In the Court of Appeal of Alberta

Citation: Edmonton (City) v Clara Industrial Services Limited, 2024 ABCA 416

Date: 20241219
Docket: 2303-0147AC
Registry: Edmonton

Between:

The City of Edmonton

Appellant

- and -

Clara Industrial Services Limited

Respondent

- and -

Alberco Construction Ltd, Dialog Alberta Architecture Engineering Interior Design Planning Inc, Termarust Technologies Inc, Coveright Surfaces Canada Inc, Akzo Nobel Coatings International B.V., Tisi Inspection Services West, Inc, ABC Corporation, Corporation Bridgecote operating as Termarust Technologies and Dolores Lindal

Not Parties to the Appeal

The Court:

The Honourable Justice April Grosse
The Honourable Justice Alice Woolley
The Honourable Justice Joshua B. Hawkes

Memorandum of Judgment

Appeal from the Order of
The Honourable Justice K. Teskey
Dated the 23rd day of June, 2023
Filed on the 6th day of July, 2023
(Docket: 1303 07965)

Memorandum of Judgment

The Court:

Background

[1] In 2006, the respondent Clara Industrial Services Limited painted the Low Level Bridge in Edmonton using paint manufactured by the defendant Termarust Technologies Inc. The respondent and Termarust provided the appellant City of Edmonton with a five-year warranty. By 2008, it became apparent there were defects and deficiencies in the paint on the bridge and, in late 2011, the appellant requested that the respondent and Termarust honour their warranty. The respondent denied liability under the warranty, asserting that it applied the paint in accordance with the applicable specifications; it refused to repair the paint failure.

[2] On June 5, 2013, the appellant filed its statement of claim. It served the statement of claim on the respondent on April 28, 2014, advising the respondent that it did not need to file a statement of defence, and that reasonable notice would be given if one was needed.

[3] On August 27, 2014, the appellant amended its statement of claim to add an additional defendant. It otherwise took no formal steps to advance its litigation until June 2018, when it requested that the respondent file its statement of defence. The appellant had obtained two expert reports, one from Dr Li which it provided to the respondent on August 7, 2015, and one from Dr Ellis which it provided to the respondent on June 29, 2018. The two expert reports addressed the cause of the paint failure, identifying both the paint and its application as sources of the failure. The Ellis report also estimated the cost of repairing the paint based on the cost of painting the bridge in 2006 adjusted for inflation.

[4] The appellant and respondent had a meeting in October 2015 to discuss the dispute; the court below agreed with the respondent that that meeting was without prejudice. Correspondence from the appellant after that meeting indicated that, despite receiving the Li report, the respondent continued to deny responsibility for the paint failure.

[5] When the appellant contacted the respondent in June 2018 to advise it would be sending the respondent the Ellis report, it indicated that it understood there to be a standstill agreement between them. The respondent advised there was no such agreement and that it expected it would be seeking to have the action struck for delay. On July 25, 2018, the respondent filed that application, which also sought summary dismissal of the action based on it having been filed after the expiry of the limitation period.

[6] In a written decision dated December 15, 2021 (*Edmonton (City) v Alberco Construction Ltd*, 2021 ABQB 1006), the applications judge denied the respondent's application. The respondent appealed, and in an oral judgment delivered June 23, 2023, the chambers judge allowed

the appeal, holding that the action ought to be dismissed for prejudicial delay. The appellant appeals the chambers judge's decision to dismiss the action.

Standard of Review

[7] The decision to dismiss an action for delay "engages a certain element of discretion" and is entitled to deference unless "the exercise of that discretion is based on an error in principle, or is clearly unreasonable". Decisions about the existence and nature of delay in an action, and its effect on the other party, raise questions of fact, and will not be disturbed by this Court absent palpable and overriding error: *Royal Bank of Canada v Levy*, 2020 ABCA 338 at paras 11-12 [*Royal Bank*]; *Cochrane (Town) v Austech Holdings Inc*, 2022 ABCA 377 at para 22 [*Cochrane*]; *Alston v Haywood Securities Inc*, 2022 ABCA 84 at para 10.

