In the Court of Appeal of Alberta

Citation: Ro-Dar Contracting Ltd. v Verbeek Sand & Gravel Inc., 2016 ABCA 123

Date: 20160422
Docket: 1503-0157-AC
Registry: Edmonton

Between:

Ro-Dar Contracting Ltd.

Appellant
(Respondent)/(Plaintiff)

- and -

Verbeek Sand & Gravel Inc., Calvin E.E. Verbeek, John Doe and XYZ Corporation

Respondents
(Appellants)/(Defendants)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Myra Bielby

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice C.M. Jones
Dated the 11th day of May, 2015
Filed on the 26th day of June, 2015
(2015 ABQB 300, Docket: 0803 10814)

Memorandum of Judgment

The Court:

[1] This is an appeal from an order which dismissed this action for long delay under the "drop dead" rule, R. 4.33: ***Ro-Dar Contracting Ltd. v Verbeek Sand & Gravel Inc.***, 2015 ABQB 300, 18 Alta LR (6th) 296.

Facts

[2] The respondents own a gravel pit. They verbally retained the appellant to crush some of the gravel at a cost of $4.80 per tonne. A dispute arose in 2008 as to the amount of gravel that had been crushed. The appellant claimed it was owed $474,680.14, whereas the respondents alleged that only $184,670.82 was earned. The amount in dispute was said to be $311,009.32. The resulting litigation has been ongoing for eight years.

[3] There have been numerous proceedings, including two actions, an attachment order, the brief appointment of a receiver, the filing of a builders' lien, and various interlocutory procedures relating to discovery of information. In October 2008 the respondents paid $198,680 into court in order to have the receiver discharged. In May 2009, $69,586 of undisputed funds were paid out, leaving $129,094 in court.

[4] The chambers judge provided a comprehensive summary of the proceedings to date in para. 4 of his reasons. On February 24, 2014 the respondents filed an application to dismiss the action for long delay under R. 4.33. A Master dismissed that application, but on appeal the chambers judge allowed the application and dismissed the action. This appeal followed.

[5] The chambers judge identified a number of "Occurrences" in the litigation, the relevant ones being as follows (using the chambers judge's numbering, supplemented in italics with other relevant dates):

> 23. February 1, 2010 -- Master Smart granted an Order regarding refusals to answer on Defendants' Examinations for Discovery.
>
> 24. October 4, 2010 -- Defendants complied with the Order of February 1, 2010.
>
> *24A. November 1, 2010 -- New Rules of Court in force, effectively introducing a 3 year drop dead rule.*
>
> 25. October 22, 2012 -- Defendants' counsel wrote to the Plaintiff's counsel with a settlement proposal. The letter included information to support the

assertion that gravel crushed and actually sold was less than the amount for which the Defendants had already paid the Plaintiff.

26. October 23, 2012 -- Plaintiff's counsel requested supporting documentation to assist in evaluating the Defendants' settlement proposal.

27. October 24, 2012 -- Defendants' counsel wrote to Plaintiff's counsel advising that they would request underlying documents in support of the Defendants' settlement proposal.

28. February 8, 2013 -- Defendants' counsel wrote to Plaintiff's counsel advising that back-up documentation had been gathered and was available for inspection by Plaintiff's counsel.

29. October 30, 2013 -- Plaintiff's counsel served Defendants' counsel with a Supplemental Affidavit of Records, but it was missing the Schedule 1 - list of producible documents.

29A. November 1, 2013 - - Three years since the new Rules of Court came into force; possible end of the drop dead period.

30. February 24, 2014 -- Defendants filed an Application to Dismiss the Plaintiff's action pursuant to Rule 4.33.

31. April 15, 2014 -- Plaintiff's counsel served a Supplemental Affidavit of Records with attached Schedule 1 on Defendants' counsel.

32. April 24, 2014 -- Defendants' application to dismiss the Plaintiff's action is itself dismissed by the Master.

33. May 11, 2015 -- The appeal from the Master's decision is allowed, and the Plaintiff's action is dismissed.

The central issue on this appeal is whether "3 or more years passed without a significant advance in the action", requiring dismissal of the action under R. 4.33.

[6] The parties agreed that there was a significant advance in the action on October 4, 2010 when the defendants complied with the order of February 10, 2010. The new Rules came into force on November 1, 2010, effectively starting the 3 year period. The chambers judge therefore concluded at para. 35 that the relevant period of time for the purposes of the application was from November 1 2010, until the application to dismiss was brought on February 24, 2014. Any three year period of inactivity would require that the action be struck, because the defendants had not

participated in any proceedings in that period that would preserve the litigation under R. 4.33(1)(d).

[7] The chambers judge applied a functional approach to the rule. He concluded at para. 72 that taking a step contemplated by the Rules did not necessarily significantly advance the action. He followed ***Nash v Snow***, 2014 ABQB 355, 590 AR 198 in concluding that some genuine and measurable advancement was required. Further, at paras. 78-9 he concluded that genuinely advancing the action toward resolution (not necessarily towards a trial) was sufficient.

