Court of Queen's Bench of Alberta

Citation: Song v Fong, 2019 ABQB 119

Date: 20190226
Docket: 0903 18386
Registry: Edmonton

Between:

Alexander Song by His Guardians and Next Friends Kwan Song and Soon Song, Kwan Song and Soon Song

Plaintiffs/Respondents

- and -

Andrew Fong and Andrew Fong Professional Corporation, and Henry Kenneth Mah Carrying on Business As Mah & Company

Defendants/Applicants

Corrected judgment: A corrigendum was issued on February 26, 2019; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision of the Honourable Mr. Justice Douglas R. Mah[1]

A. Background

[1] On appeal from the Master, the Court is tasked with determining whether this action should be dismissed for inordinate delay under Rule 4.31, using the framework established in ***Humphreys v Trebilcock***, 2017 ABCA 116 at paras 150-156.

[1] One of the Defendants has the same last name as me. I advised counsel at the hearing that I do not know this individual, have never met him and certainly am not related to him. In any event, the action was discontinued against this individual back in 2010 and he was not a party to the appeal before me.

[2] The Plaintiff, Mr. Song, was charged with second degree murder in 2003. The following year he retained the Defendant lawyer, Mr. Fong, to defend him. Prior to the matter reaching trial, Mr. Song was assaulted by another inmate while in remand and suffered a serious brain injury. After a jury trial in 2006, Mr. Song was convicted of second degree murder and then sentenced to life imprisonment with no parole eligibility for 12 years. Mr. Song successfully appealed the conviction with different counsel and through negotiation with the Crown, eventually pled guilty to manslaughter and was sentenced to time served.

[3] Thereafter, Mr. Song, by his litigation representative, commenced a negligence action against Mr. Fong, first in 2008 and then again in 2009. The first action did not proceed beyond Statement of Claim issuance. The second action is the subject of this Application.

B. Timeline

[4]

Date Range of Events Alleged in Statement of Claim	June 2004 to October 2006
First Statement of Claim issued. (Note: never served)	October 2008
Second Statement of Claim issued	November 29, 2009
Second Statement of Claim served	February 4, 2010
Statement of Defence filed	December 29, 2010
Plaintiff serves Affidavit of Records	September 24, 2013
Defendant serves Affidavit of Records	November 21, 2013
Defendants' producible records provided to Plaintiff	January 3, 2014
Plaintiff's counsel requests available Questioning dates from Defendant's counsel. (Note: no response ever received.)	January 19, 2015
Plaintiff's counsel serves Notice of Appointment for Questioning on Defendant's counsel	September 19, 2016
Standstill Agreement entered into suspending operation of Rules 4.31 and 4.33 effective October 17, 2016	October 18, 2016

C. Issues

[5] The standard of review with respect to an appeal of a Master's decision to this Court on all matters is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

[6] Counsel agree that the learned Master applied the wrong standard in determining that the presumption of significant prejudice found in Rule 4.31(2) was rebutted. It was jointly submitted that the "legitimate doubt" standard relied upon by the Master has since been replaced by the "balance of probabilities" standard per ***Humphreys*** at para 149. However, Plaintiffs' counsel asserts that, regardless of the standard applied, the result reached by the Master is correct and accords with the current standard.

[7] Counsel also agree that the action has not been prosecuted diligently. They disagree as to whether the delay has been inordinate and inexcusable within the meaning of Rule 4.31 with reference to the relative degree of responsibility of each party for the delay, and as to prejudice.

[8] Following argument by counsel at the hearing, I have concluded that I only need to focus on two aspects of the ***Humphreys*** framework in order to determine this Appeal:

- Whether any contribution to delay on the part of the Defendant means the delay is not inordinate and inexcusable; and
- Whether Mr. Fong has suffered significant prejudice, either actual or presumed, as the result of any delay and, if the latter, whether the presumption is rebutted.

D. Inordinate and Inexcusable Delay

[9] For the purposes of Rule 4.31, I must measure the period of delay and examine the state of the litigation's progress to determine whether the Rule is engaged.

[10] For that purpose, I disregard the first Statement of Claim. The action was in effect abandoned before service. What concerns the Court now is not overall delay on the part of the Plaintiff, but rather, delay with respect to the prosecution of this action. Therefore, the starting point is the issuance of the second Statement of Claim on November 29, 2009. Delay for the purposes of the Rule means the elapse of time. The termination point for this period is October 17, 2016, as a result of the standstill agreement that was put in place. This results in a total delay of just under seven years.