Dismissal for Delay – Rule 4.31

[8] Rule 4.31(1)(a) of the *Alberta Rules of Court*, Alta Reg 124/2010 empowers the court to dismiss all or part of a claim where delay has resulted in significant prejudice to a party. Rule 4.31(2) provides that significant prejudice will be presumed where delay is "inordinate and inexcusable".

[9] The assessment of the nature and significance of delay in an action depends on the specific circumstances, taking into account the "overall delay" as well as "gaps between steps": *Royal Bank* at para 14. The assessment of the delay is based on "the entire action, and not segments": *Arbeau v Schulz*, 2019 ABCA 204 at para 27 [*Arbeau*]; *Cochrane* at para 25. To determine whether the delay is inordinate, a court will consider whether the time taken 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": *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2019 ABCA 276 at para 18 [*Transamerica*], citing *Kuziw v Kucheran Estate*, 2000 ABCA 226 at para 31.

[10] The ultimate consideration is always whether the non-delaying party has suffered "significant prejudice" as a result of the delay: *Transamerica* at para 21.

Analysis

[11] We are satisfied that the chambers judge made no reviewable error in dismissing the appellant's action against the respondent. He correctly identified the applicable legal principles and did not make a palpable and overriding error in his assessment of the nature and significance of the delay, and its effect on the respondent.

Assessment of Delay

[12] With respect to the nature and significance of the delay, the chambers judge emphasized the absence of formal procedural steps taken to advance the litigation beyond filing the statement

of claim, finding that "the litigation from a procedural standpoint had not left the starting gates" and that, if allowed to proceed, "it would be years before this matter was ready for trial". The chambers judge acknowledged that obtaining expert reports was reasonable and useful, but found that there was no reason for doing so to exclude "every other usual step we expect of litigants". It "was unreasonable for the City to take effectively 5 years to produce two expert reports and do nothing by way of examination or record exchange". He rejected the suggestion that the respondent had acquiesced in the appellant's approach to the litigation.

[13] The appellant submits that the chambers judge erred in this assessment, and that the only problematic delay was the gap between correspondence it sent the respondent in early 2016 and June 2018 when it provided the Ellis report to the respondent. It points out the reasonableness of obtaining expert reports prior to taking formal steps in the litigation and submits that the chambers judge erred by impugning the value of the Ellis report. It notes as well that it had no legal obligation to serve the statement of claim before the expiry of the permitted time for service, and that the time it took to do so cannot properly be counted against it. The appellant submits that the record shows that the respondent participated in the delay and acquiesced in the manner in which the appellant tried to resolve the dispute.

[14] In our view, the chambers judge did not make an error in principle in his assessment of the nature and significance of the delay. Delay in the progress of litigation is to be assessed in its totality, not in segments: *Arbeau* at para 27. His reasons do not suggest that it was improper for the appellant not to serve the statement of claim immediately; he simply observed the time between filing and service in his summary of the facts, and accurately described the litigation steps taken between filing the claim and the respondent's Rule 4.31 application.

[15] The chambers judge acknowledged that obtaining expert reports "may have been of assistance", and that the Li report was of value and prepared in a reasonable time. His critique of the appropriateness and timeliness of the Ellis report was available on the record before him and, in any event, his primary concern was with the absence of other litigation steps while the expert reports were obtained. As discussed below, the chambers judge reasonably determined that the absence of procedural steps between the completion of the Li report in August 2015 and the Ellis report in June 2018 resulted in significant prejudice to the respondent; "the degree of prejudice is generally more important than the raw passage of time": *Royal Bank* at para 17.

[16] With respect to his finding that the respondent did not acquiesce in the delay, the chambers judge's conclusions were available to him on the record. The appellant had advised the respondent that it did not need to file a statement of defence, the parties had not entered into a standstill agreement and the evidence did not establish that the respondent had otherwise agreed to the appellant's approach to the litigation. The chambers judge's assessment of the respondent's conduct reveals no palpable and overriding error.

