In the Court of Appeal of Alberta

Citation: Arbeau v Schulz, 2019 ABCA 204

Date: 20190523
Docket: 1803-0336-AC
Registry: Edmonton

Between:

Tammy Michele Arbeau

Respondent
(Plaintiff)

- and -

Martin Gustav Schulz

Appellant
(Defendant)

The Court: **The Honourable Madam Justice Jo'Anne Strekaf**
The Honourable Madam Justice Ritu Khullar
The Honourable Mr Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Order of
The Honourable Mr. Justice M.J. Lema
Dated the 16th day November, 2018
Filed the 12th day of December, 2018
(2018 ABQB 941, Docket: FL03 31274)

Memorandum of Judgment

The Court:

Introduction

[1] Mr Schulz applied to dismiss an action for delay pursuant to rules 4.31 and 4.33. The chambers judge denied that application, and Mr Schulz appeals. For the reasons that follow, the appeal is dismissed.

Background

[2] The parties were in a common law relationship for 20 years, and had two children together. In October 2011, following the termination of the relationship, Ms Arbeau brought an action for unjust enrichment and spousal support. Various steps were taken after that date. In June 2012, Mr Schulz filed a Statement of Defence. Following some disputes about disclosure, both parties conducted questioning in June 2014. Ms Arbeau provided responses to undertakings on March 26, 2015, and Mr Schulz did the same on June 17, 2015. An application by Mr Schulz to reduce the list price of the parties' residence was resolved by a consent order granted on July 8, 2015, but the sale of the residence did not proceed.

[3] Between July 2015 and April 2018, the parties' counsel exchanged correspondence, including requests for, and the provision of, updated financial information. Ms Arbeau then retained new counsel, who served a Notice to Disclose on May 4, 2018, returnable June 12, 2018. She also applied for various other relief in an application returnable on May 25, 2018 (adjourned to June 6, 2018). Mr Schulz filed an affidavit in response to that application on May 31, 2018. On June 6, 2018, a chambers judge dismissed a subset of the relief sought in Ms Arbeau's application. On June 7, 2018, Mr Schulz was served with an appointment and conduct money to examine him on his undertakings. He provided a response to the Notice to Disclose on June 11, 2018. Ms Arbeau provided her Affidavit of Records on June 15, 2018 and two expert reports on June 26, 2018.

[4] On July 18, 2018, Mr Schulz filed an application to dismiss the action pursuant to either rule 4.31 or 4.33. The application to dismiss was heard in regular chambers on August 18, 2018.

[5] The chambers judge set out his analysis in a detailed written decision. He declined to dismiss the action pursuant to rule 4.33 (the drop dead rule) because he found there was no period of delay of three or more years without a significant advance in the action. In particular, he found that undertakings provided by Ms Arbeau on March 26, 2015 constituted a significant advance in the action (which Mr Schulz concedes), as did the undertaking responses provided by Mr Schulz on June 17, 2015 and the disclosure provided on June 11, 2018. He went on to conclude that if he was incorrect, and March 26, 2015 constituted the last significant advance in the action prior to

2018, he would have concluded that the disclosure provided by Mr Schulz on June 11, 2018 constituted participation in the action that, in his opinion, warranted the action proceeding pursuant to rule 4.33(2)(b).

[6] The chambers judge also declined to dismiss the action pursuant to rule 4.31 (the prejudicial delay rule), finding no delay that resulted in significant prejudice.

[7] While the chambers judge denied the application to dismiss the action for delay, he granted a procedural order pursuant to rule 4.33(2) directing the parties to attempt to map out a litigation plan within 20 days, failing which they would submit their proposals to him within three days thereafter.

Standard of Review

[8] Questions of law are reviewed for correctness, and questions of fact for palpable and overriding error. Questions of mixed fact and law lie on a spectrum, with extricable errors of law, such as applying the incorrect standard or failing to consider a required element of a legal test, being reviewed for correctness and other questions of mixed fact and law being reviewed for palpable and overriding error: *Housen v Nikolaisen***,** 2002 SCC 33 (CanLII) at paras. 8,10, 27 and 36.