[11] During that span, the following was accomplished:

- Service of the Statement of Claim;
- Filing and service of the Statement of Defence;
- Exchange of Affidavits of Records;
- Production of Defendant's Records to the Plaintiffs; and
- Service of a Notice of Appointment for Questioning on Defendant's counsel.

[12] That is the totality of it. No Questioning for Discovery has taken place. In this regard, I agree with the Master that the litigation is not at a point one would normally expect following this period of time, and that the delay, without more, is both inordinate and inexcusable.

E. Defendant's Contribution to Delay

[13] The delay alleged consists of Defendant's counsel's failure to respond to a January 19, 2015 request for Questioning dates. The next occurrence on the file was Plaintiffs' counsel service of a Notice of Appointment for Questioning, by which time a further year and eight months had elapsed.

[14] Ms. Smith, now acting for the Plaintiffs, asserts that delay for the purposes of Rule 4.31, and the responsibility for it, must be assessed in context with the foundational Rules and, in particular, foundational Rule 1.2, which imposes duties of timeliness on both parties.

[15] With regard to the duties of a defendant under this Rule, the Court of Appeal in ***Janstar Homes v Elbow Valley West Ltd***, 2016 ABCA 417, says at para 26 (emphasis added):

> With respect to the foundational Rule 1.2, two comments are in order. First, it does not override the clear mandatory language of Rule 4.33. Second, it does not have the effect of requiring a defendant, in any manner, to assume carriage of an action where the plaintiff is not actively advancing its own claim. The initiative at all times remains with the plaintiff to pursue its lawsuit in a timely fashion: ***XS Technologies Inc v Veritas DGC Land Ltd***, 2016 ABCA 165 (CanLii) at para 7. <u>On the other hand, a defendant is obliged, pursuant to the foundational Rule 1.2, not to engage in tactics that obstruct, stall or delay an action that the Plaintiff is advancing.</u>

[16] The Plaintiffs rely on Graesser J's application of the above passage in ***Jacobs v McElhanney Land Surveys Ltd***, 2018 ABQB 867, where he says at para 96:

> The case law recognizes that the plaintiff is primarily responsible to move the action along. That is clear from ***Janstar Homes v Elbow Valley West Ltd***, quoted above. Nevertheless, the defendant may not benefit from "tactics that obstruct, stall or delay an action that the plaintiff is advancing".

[17] No explanation was offered for the failure of Defendant's counsel to respond to the January 19, 2015 letter requesting Questioning dates. Mr. Fong said he does not know why there was no response. Ms. Smith suggested that the reason is unimportant and what matters is the fact of the delay that was caused. However, it seems to me, that the duty imposed on a defendant, by foundational Rule 1.2, as characterized by ***Janstar Homes*** and ***Jacobs***, is not to engage in "tactics" that have the effect of stalling or delaying an action that the plaintiff is advancing. For example, in ***Jacobs***, Graesser J in paras 96 through 108 catalogues the various obstruction and stalling tactics employed by the defendant to frustrate the advancement of the plaintiff's action. He characterizes the defendant's conduct as follows at para 110:

> Both parties have responsibilities. Since the new Rules came into effect in 2010, the Courts have minimized defendants' responsibilities to move the action along. But they have also held that the action cannot "obstruct, stall or delay" the plaintiff. In my view, forcing the plaintiff to make applications at every procedural step of the way does nothing to facilitate the quickest means of

> resolving the claim at the least expense. Requiring the plaintiff to file applications to take proceedings that do not further speedy or economical resolution also runs afoul of the Rule, and forcing the plaintiff to make procedural applications that could easily be avoided with a reasonable measure of courtesy and cooperation is certainly a waste of publicly funded court resources.

[18] Here, I have no evidence before me from which I can conclude or even infer the failure to respond to the January 19, 2015 letter was tactical and deliberate, as opposed to a more benign reason such as, let's say, inadvertence. Even so, I note that the letter requested Questioning dates in May 2015. Surely, by that date, it would have occurred to then Plaintiffs' counsel that Questioning in May was not going to occur and something else needed to be done in order to move the litigation ahead. Indeed, after the passage of a few weeks, Plaintiffs' counsel should have done something: make a telephone call or write a letter to opposite counsel seeking a response, have an assistant call the other's assistant to set up the Questioning date, or serve a Notice of Appointment.

[19] That something else was indeed done on September 19, 2016, when then Plaintiffs' counsel served the Notice of Appointment for Questioning. That was 15 months after the originally proposed Questioning dates.

