IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *SAAN Stores Ltd.* v. *328995 Alberta Ltd. et al*, 2006 YKSC 46

Date: 20060808
Docket No.: S.C. No. 96–A0210
S.C. No. 96–A0271
Registry: Whitehorse

S.C. No. 96–A0210

Between:

SAAN STORES LTD.

Plaintiff

And

328995 ALBERTA LTD., ANTLER CONSTRUCTION LTD. and MCLEAN'S ELECTRIC LTD.

Defendants

And

ANTLER CONSTRUCTION LTD., MCLEAN'S ELECTRIC LTD., UNDERHILL & UNDERHILL PROFESSIONAL LAND SURVEYORS & ENGINEERS, UNDERHILL ENGINEERING LTD., DAN WOLFROM, MICHAEL FRASHER, PHILIP BROWN, JEFF KUZYK, JERRY CARTER and NAGEL'S METAL CONTRACTORS LTD.

Third Parties

S.C. No. 96–A0271

Between:

RICK HOLDINGS LTD. and 328995 ALBERTA LTD.

Plaintiffs

And

ANTLER CONSTRUCTION LTD., MCLEAN'S ELECTRIC LTD., DAN WOLFROM, UNDERHILL & UNDERHILL PROFESSIONAL LAND SURVEYORS & ENGINEERS, UNDERHILL ENGINEERING LTD., MIKE FRASHER, PHILIP BROWN, JEFF KUZYK and JERRY CARTER

Defendants

And

ANTLER CONSTRUCTION LTD., UNDERHILL & UNDERHILL PROFESSIONAL LAND SURVEYORS & ENGINEERS, UNDERHILL ENGINEERING LTD., DAN WOLFROM, MICHAEL FRASHER, and SAAN STORES LTD.

Third Parties

Before: Mr. Justice D. O'Connor

Appearances:

Michael Kinash	For McLean's Electric Ltd., Philip Brown, Jeff Kuzyk and Jerry Carter
Anthony Slemko	For SAAN Stores Ltd.
R. Grant MacDonald, Q.C.	For Underhill Engineering Ltd., Underhill & Underhill Professional Land Surveyors & Engineers and Michael Frasher
Ray G. Baril, Q.C.	For 328995 Alberta Ltd. and Rick Holdings Ltd.

REASONS FOR JUDGMENT

[1] The applicants, McLean's Electric Ltd., Philip Brown, Jeff Kuzyk and Jerry Carter, seek dismissal of two lawsuits for want of prosecution. The lawsuits relate to a SAAN clothing store in Whitehorse, which was destroyed by fire over 15 years ago. The plaintiffs in both

actions allege that the defendants were negligent during construction of the store, some 20 years ago.

[2] By order dated April 5, 2006, Mr. Justice Gower directed that the applications to dismiss the two lawsuits be heard together. The relevant facts relating to the two applications are to a large extent the same and I am satisfied that the two applications should be disposed of in the same manner.

EVIDENTIARY ISSUE

[3] The parties raised a preliminary evidentiary issue. As will became apparent in these reasons, the respondents rely upon certain without prejudice settlement discussions as a reason for some of the delay that is in issue. The applicants seek to introduce additional details of those discussions in order to put them in their proper context and to respond to the argument that the settlement discussions provided an excuse for delay.

[4] Normally, it is not permissible to refer to the details of without prejudice communications; however, there is an exception to the privilege that attaches to without prejudice communications when settlement negotiations are offered as an excuse for delay in the context of an application to dismiss an action for want of prosecution. See *Family Housing Association (Manchester) Ltd.* v*. Michael Hyde & Partners et al.,* [1993] 2 All ER 567, *Guccione* v*. Bell*, 2004 ABQB 729.

[5] Accordingly, I have considered all of the evidence relating to the settlement discussions among the parties in addressing the issues raised in these applications.

RELEVANT FACTS

[6] In 1986, 328995 Alberta Ltd., the owner of the property in issue, hired various contractors, including the applicants, to help construct a SAAN clothing store. Construction was substantially completed by the end of 1986.

[7] The building was destroyed by fire on January 2, 1991.