[9] The standard of review of a chambers judge's decision on an application to dismiss an action for delay is set out in *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 (CanLII) at para 11:

> The interpretation of the Rules of Court raises questions of law which are reviewed for correctness. The application of the Rules to a fixed set of facts is in most instances a mixed question of fact and law, to which some deference is owed. Whether an action has been "significantly advanced" involves an assessment and measurement of the effect of what happened in the action during the period of alleged delay, measured in light of the facts and the objectives of the Rules of Court. The chambers judge's conclusion on that issue is entitled to deference.

Analysis

A. Rule 4.33 (drop dead rule)

[10] Rule 4.33(2) provides:

> (2) If 3 or more years have passed without a significant advance in an action, the court, on application, must dismiss the action as against the applicant, unless
>
> ....

> (b) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

[11] A "significant advance" in an action is something that "...moves the lawsuit forward in an essential way considering its nature, value, importance and quality...The focus is on substance and effect, not form...": *Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135 at para 19. In considering the drop dead rule, the chambers judge noted the applicable law and undertook a detailed review of the steps taken in the action. He concluded that the undertakings provided by Mr Schulz on June 17, 2015, and his response to the Notice to Disclose provided on June 11, 2018, each constituted a significant advance in the action.

[12] Mr Schulz submits that the chambers judge erred in finding that those steps significantly advanced the action. He takes the position that his undertaking responses were nominal, as all of the documents material to the action had previously been provided. The chambers judge rejected that submission. He found that the undertaking responses did not fall into the "perfunctory" category, as they contained new information on post-separation asset values relevant to Ms Arbeau's unjust enrichment claim. The chambers judge concluded that information does not have to be conclusive or decisive to constitute a significant advance; it was "sufficient if it helps narrow the issues, clarifies uncertainty or otherwise moves the parties closer to trial or resolution" (para 93).

[13] Mr Schulz also submits that his response to the Notice to Disclose, provided after his counsel advised Ms Arbeau's counsel that a drop dead application was pending, was a mandated "formalistic step" and did not advance the action. The chambers judge rejected that submission as well, finding that the disclosure contained updated information that had been sought in the action, including income information that would be necessary if entitlement to support is found.

[14] Given his findings with respect to these two steps, the chambers judge concluded there was no period of three or more years without a significant advance in the action; rule 4.33(2) therefore did not mandate that the action be dismissed. That conclusion, which involves questions of mixed fact and law and is entitled to deference on appeal, is reasonable and discloses no reviewable error. This ground of appeal is dismissed. It is not necessary for us to consider the chambers judge's additional analysis under rule 4.33(2)(b).

B. Rule 4.31 (prejudicial delay rule)

[15] Rule 4.31 provides:

> (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 ...

> (2) Where, in determining the 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.

[16] The factors to be considered in an application under rule 4.31 were outlined in *Humphreys v Trebilcock*, 2017 ABCA 116 at paras 150 - 156:

> In order to apply r. 4.31 an adjudicator must answer six distinct questions.
>
> 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?
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> 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).

[17] The approach of the chambers judge to the application of rule 4.31 is central to this appeal. He considered the rule and the applicable case law, including *Humphreys*, and set out a detailed chronology of the action. He concluded that it had "two distinct phases": from October 2011 to June 2015, and from June 2015 to June 2018. He described the first phase as "plodding progress, with both sides being responsible for various portions of delay" (para 133) and concluded that "(t)o this point, I would not characterise the delay as 'inordinate', in the sense contemplated by *Humphreys (ABCA)*, i.e. 'exceeding ...the ordinary, reasonable or prescribed limits: extraordinary', or where 'the differential between the norm and the actual progress of an action is to (sic) large as to be unreasonable or unjustifiable'" (para 137). He found that Mr Schulz was not "obstructive or intentionally delaying, but (the record) does show that he had to be pushed to complete certain steps" (para 134), as he "took eight months to file his statement of defence, responded to disclosure requests only after disclosure applications were brought (and adjourned

many times) and took almost a full year to provide his undertaking responses (and only after an application to compel was threatened)" (para 141).