[20] I absolutely agree that the Defendant's counsel should have responded to the January 19, 2015 letter in a timely fashion to meet the spirit of Rule 1.2. However, the mere sending of the letter cannot shift the onus to the Defendant to move the matter ahead and allow the Plaintiffs to sit back and await the Defendant's action. Indeed, Ms. Smith took pains at the hearing to say she was not suggesting in any way that the onus for prosecuting the action was reversed, only that in assessing delay, any delay by the Defendant is relevant. That may be so, but surely by May 2015 at latest, something else needed to be done by the Plaintiffs.

[21] The one instance of failing to respond to a letter cannot be equated to the litany of deliberate obstructionist tactics employed by the Defendant in ***Jacobs***. It is a matter of degree. In this case, I find that the failure to respond to the letter did not appreciably add to the delay.

[22] Ms. Smith, quite candidly, stated at the hearing that but for the failure on Defendant's counsel's part to respond to the January 19, 2015 letter, there would have been no application before me. I find that this failure to respond to the letter does not neutralize the inordinate delay nor provides an excuse for it. At the very most it would have added five months to the delay. Six and a half years of delay is still inordinate and inexcusable in this case.

F. Prejudice to the Defendant

[23] Counsel for Mr. Song takes the position that there is no significant prejudice to Mr. Fong, or alternatively, even if there has been inordinate and inexcusable delay, the presumption of prejudice found in Rule 4.31(2) is rebutted. The lack of significant prejudice or the rebuttal of the presumption can be found in the transcript of Mr. Fong's Questioning on Affidavit, and the exhibits therefrom consisting of letters exchanged between Mr. Fong and Mr. Bloos (successor counsel) in the latter part of 2006.

[24] The documentary record is incomplete because Mr. Fong misplaced or lost the two trial binders pertaining to Mr. Song's matter shortly after the trial was completed in October 2006. Those binders constituted, in effect, Mr. Fong's record of his dealings with Mr. Song on the

murder charge and his handling of the file. The loss of the binders occurred before Mr. Fong had any idea that he would be sued by Mr. Song and his parents for the way the criminal case was conducted.

[25] Further, the trust accounting records in relation to the matter were more latterly disposed of by Mr. Fong's office in the "normal course" notwithstanding that this litigation had commenced. These records might have shed further light on Mr. Fong's handling of certain retainer funds, the misuse of which is also claimed in the Statement of Claim. However, neither counsel considered the accounting records or the allegation of misuse of funds to be a significant issue in the appeal before me.

[26] The Questioning on Mr. Fong's Affidavit went well beyond the content of the Affidavit, which was essentially a recitation of the timeline set out in Section B above. The first 40 pages of the transcript were primarily an exploration of the accounting practices of Mr. Fong's office and his handling of the retainer funds. The balance of the Questioning (the remaining 74 pages) related to Mr. Fong's understanding of Mr. Song's competence following the brain injury, whether he knew at the time that Mr. Song's parents had been appointed guardians, his handling of plea negotiations, how he obtained obstructions from Mr. Song, his state of knowledge when corresponding with Mr. Bloos starting in October 2006 and his general handling of the matter. In short, much of the Questioning on Affidavit related to the merits of the action itself. This was characterized by Mr. Song's then counsel as testing the state of Mr. Fong's current memory.

[27] It is clear that Mr. Fong has a good recollection of his discussions with Crown counsel concerning a possible manslaughter plea and Mr. Song's reaction to the Crown's sentence proposal in that regard. He is also able to speak generally regarding his impressions of Mr. Song's competence to give meaningful instructions at the time. He was adamant that he was not aware that Mr. Song's parents had been appointed guardians at or before the trial and has some other clear memories.

[28] On the other hand, there are areas, particularly with respect to detail, where Mr. Fong's memory lapses. These examples can be found in the transcript:

- dates that certain conversations took place (for example, p 43, lines 25 to 22 and p 44, lines 1 to 9);
- whether he was told legal steps were taken for Mr. Song's parents to be appointed guardians (p 46, lines 6 to 27 and p 47, lines 1 to 4);
- when it was he told Mr. Bloos that the trial binders were missing (p 43, lines 25 to 22 and p 44, lines 1 to 9);
- who gave him instructions to write to the media concerning Mr. Song's condition (p 48, lines 6 to 16);
- whether he knew the trial binders were missing when first responding to Mr. Bloos (p 57, lines 7 to 16);
- whether he had a personal hand in compiling the second batch of correspondence sent to Mr. Bloos (p 59, line 1 to 5);
- whether or not he knew other information about the file that he had not disclosed to Mr. Bloos (p 65, lines 10 to 14);

- whether he informed Mr. Bloos that he was not aware that Mr. Song's parents had been appointed as guardians (p 67, line 27 and p 68, lines 1 to 3);
- whether he discussed a possible manslaughter plea with Mr. Song's parents (p 75, line 27 and p 76, lines 1 to 6);
- whether there was a discussion about adjourning the Board of Review hearing to the next day (p 84, lines 19 to 27);
- whether the judge's concern regarding the medical evidence not being current at the fitness hearing on October 2, 2006 was discussed with Mr. Song (p 106, lines 26 and 27); and
- whether Mr. Fong specifically discussed s 672.32 of the *Criminal Code* with Mr. Fong during the fitness hearing (p 109, line 27 and p 110, lines 1 to 3 and 9 to 18).

