Rule 5.5. In light of my findings above, I need not address this alternative ground.

V. Litigation Plan

[74] In its cross-application, ELS sought to have a litigation plan put into place that would move its counterclaim toward resolution at trial. In light of my finding that the counterclaim should be dismissed on the grounds of delay, it is not necessary for me to deal with this cross-application and, accordingly, it is dismissed.

VI. Conclusion

[75] In ***Humphreys*** at para 90, the Court of Appeal made these comments about the problem of litigation delay:

> Litigation delay harms those who are directly and indirectly involved in an action tainted by inaction, the civil justice system as a whole and the greater community. Litigation is a form of stress that has the potential to make those directly and indirectly affected unhappy – litigation is expensive, introduces uncertainty and may undermine a person's ability to earn a livelihood and to plan ahead – and may diminish the productivity of the persons affected by the unresolved dispute. People understandably expect that the mechanisms our state has constructed for the resolution of disputes will process them at a reasonable rate and not allow stale actions to survive. When these legitimate expectations are not met, individuals most closely linked to actions and the greater community may lose confidence and respect for the manner in which justice is administered. Litigation delay is a corrosive force in a free and democratic state committed to the rule of law.

[76] These considerations, in my view, require assessment of this litigation with a critical eye. Based on the foregoing analysis, I find that WestJet has established the necessary grounds pursuant to Rule 4.31 and the counterclaim is therefore dismissed.

[77] As the successful party, WestJet is entitled to costs of this application. If the parties are unable to agree on the quantum of those costs, each may provide me with written submission, not to exceed five pages, within 45 days of the date of this decision.

Heard on the 24th day of April, 2023.
Dated at the City of Calgary, Alberta this 5th day of July, 2023.

J.T. McCarthy
J.C.K.B.A.

Appearances:

Blake P. Hafso
McLennan Ross LLP
for WestJet

Ian S. Wilson
Miller Thomson LLP
for ELS