[18] The chambers judge factored out the first phase because "the action was not materially off-track or, if it was, Schulz was largely or materially responsible for that, during the first phase" (para 150). He found that "not much happened" during the second phase. He pointed out that the rule 4.31 cases recognize that "the plaintiff has the onus of advancing the litigation. During the second phase, when Arbeau did not move forward with the litigation, Schulz had no responsibility to pick up the slack" (para 151).

[19] The chambers judge also concluded that he did not "have to decide whether the June 2015 to spring 2018 period featured 'delay' within the meaning of Rule 4.31(1) or 'inordinate delay' per Rule 4.31(2), or whether any 'inordinate delay' was 'inexcusable'... (because) Schulz did not suffer any prejudice arising during this period, or at least no significant prejudice" (para 153). After stating that "Rule 4.31(1) requires that a defendant show significant prejudice arising from the delay; Rule 4.31(2) raises a presumption of such prejudice where delay is inordinate and inexcusable" (para 154), he noted that "Schulz did not rely on the presumption of significant prejudice (assuming it otherwise applies)" (para 155).

[20] Finally, the chambers judge reviewed the claims of prejudice advanced by Mr Schulz in his affidavit and concluded that he "has not demonstrated any prejudice, let alone significant prejudice within the meaning of Rule 4.31" (para 159). He further found that Mr Schulz waived any delay "otherwise engaging Rule 4.31, by providing the disclosure on June 11, 2018" (para 162).

[21] Mr Schulz submits that the chambers judge made a numbers of errors, including by:

a. referring to an affidavit sworn by Ms Arbeau on October 2, 2013 as Ms Arbeau did not indicate that she was relying on this affidavit, nor was he given an opportunity to respond;

b. focusing on delay allegedly caused by him and failing to reference delays caused by Ms Arbeau;

c. failing to apply the test set out in *Humphreys* and, in particular, not considering whether the litigation was at a stage "that a litigant acting reasonably would have attained with the time frame under review";

d. failing to determine that the delay was "inordinate";

e. concluding that he was not relying on presumed prejudice; and

f. concluding that he waived any delay by providing disclosure in June 2018.

[22] The first issue can be dealt with briefly. The chambers judge made limited reference to information contained in Ms Arbeau's October, 2013 affidavit. In the context of an application to strike an action for delay that was brought in regular chambers, where the issue is whether there had been inordinate and inexcusable delay in the action, it was not inappropriate for the chambers judge to review the court file and consider the October 2013 affidavit.

[23] The remaining issues all address the application of rule 4.31 to the circumstances of this action, and various aspects of the analysis set out in *Humphreys*. The questions identified in *Humphreys*, while not a code that must be followed in a specific order in all cases, provide direction on the considerations to be taken into account on an application pursuant to rule 4.31 that can be adapted to the circumstances of a particular case. In our view, the chambers judge's consideration of those factors, and his application of the test, reveal several errors in principle.

[24] The first question posed in *Humphreys* addresses whether there was delay, within the meaning of rule 4.31(1); that is, whether the litigation was at a stage "that a litigant acting reasonably would have attained within the time frame under review". The failure of a motions court to start its analysis with a consideration of delay was one of the concerns expressed in *Humphreys* (para 20):

> ... the motions court failed to ask the right questions in the right order. It did not start its analysis with a consideration of delay. How much delay is there? Is this delay inordinate because of the nature of the claim or for any other reason? Have the plaintiffs provided an explanation for the delay? What is it? Does it justify or excuse the pace at which the litigation has proceeded? Instead, the motions court initially asked whether the moving party had established that the nonmoving party's delay had caused it litigation prejudice. Had the motions court undertaken this study we expect that it would have been hardpressed to reach the conclusion that it did.

[25] The chambers judge did not consider this issue directly, in part because "Schulz did not offer any particular 'comparator' timeline". He found that he was "not able to take judicial notice of the 'standard progress of an unjust enrichment action in a family-law setting including family trusts' or at least to take such notice that this action was markedly behind schedule in June 2015" (para 138).

[26] *Humphreys* should not be read to suggest that evidence must be led on this question in all cases. A Queen's Bench judge or master is quite capable of making this assessment in most cases, based upon the nature of the action and the court record. This particular action is a relatively straightforward one for spousal support and unjust enrichment arising out of a twenty year common law relationship. It is alleged that the plaintiff stayed home to care for the couple's two children as part of a joint family venture with the expectation that she would share in the increase in the defendant's net worth, that upon termination of the relationship the defendant enjoyed a

disproportionate share of the parties' accumulated wealth, and that he was unjustly enriched as a result.