[29] Whether and when Mr. Fong should have reasonably known that Mr. Song's parents had been appointed as his guardians and the discussions Mr. Fong had with them concerning Mr. Song's criminal case would be important to Mr. Fong's defence. He is now unable to remember those details.

[30] In terms of non-litigation prejudice, Ms. Stevenson suggested that allegations of incompetence and financial malfeasance hanging over a lawyer's head would result in stress and loss of reputation. That could be the case, but unlike the deponent in ***Humphreys***, Mr. Fong did not depose specifically to such prejudice.

[31] Litigation prejudice, on the other hand, relates to the ability of Mr. Fong to defend himself. Here, I must concern myself with the Defendant's evidence and not the Plaintiff's evidence. Such evidence on the Defendant's part would consist of the state of his current memory, but also the memory of other witnesses who could support his version of the events, such as the Crown prosecutors with whom he dealt at the time.

[32] The Court of Appeal in ***Humphreys*** definitively outlines some of the aspects of litigation prejudice. Beginning at para 180, the Court of Appeal states that:

> [180] We are also satisfied that the appellants have made out a case of litigation prejudice.
>
> [181] Several reasons account for this determination.
>
> [182] First, the ability of persons to recall events accurately diminishes with the passage of time.[106] This is true even for persons with above-average recall skills. In this case witnesses will probably be asked in 2020 about events that occurred between 2003 and 2006 or between fourteen and seventeen years ago.

[33] The learned Master had noted at p 29, lines 11 to 14 of the transcript of that proceeding that the Defendant had failed to demonstrate prejudice. In that regard, she noted that "there has been no evidence other than with respect to Mr. Fong in terms of witness memories or experts that might be called."

[34] Footnote 106 in the ***Humphreys*** case addresses this point directly:

> [106] See ***M.L. Bruce Holdings Inc. v. Ceco Developments Ltd***., 2015 ABQB 604 (CanLII), 50 (Master) ("in light of the fact that the claim is based on oral agreements, memory lapse seems likely. Even if a plaintiff witness feels he or she has a very clear recollection of events, the witness' ability to answer questions in cross-examination may be compromised, because such questions often probe topics to which the witness has not given much, if any, thought"); ***Roebuck v. Mungovin***, [1994] 2 A.C. 224, 234 (H.L.) per Lord Browne-Wilkinson ("In the ordinary case the prejudice suffered by a defendant caused by the plaintiff's delay is the dimming of witnesses' memories. ... I have no doubt that [specific evidence] ... is not necessary and that a judge can infer that any substantial delay ... leads to a further loss of recollection"); ***Brisbane South Regional Health Authority v. Taylor***, [1996] HCA 25; 186 C.L.R. 541, 551 ("Prejudice may exist [on account of the passage of time] without the parties or anybody else realizing that it exists"); ***Lovie v. Medical Assurance Society NZ Ltd.***, [1992] 2 N.Z.L.R. 244, 254 (H.C.) ("One needs to guard ... against the danger of discounting the arguments based on the dimming of memories simply because often they cannot be adequately demonstrated"); ***Spitfire Nominees Pty. Ltd. v. Hall & Thompson***, [2001] VSCA 245, 40 (Vict. C.A.) ("[the lower court] could be well satisfied that the defendants and their witnesses would be placed at a distinct disadvantage by the plaintiffs having allowed 11 years to elapse before evidence could be given at trial") & ***Barker v. Wingo***, 407 U.S. 514, 532 (1972) ("Loss of memory ... is not always reflected in the record because what has been forgotten can rarely be shown").

[35] Consequently, I may infer simply from the passage of time that, for example, the memory of the particular Crown prosecutors (one of whom is now a Provincial Court Judge) who dealt with Mr. Fong in plea negotiations would have a compromised memory of what was discussed, particularly in light of the hundreds of cases they have dealt with since. This would consist of prejudice accruing to Mr. Fong.