[17] The appellant relies on other case law which it submits featured more significant or material delay than occurred here. Relying on *Transamerica* at para 21, it says that this case does

not fit within the "slowest examples" of cases meriting dismissal. Given the case specific nature of the assessment of prejudicial delay, however, these case comparators are of minimal assistance. The chambers judge did not make a palpable and overriding error by emphasizing the absence of any litigation steps other than obtaining the expert reports after serving the statement of claim in 2014, in finding that there was no reasonable excuse or justification for that lack of progress, or in his assessment of prejudice.

Assessment of Prejudice

[18] The chambers judge found that the respondent had suffered significant actual prejudice. He did not accept that this case rested primarily on experts or documents. He agreed with the respondent that *viva voce* evidence from the people present during the application of the paint would be "critical". He emphasized the prejudice arising from the death of two of those potential witnesses, one of whom, Mr. Wentrot, died in 2017, during the period that the chambers judge identified as involving unexcused delay. The chambers judge also expressed concern over the absence of record exchange and questioning, given that "memories fade and documents may be lost", noting that the absence of those steps meant that there "has literally been no preservation of evidence at all". He described the respondent as being in the position of "the unknown unknown", where the extent of the prejudice is partially obscured by "the lack of examination or record exchange". He further identified the possibility of prejudice to the respondent from the paint used on the bridge having solidified, which he described as "another piece of key evidence which has deteriorated over time" and which, given the very limited progress in the litigation over a five-year period, could be considered "part of the significant prejudice in this matter".

[19] The appellant submits that the chambers judge erred because the prejudice he identified was unconnected to what it says was the only relevant delay, from 2016 to 2018. It emphasizes that even if the appellant had advanced the litigation as quickly as possible, a trial would not have occurred prior to Mr. Wentrot's death in 2017, and that the loss of evidence from Mr. Wentrot through questioning would injure the appellant, not the respondent, since only the appellant can read in questioning responses at trial. It points out that the effect of the paint having solidified is unknown. It emphasizes that the relevant records have been retained by both parties since the commencement of the litigation and are documented in significant part through the expert reports, such that the absence of formal document production did not result in prejudice to the respondent.

[20] The chambers judge did not make a palpable and overriding error or an error in principle in his assessment of prejudice. As of late 2015, the appellant knew that the respondent continued to deny liability despite the contents of the Li report. Had it at that point advanced the litigation, requiring the respondent to file a statement of defence, exchanging affidavits of records and providing representatives for questioning, the respondent would have begun the preparation of its case in earnest. It is reasonable to infer that the respondent's representative would have informed themselves with respect to potential evidence from persons with knowledge, including Mr. Wentrot. After 2017, that evidence was no longer available to the respondent, and the chambers

judge did not make a palpable and overriding error in finding significant prejudice to have arisen as a result.

[21] The chambers judge also did not make a palpable and overriding error in finding that the absence of document production and questioning created prejudice for the respondent. While records have been maintained, the sufficiency and completeness of that retention has not been tested. The specific nature of a dispute crystallizes in the litigation process, through the filing of a statement of defence, the production of records, and questioning. The chambers judge reasonably emphasized this point in identifying the "unknown unknown" faced by the respondent. Similarly, while the exact effect of the paint solidifying is uncertain, as is the time when the deterioration occurred, the trial judge did not make a palpable and overriding error in describing this as evidence that had deteriorated over time and as an aspect of the prejudice to the respondent. He did not place undue emphasis on the deterioration of the paint, and he was entitled to consider it as part of his assessment of prejudice to the respondent.

Conclusion

[22] As this Court stated in *Royal Bank*, the decision on whether to dismiss an action for delay "engages a certain element of discretion. Unless the exercise of that discretion is based on an error in principle, or is clearly unreasonable, deference is warranted on appeal": *Royal Bank* at para 11. No such error was made by the chambers judge. The appeal is dismissed.

Appeal heard on November 27, 2024

Memorandum filed at Edmonton, Alberta
this 19th day of December, 2024

Grosse J.A.

Woolley J.A.

Hawkes J.A.

Appearances:

B.E.K. Wallace, KC
B. Angove
for the Appellant

J.L. Cairns, KC
for the Respondent