[27] Moreover, rule 4.31 and this aspect of the *Humphreys* analysis requires a review of the entire action, and not segments. *Humphreys* contemplates a comparison being made between the overall progress of an action from the time the action was commenced until the application to dismiss is brought, to determine whether "the non-moving 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." The chambers judge, having acknowledged this approach earlier in his reasons, proceeded to examine the delay in two phases and decided to "factor out" the first because "Schulz was largely or materially responsible" for that delay (para 150). This was not the correct approach.

[28] When the chambers judge turned his mind to the second phase of the action, he did not directly address the delay said to have occurred during this period, saying at para 153:

> I do not have to decide whether the June 2015 to spring 2018 period featured 'delay' within the meaning of Rule 4.31(1) or 'inordinate delay' per Rule 4.31(2), or whether any 'inordinate delay' was 'inexcusable'... [because] I find that Schulz did not suffer any prejudice arising during this period, or at least not significant prejudice.

[29] The chambers judge found that Mr Schulz did not prove he had suffered actual significant prejudice, as contemplated by rule 4.31(1). He concluded that Mr Schulz did not rely on the presumption of significant prejudice raised in rule 4.31(2) in circumstances where the delay is "inordinate and inexcusable", relieving him of the need to consider whether the presumption applied in this case.

[30] As the chambers judge noted, Mr Schulz did provide some evidence of actual prejudice, but relying on actual prejudice does not preclude also relying on presumed prejudice. While the application does not specifically identify rule 4.31(2), the grounds assert that "the litigation has been outstanding for almost 7 years and no dates are set for trial". At the application, counsel for Mr Schulz submitted that "under the jurisprudence that has been provided, the court says very clearly that the delay is presumed to be prejudicial and doesn't have to be proven." It appears that Mr Schulz was relying on both actual and presumed prejudice in support of his application.

[31] Similarly, it was an error for the chambers judge to not address the issues of delay, and of inordinate and inexcusable delay, before turning to the question of prejudice. The test in the rule is whether "the delay has resulted in significant prejudice". As a result, the determination of significant prejudice cannot be made in the abstract as the concepts of delay and significant prejudice are causally linked. The court must first determine whether there was delay (or inordinate delay) and, if so, whether that delay led to significant prejudice.

[32] The errors in the chambers judge's application of the legal test require a fresh consideration of the *Humphreys* factors applicable to this appeal.

1. Has there been delay?

[33] The first question to be addressed is whether there has been delay in this litigation. In other words, has Ms. Arbeau 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?

[34] At the time the application was brought in July 2018, examinations for discovery had been conducted of both parties, undertakings had been provided by both parties, and the plaintiff's affidavit of records and two expert reports had been served. Notice had been given to Mr Schulz to produce his affidavit of records and to conduct an examination on his undertakings. But this relatively straightforward action for unjust enrichment was not yet ready to be set down for trial, 6 years and 9 months after the action was commenced. Mr Schulz has established delay, as he has demonstrated that Ms Arbeau failed to advance her action to the point on the litigation spectrum that a litigant acting reasonably would have attained over this period of time.

2. Is the delay inordinate and inexcusable in the circumstances?

[35] Rule 4.31 distinguishes between "delay" (rule 4.31(1)) and delay that is "inordinate and inexcusable" (rule 4.31(2)). In both cases, an action may be dismissed if significant prejudice is established. However, in the case of "delay", the onus is on the moving party to establish that they suffered significant prejudice. In the case of delay that is "inordinate and inexcusable", there is a rebuttable presumption that significant prejudice was suffered "unless the nonmoving party has proven on a balance of probabilities that the moving party has not suffered significant prejudice" (*Humphreys* at para 149). It is, therefore, necessary to consider what sort of delay is at issue in this action.

[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).

[37] The onus to keep an action progressing is on the plaintiff (*Lethbridge* at para 19). "A defendant is not responsible for taking any steps or pushing the plaintiff to move the action. However, a defendant may not rely on its delay in responding to the plaintiff": *Riviera Developments Inc v Midd Financial Corp*, 2002 ABQB 954 at para 23.