[36] Further, the Court of Appeal at para 183 of ***Humphreys*** states:

> [183] Second, the appellants have not had the opportunity to question Mr. Humphreys, either in his capacity as a plaintiff or the representative of the corporate plaintiff. This means that the plaintiffs' star witness will not be required to disclose critical facts on which the plaintiffs rely until up to seventeen years after the events transpired. This is grossly unfair.

[37] Similarly, in this case, no Questioning for discovery of the Plaintiffs has taken place yet. If this lawsuit proceeds, such Questioning could take place this year, but that would mean that the Plaintiffs' side would not be required to disclose critical facts on which the Plaintiffs rely for some 13 to 15 years after the fact (the events having transpired between 2004 and 2006). Even if a trial were to take place within two years, this would mean that the Defendant would be answering some evidence that he will be hearing for the first time some 16 or 17 years after the fact (for example, the evidence of the brother, Daniel Song). It might even be said that the situation in ***Humphreys*** is less extreme than in the current case. In ***Humphreys***, some Questioning for discovery had taken place and the matter had been under case management for six years. In the present case, the litigation is still at the nascent stage. The mere passage of time, as in ***Humphreys***, is unfair to Mr. Fong.

[38] Finally, the learned Master found that the letters exchanged between Mr. Fong and Mr. Bloos contain information by which Mr. Fong can refresh his memory for the purpose of further Questioning and trial. However, this conclusion does not recognize what the Court of Appeal perceived in ***Humphreys*** that the documentary record, such as it is, still contains important gaps that can prejudice the Defendant. At para 184:

> [184] Third, while it is true that the disclosed documents will undoubtedly provide a paper trail tracking the distribution of assets, it is inevitable there will be questions the answers to which cannot be found in the documents. It is unrealistic to insist that moving parties catalogue these lacunae. They cannot possibly know at this stage of the litigation where the gaps are. This is especially so given that they have not had the opportunity to question Mr. Humphreys and explore his perception of the key events.

[39] Mr. Fong himself expressed this very notion at pp 63 to 65 of his Questioning on Affidavit with regard to the letters in question. He stated, in effect, that his responses in the letters address the questions he was asked by Mr. Bloos. They do not address the questions that Mr. Bloos did not ask. This is the very point that the Court of Appeal makes in ***Humphreys*** in para 184.

[40] My conclusion is that significant prejudice to the Defendant has been established. Even if the Defendant had relied on the presumption, then my finding would be that the presumption is not rebutted on a balance of probabilities.

G. Conclusion

[41] It is no small thing to deprive a Plaintiff of his or her day in court. Nonetheless, fairness is a two-way street. The Court of Appeal in ***Humphreys*** said this regarding fairness and the timely pursuit of litigation at para 143:

> [143] The purposes served by the Alberta Rules of Court do not require a refinement of the ordinary meaning of r. 4.31(1). A direction to interpret the rules to accomplish the expeditious resolution of differences is honored if the delay rule attaches onerous consequences to litigants who do not prosecute their actions with reasonable dispatch[89]. Nor is it unfair to prefer the interests of those who are harmed by the conduct of litigants who do not invest the resources needed to advance their action with reasonable urgency over those who are dilatory.[90] In addition, judicial resources are scarce and should not be made available to advance cases that have been largely ignored by those responsible for their prosecution.[91]

[42] Further, as noted in footnote 89 of ***Humphreys***:

> [89] 1 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2017, at 4-67 (2017) (“ Delay in a suit is anathema to all the principles of the 2010 Rules (efficiency, proportionality, and economy”).

[43] In the result, I find that the learned Master erred in not considering the dimensions of prejudice found in paras 182 to 184 of ***Humphreys***. I overturn the learned Master on the issue of rebuttal of the presumption of significant prejudice. Further, I find that there is no compelling reason why I should not grant the relief sought by the Defendant. The only compelling reason offered in this appeal was the Defendant's contribution to delay, which I dealt with above.

[44] Therefore, the Plaintiffs' action is dismissed under Rule 4.31.

[45] If the parties are unable to agree to costs, they may contact me in writing through counsel, within 60 days of this decision.

Appeal allowed.

Heard on the 29th day of November, 2018.
Dated at the City of Edmonton, Alberta this 22nd day of February, 2019.

Douglas R. Mah
J.C.Q.B.A.

Appearances:

Ms. Phyllis A. Smith, Q.C.
Emery Jamieson LLP
for the Plaintiffs/Respondents

Ms. Vivian R. Stevenson, Q.C.
Duncan Craig LLP
for the Defendants/Applicants
Andrew Fong and Andrew Fong Professional Corporation

Corrigendum of the Memorandum of Decision
of
The Honourable Mr. Justice Douglas R. Mah

In para 23, line 4, correction has been made from Mr. Song to Mr. Fong.