[8] In late 1996, the two lawsuits which underlie these applications were commenced, claiming damages as a result of the fire. The plaintiff in action S.C. No. 96–A0210 is

SAAN Stores Ltd., (SAAN Stores) the tenant of the building. The plaintiffs in action S.C. No. 96–A0271 are 328995 Alberta Ltd., and Rick Holdings Ltd., the owner of the property and the corporation which constructed the building, respectively.

[9] The defendants, including the applicants, are companies or individuals who were involved in the construction of the building and in particular, the installation of electrical equipment in 1986.

[10] The pleadings were essentially completed by July 1997.

[11] Examinations for Discovery were initially scheduled for July 1998, but were cancelled by the solicitors for the applicants, as were two subsequently scheduled discovery dates. In August and September of 1999, an officer of SAAN Stores and the applicants were examined for discovery. The officer for SAAN Stores undertook to provide answers to 85 questions that were left unanswered at the examination. Approximately 70 of those undertakings were answered in July 2001.

[12] As an aside, I note that by 2000 this had become an historical case in the sense that the facts underlying the dispute had occurred 14 years earlier. Despite that, there is no serious argument that at that point there had been inexcusable delay on the part of the plaintiffs. The plaintiffs had waited until late in the six-year limitation period to start the actions, however, they were entitled to do so. The pleadings and the discoveries had proceeded at an acceptable pace and the plaintiff SAAN Stores was in the process of answering its undertakings.

[13] The next significant event in the litigation occurred in February 2003, when the parties met and the plaintiffs provided the defendants with their expert reports. There is little in the record to explain the lack of activity during the period leading up to that meeting. Significantly however, the applicants changed counsel on two occasions during this period. SAAN Stores also changed counsel in this time period. It seems logical that the changes in counsel would cause some delay. The applicants' present solicitor was retained in October 2002 and initiated the February 2003 meeting.

[14] Following the February 2003 meeting there were periodic discussions about proceeding to Judicial Dispute Resolution or mediation. In the end, one of the defendants, which is

not involved in these applications, refused to participate and thus no Judicial Dispute Resolution or mediation took place. In addition, during this period offers to settle were exchanged and in July 2005, plaintiffs' counsel had a meeting with counsel for one of the defendants to discuss the proceedings. In late 2005 the plaintiffs in the two actions made further offers to settle. In January 2006, the applicants moved to dismiss the actions for want of prosecution.

[15] There is little in the record to suggest that prior to the February 2003 meeting any of the defendants suggested that the action should proceed more quickly. Indeed, as I mentioned above, the applicants changed counsel on two occasions.

[16] During the communications among the parties following the February 2003 meeting, the defendants on a few occasions indicated that the plaintiffs should get on with the litigation. It is fair to say, however, that none of the defendants pressed the matter, nor was there any suggestion that an application to dismiss for want of prosecution would be brought before these applications were initiated in January 2006.

ANALYSIS

[17] Rule 2(7) of the *Supreme Court Rules* provides:

> 2(7) Dismissal for Want of Prosecution
>
> If upon application by a party it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[18] The requirements for a determination that an order should be dismissed for want of prosecution can be summarized as follows:

(i) there has been inordinate delay;

(ii) the inordinate delay is inexcusable;

(iii) the delay has caused serious prejudice or is likely to cause serious prejudice to the defendants; and

(iv) even if the first three requirements are met, the court must still determine that the balance of justice demands that the action be dismissed.

Irving v. *Irving*, [1982] B.C.J. No. 970 (B.C.C.A.) at para. 8.

[19] I have concluded that even if the first three requirements are met, the balance of justice does not require that these actions be dismissed. Obviously, dismissing an action for want of prosecution is a serious matter. Given the history of this case, I have concluded that rather than dismissing the actions, the interests of justice would be better served by implementing the steps that I describe below. Before I come to those steps, I will set out my reasons.

[20] I accept the applicants' submission that the delays in prosecuting these actions are inordinate. As the applicants point out, determining whether a delay is inordinate in cases like these, is often obvious. You know inordinate delay when you see it. In considering whether a delay is inordinate, it is open to a court to consider the entire time period after the cause of action arose, including the time prior to filing the Statement of Claim. These actions relate to events that occurred approximately 20 years ago. The cause of action arose 15 years ago in 1991. The actions are now close to 10 years old. Discoveries have not been completed and there will be further delay before the actions can be listed for trial. The delays are inordinate.

