

In the Court of Appeal of Alberta

Citation: Lanset Capital Corp. v. Waterloo Geological Consulting Ltd., 2006 ABCA 77

Date: 20060303

Docket: 0501-0329-AC

Registry: Calgary

Between:

Lanset Capital Corp.

Respondent
(Plaintiff)

- and -

Waterloo Geological Consulting Ltd.

Appellant
(Defendant)

The Court:

**The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Anne Russell
The Honourable Mr. Justice Peter Martin**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.I. MacLeod
Dated the 12th day of October, 2005
Filed on the 26th day of October, 2005
(Docket: 9901-07003-QB)

Memorandum of Judgment

The Court:

Introduction

[1] This appeal concerns the operation of Rule 244.1 and whether the respondent's action should be dismissed because no "thing" has been done to materially advance the action for more than 5 years.

Chronology of events

[2]

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| April, 1999 | • The lawsuit claiming approximately \$27,000 for construction services was begun by the filing of the statement of claim. |
| May, 1999 | • The statement of defense and counterclaim was filed. |
| January 10, 2000 | • The designated officer of the plaintiff was examined by counsel for the defendant. Undertakings were made. |
| October 25, 2002 | • Counsel for the plaintiff filed a Notice of Ceasing to Act. |
| June, 2004 | • The same counsel advised that he is back on the case and served a Notice of Motion for an order to have the matter put on the June 28, 2004 trial list. That application was not heard; it was adjourned <i>sine die</i> . |
| Aug./Sept. 2004 | • Counsel agree that the matter could be entered for trial on the plaintiff's performance of its outstanding undertakings. |
| January 31, 2005 | • Plaintiff's counsel provided partial responses to undertakings and advised that the outstanding information would follow soon. |
| May 6, 2005 | • Plaintiff's counsel advised that no additional information is available to respond to the other undertakings. |
| May 19, 2005 | • The defendant brought an application to dismiss the plaintiff's action relying on Rule 244.1. |
| May 24, 2005 | • The application was heard and granted by Master Alberstat. |

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| October 12, 2005 | • Master Albertstat's order was appealed to a chambers judge, who set it aside and entered the matter for trial. |
| November, 2005 | • The decision of the chambers judge was appealed to this Court. |

Issue

[3] The issue before us is whether the learned chambers judge erred in finding that the unilateral action of the plaintiff in performing undertakings after a five-year gap, but before the defendant brought the application to dismiss, allowed the plaintiff to avoid the operation of Rule 244.1.

Analysis

[4] Rule 244.1(1) of the Alberta *Rules of Court* states:

244.1(1) Subject to Rule 244.2, where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.

Position of the parties

[5] The appellant argues that:

1. the last “thing” done which materially advanced the action was the examination for discovery conducted on January 10, 2000; and
2. even if the plaintiff's partial responses to undertaking provided on January 31, 2005 could be said to have materially advanced the action, there was still a five-year gap and therefore Rule 244.1 was properly engaged to dismiss the action.

[6] The respondent maintains that:

1. the August/September 2004 agreement between counsel that the matter could be set down as soon as the undertakings were provided was a “thing” which materially advanced the action within the five-year period; and

2. in any event the undertakings were provided before the applicant brought its Rule 244.1 motion to dismiss and therefore the automatic operation of Rule 244.1 was avoided.

[7] The history and purpose of Rule 244.1 was recently explained in *Trout Lake Store Inc. v. Canadian Imperial Bank of Commerce* (2003), 31 Alta. L.R. (4th) 243, 2003 ABCA 259. There, the court, speaking through Conrad J.A., concluded:

“[30] But I am satisfied that once it is shown that there is a gap of five years or more between meaningful things done to advance the litigation, the court is obliged to dismiss the action, subject to the situation described. A delaying party cannot extend the five-year period referred to in Rule 244.1 by unilaterally taking an action before the application to dismiss is made.”

[8] Conrad J.A. outlined the following five-step approach in considering whether Rule 244.1 should be applied:

- “1. The proceedings should be examined as at the date of the application to dismiss for want of prosecution pursuant to Rule 244.1.
2. If at any time in the action there has been a gap of five years or more where no “thing” has been done to materially advance the action, the judge shall examine what has occurred since that five-year gap.
3. If the delaying party has not done a thing to materially advance the action since the five-year gap, the action shall be dismissed, absent agreement to the delay.
4. If the delaying party has done a thing to materially advance the action after the five-year gap, and the other party objected and applied for a dismissal, the action shall be dismissed, absent any agreement to the delay.
5. If the delaying party has done a thing to materially advance the action after the five-year gap, and the applicant has participated in that thing, continued to participate in the action, or otherwise acquiesced in the delay, the action shall continue, and the application for dismissal refused.”

[9] In the case at bar, the examination for discovery on January 10, 2000 was the last thing done that materially advanced the action. The August/September 2004 agreement of counsel that the matter could be set down for trial once the undertakings had been performed, did not materially advance the action. That agreement was merely a confirmation of the obvious. Indeed, in Alberta, counsel may apply for a Certificate of Readiness conditional on outstanding undertakings being

performed and set the matter down for trial on that basis. Furthermore, even if performance of undertakings offered five years earlier could be said to have materially advanced the action, it happened after the five-year clock had expired. There is no suggestion that the appellant consented to the delay, participated in the respondent's action or acquiesced in the delay.

[10] The appellant filed the motion to dismiss reasonably expeditiously.

Conclusion

[11] The appeal is allowed, the order of the chambers judge is set aside and the order of Master Alberstat dismissing the action is restored.

Appeal heard on January 16, 2006

Memorandum filed at Calgary, Alberta
this 3rd day of March, 2006

McFadyen J.A.

(authorized to sign for) Russell J.A.

Martin J.A.

Appearances:

Robert J. Simpson
for the Appellant

Michael J. Bailey
for the Respondent