[38] There are several differences between the circumstances in this case and in *Humphreys*, where the delay was found to be inordinate and inexcusable. *Humphreys* was a commercial lawsuit

in which fraud was alleged. Where such allegations are made, the plaintiff is "obliged to prosecute their action with reasonable expedition. This is a faster rate than is required of a claimant who does not allege fraud or comparable wrong": *Humphreys* at para 167. In contrast, the case before us is an unjust enrichment action arising out of a twenty year common law relationship where no fraud or comparable wrongdoing is alleged to have occurred.

[39] The time period between the commencement of the action and the issuance of the application to dismiss for delay in *Humphreys* was 9.5 years, as opposed to 6 years and 9 months in this case.

[40] The status of the action at the time that the delay application was brought was outlined above. As noted by the chambers judge, the action proceeded with "plodding progress" until June 2015. Questioning of both parties was conducted in June 2014. Ms Arbeau provided her undertaking responses nine months after questioning. The chambers judge found some delay by Mr Schulz in providing disclosure, in taking eight months to file his statement of defence and in taking a year to provide his undertakings after questioning. There was no progress in the action from June 2015 (other than the exchange of some correspondence between counsel), until May 2018, when the plaintiff retained new counsel who served a Notice to Disclose and application for various relief (May 4, 2018), an appointment to examine Mr Schulz on his undertakings, Ms Arbeau's Affidavit of Records (June 15, 2018) and two expert reports (June 26, 2018). Mr Schulz provided further disclosure on June 11, 2018.

[41] This action is closer to being ready for trial than *Humphreys*, where neither the individual plaintiff nor a representative of the corporate plaintiff had yet to be questioned despite several requests. In this case, questioning of all parties has been conducted and the plaintiff's expert reports have been served.

[42] While there was delay, we are not satisfied that the circumstances constitute inordinate delay as contemplated by rule 4.31(2).

3. Where the delay is not inordinate and inexcusable, has Mr Schulz demonstrated significant prejudice?

[43] Where the presumption of significant prejudice under rule 4.31(2) does not apply, the court must consider whether the applicant has established actual significant prejudice caused by the delay. The chambers judge found that Mr Schulz had not established that he suffered significant prejudice.

[44] The chambers judge rejected the payment of ongoing expenses for the house as prejudice, as the amounts were not detailed, it was not explained why judicial assistance had not been sought to address any alleged interference with the sale by the Ms Arbeau, and it was not demonstrated that such expenses would not be recoverable from the eventual sale proceeds. He found that Mr Schulz provided insufficient detail about Ms Arbeau accessing a line of credit and failed to show why such funds could not be recouped from the sale proceeds. The registration of a writ by the

Canada Revenue Agency against the house would only apply to Ms Arbeau's interest. The chambers judge viewed some of Mr Schulz's claims - that he had to pay legal and accounting costs, that the litigation caused stress and problems with his children, and that he faced some "less than flattering characterizations in the most recent court proceedings" - as problems that are commonly encountered in family litigation. He found that Mr Schulz had not established that the same problems would not have arisen if the litigation proceeded at a faster pace.

[45] The chambers judge concluded that Mr Schulz "has not demonstrated...significant prejudice within the meaning of rule 4.31" (para 159). While the chambers judge erred by failing to directly focus his analysis on whether there was delay in the overall progress of the action and, if so, whether that delay resulted in significant prejudice, we have reached a similar conclusion. In the circumstances, we are not satisfied that Mr Schulz has satisfied his onus of establishing significant prejudice resulting from the delay.

[46] Given the absence of actual significant prejudice, there is no basis to dismiss the action for delay pursuant to rule 4.31.

[47] In the circumstances, it is not necessary to consider whether there was a waiver of delay or any compelling reason not to otherwise dismiss the action.

Conclusion

[48] The appeal is dismissed.

Appeal heard on March 7, 2019

Memorandum filed at Edmonton, Alberta
this 23rd day of May, 2019

Authorized to sign for: Strekaf J.A.

Khullar J.A.

Feehan J.A.

Appearances:

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