[21] The question of whether the delays are inexcusable is more difficult. The plaintiffs were entitled to wait until the end of the six-year limitation period before starting their actions. However, I agree with the applicants that having done so, they were under an increased onus to get on with the proceedings so that any subsequent delays would not become inordinate. As I said above, there is no problem with how the plaintiffs proceeded up to the discoveries held in August and September 1999. Indeed, during that period the applicants appear to have been responsible for one year of delay by canceling scheduled discoveries.

[22] The plaintiff SAAN Store was slow in answering its undertakings and I note that even in 2001, it had not answered all of the undertakings and has not done so to date. While it is not entirely clear, it appears that the rather frequent changes of solicitors, including twice by the applicants, caused some further delay during the period leading up to the meeting of February 2003.

[23] The meeting of February 2003 was a significant step in the litigation. Although not required by the *Rules*, the plaintiffs presented their expert reports, a step which could have helped narrow issues and promote settlement discussions.

[24] Prior to February 2003, there had been little, if any, encouragement from the defendants to get on with the actions. I recognize that a defendant has no obligation to encourage a plaintiff to prosecute a lawsuit and that inordinate delays do not become excusable because a defendant appears to tolerate slow progress. However, in this case, the defendants had contributed to some of the delay, by canceling discoveries and possibly by changing counsel. In addition, the defendants, including the applicants, have not taken any steps to complete their Examinations for Discovery. Counsel for the applicants indicated that should these actions proceed, he will seek to examine an additional four or five individuals.

[25] I have concluded that the delay before the February 2003 meeting, while inordinate, was not inexcusable.

[26] Following that meeting, attempts were made to arrange Judicial Dispute Resolution and mediation and some offers to settle were exchanged. However, nothing was done to prosecute the actions. It was reasonable to pursue the settlement initiatives and to allow some time, perhaps six months, to attempt to resolve the actions before incurring further expense in prosecuting the actions. However, over two-and-a-half years passed before these applications were commenced. At some point during that period, the plaintiffs should have got on with these actions. In particular, SAAN Stores should have completed answering the remaining undertakings and taken steps to complete the remaining discoveries.

[27] Thus, I am satisfied that the plaintiffs are responsible for some inexcusable delay in the period following the February 2003 meeting.

[28] That said, the inexcusable delay in these cases is far from the most egregious kind of delay. To start, I am satisfied that the delay was neither tactical nor intentional, factors frequently present when inordinate delays are found to be inexcusable. Rather, the delays here were caused, in part at least, by the plaintiffs' efforts to resolve the cases

without incurring further expense, a laudable objective. The problem of course is that the plaintiffs did not pursue those efforts with diligence.

[29] I turn now to the issue of whether the delay in these cases has caused prejudice to the applicants.

[30] The applicants have not established any actual prejudice resulting from the delay. Their main contention in this regard is that the events giving rise to the causes of action are now 20 years old and that memories of witnesses will have faded. That may be, however, even without the inordinate delay, this was an historical case. The evidence at trial was always going to relate to events that had occurred many years previous. I am very doubtful that if these actions now proceed to trial on an expedited basis as I direct, there will be much, if any, additional memory loss from the delay. The fact of the matter is, that some cases must be tried many years after the relevant events took place. Commonly, courts must cope with the passage of time when deciding cases. In addition, in these cases, the plaintiffs point out that a number of important issues at trial will turn more on documents and expert opinions than on *viva voce* evidence that is dependant on memories.

[31] The applicants also argue that because of the delay, some witnesses may not be located, some documents may not be available (the inspection reports in particular) and a piece of physical evidence (the roof top unit) may have gone missing. Leaving aside the relevance of these pieces of evidence, it is not clear at this point whether any of these problems will in fact arise.

[32] Finally, as to actual prejudice, the applicants point to the death of one of the plaintiff's experts who examined the fire scene. Although the parties could not be precise, it appears that the expert died sometime in the 1990's, before there is any suggestion of unacceptable delay. Moreover, all of the parties have the advantage of his report which was produced during the February 2003 meeting.

[33] Thus, at this stage at least, I am not satisfied that the applicants have suffered any actual prejudice.

[34] However, the fact that the applicants have not established actual prejudice does not end the consideration of the issue of prejudice. Once a defendant has established that the delay has been inordinate and inexcusable, a rebuttable presumption of prejudice arises. Proof of actual prejudice does not need to be addressed by the applicants for the motion to succeed. It falls to the plaintiff to rebut the presumption. See *Busse* v. *Robinson Morelli Chertkow*, 1999 BCCA 313 at para. 18.

[35] I have found that there was some inordinate and inexcusable delay, albeit limited in duration and seriousness. The presumption therefore arises.

[36] The plaintiffs have satisfied me that in many respects there has been no prejudice. They have located several of the witnesses who the applicants say might provide material evidence. However, there is some doubt whether two witnesses, the inspectors, are still available. Most of the relevant documents are available, however, there may or may not be a problem obtaining the City of Whitehorse documents. Further, the roof top unit may no longer be available. It is by no means certain any of this evidence is not available, however, given that the plaintiffs bear the onus to rebut the presumption of prejudice, they must bear the responsibility for the failure to establish the availability of this evidence on this motion. That said, it is not clear to me how necessary or material any of this evidence is and whether there is other evidence available that would address the same issues.

[37] In the end, I conclude that the plaintiffs have not rebutted some aspects of the presumption of prejudice, however, this is far from the most serious case of prejudice that one can imagine. As I say, if these actions proceed, the potential problems may be resolved.

[38] That then brings me to the final requirement for a dismissal application – whether on balance, justice demands that the action should be dismissed.

[39] I have concluded that on balance, it would be just for these actions to proceed on the terms set out below for three reasons. First, these are essentially actions resolving disputes among insurance companies about who should bear the loss from the fire. Effectively, the plaintiffs are insurance companies asserting subrogated claims. The applicants, with one exception, are covered by insurance and the one individual who is

not, is represented by counsel for an insurer. The point is that the parties to this dispute are sophisticated and experienced litigants. This is not a case where defendants are without resources, or are being taken advantage of by the plaintiffs' actions in unduly protracting the litigation.

[40] Second, the length of the inexcusable delay is relatively short and importantly the conduct of the plaintiffs in causing the inexcusable delay is at the benign end of the spectrum. The delay attributable to the plaintiffs has not been shown to be either intentional or tactical. At worst, the plaintiffs were too inattentive to their responsibility to prosecute these actions.

[41] Finally, there has been no showing of actual prejudice and the prejudice that is presumed may well not materialize and if so, may be of little substance. I am not persuaded that a fair trial is not still possible.

[42] Dismissal for want of prosecution is a serious matter, and I am satisfied the plaintiffs should be given an opportunity to remedy the situation by proceeding with the actions on an expedited basis.

DISPOSITION

[43] In the result, I dismiss the applications on the conditions set out below.

[44] I direct that the plaintiffs apply by August 22, 2006, to have these cases managed by Mr. Justice Veale. I leave it to Mr. Justice Veale to set the schedule for proceeding. I would suggest, however, that all of the remaining procedural steps necessary to set the actions for trial be completed within six months. In short, these cases should be fast-tracked.

[45] My decision to dismiss these applications is made without prejudice to the right of the applicants to bring new applications to dismiss for want of prosecution. Obviously if the plaintiffs are responsible for any inexcusable delay in the future, it should be open to the applicants to bring further applications. In addition, in making this direction, I have in mind the question of prejudice. If it turns out, after further investigation or further

discoveries, that there will be actual prejudice to the applicants resulting from the delay, then the applicants should be free to apply again for an order dismissing the actions.

[46] Finally, I direct that the plaintiffs pay to the applicants the reasonable costs of this application on a solicitor-client basis. Normally costs follow the event. However, I have found that the plaintiffs were responsible for some inexcusable delay. The applicants were entirely justified in bringing these applications. Indeed, the result of these applications is that the plaintiffs will be required to do what they should have done sooner. Had the applicants not brought these applications, the actions would likely have languished even longer. The plaintiffs can sort out among themselves how to apportion payment of these costs. If there are disputes about the amount of the costs or the apportionment among the plaintiffs, I may be spoken to.

[47] There will be no order as to costs for the Underhill defendants who were represented on the applications, but who did not actively participate.

Justice D. O'Connor