[8] The chambers judge accepted at paras. 52, 93 that the privilege attaching to settlement documents did not preclude their use in opposition to an application to strike for delay. Settlement initiatives could significantly advance an action, but he concluded at para. 83 that the settlement overtures in this action were "nothing more than a brief flurry of activity, accomplishing little". The settlement discussions did not resolve any part of the action, nor did they narrow the issues in any material respects. There was no explanation why the plaintiff never attended to inspect the documents after receiving notice on February 8, 2013 that they were available. He reasoned at para. 98 that the failure to inspect these documents undermined the plaintiff's argument that they were "critically important".

[9] The chambers judge accepted that Schedule 1 was omitted through inadvertence from the Supplemental Affidavit of Records filed on October 30, 2013. However, he ruled at para. 118 that even though the Rules require a party to keep discovery of records "evergreen", compliance with the formal requirement to file a supplemental affidavit did not necessarily advance the action. If the supplemental affidavit was just "housekeeping", and merely listed documents that were already well known, it might not advance the action. He concluded that the Supplemental Affidavit of Records did not advance the action.

[10] Following this analysis the chambers judge allowed the appeal from the Master, and dismissed the action. This appeal followed.

Standards of Review

[11] The standards of review are summarized in ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235:

(a) conclusions on issues of law are reviewed for correctness: ***Housen*** para. 8,

(b) findings of fact, including inferences drawn from the facts are reviewed for palpable and overriding error: ***Housen*** paras. 10, 23; ***H.L. v Canada (Attorney General)***, 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and

(c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity":

> ***Housen*** para. 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: ***Housen*** paras. 33, 36.

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.

The General Approach to the Drop Dead Rule

[12] The present Rules of Court have two general rules that deal with delay. Rule 4.31 is the basic prejudice-based rule that allows an action to be dismissed at any time if there has been delay in prosecution that has resulted in significant prejudice to a party. Rule 4.33 is the so-called "drop dead rule" which provides for the mandatory dismissal of an action that has not been significantly advanced for three years.

[13] The decision presently under appeal was made under the drop dead rule, the present text of which is:

> 4.33(1) If 3 or more years has passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless
>
> (a) the parties to the application expressly agreed to the delay,
>
> (b) the action has been stayed or adjourned by order, an order has extended the time for advancing the action, or the delay is provided for in a litigation plan,
>
> (c) the applicant did not provide a substantive response within 2 months after receiving a written proposal by the respondent that the action not be advanced until more than 3 years after the last significant advance in the action, or
>
> (d) 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.

(2) If the Court refuses an application to dismiss an action for delay, the Court may still make whatever procedural order it considers appropriate.

(3) The following periods of time must not be considered in computing periods of time under subrule (1):

(a) a period of time, not exceeding one year, between service of a statement of claim on an applicant and service of the applicant's statement of defence;

(b) a period of time, not exceeding one year, between provision of a written proposal referred to in subrule (1)(c) and provision of a substantive response referred to in that subrule.

(4) Rule 13.5 does not apply to this rule.

As noted, the chambers judge concluded that "3 or more years had passed without a significant advance in an action" and dismissed the action.

[14] The two existing delay rules have a considerable amount of history behind them:

(a) Before 1994, R. 243 required a party to take any "step" in the litigation within one year of becoming entitled to take that step. This generated a large body of inscrutable law about what was a "step" and what was "not a step".

(b) Before 1994, R. 244 was the general delay rule that provided that an action could be dismissed at any time if prejudice was shown. That was the precursor to R. 4.31.

(c) In 1994 the delay rules were completely revised and R. 244.1, the first "drop dead" rule, was introduced. It provided for mandatory dismissal of an action "where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action". In an attempt to get away from the law on what was a "step", the rule was written to refer to a "thing that materially advances the action". In this context "thing" was meant in the sense of "something" or "anything". Old habits, however, die hard, and soon all of the emotional energy that had been invested in deciding what was a "step" was dedicated to determining what was a "thing".

(d) When the new Rules of Court were introduced in 2010, the drop dead period was reduced from five years to three years, and the rule was restated.

(e) The rule was then amended again in 2013, removing all references to either "steps" or "things", and merely requiring a "significant advance in the action".

An awareness of the legislative history of the rule is helpful in its interpretation. The most important lesson is that the 2013 amendments, in effect, approved the functional approach in ***Phillips v Sowan***, 2007 ABCA 101 at para. 5, 40 CPC (6th) 378. The drop dead rule now clearly requires a functional approach, without overemphasizing formalistic steps that might have been taken. The *obiter* statement in ***Morasch v Alberta***, 2000 ABCA 24 at para. 6, 75 Alta LR (3d) 257, 250 AR 269 (that anything required by the Rules is deemed or presumed to advance the action) does not correctly state the law.

[15] The chambers judge recognized the importance of the 2013 amendments, noting at para. 6 that the issue was not: ". . . "steps" or "things", both of which have prior judicial history associated with them, not all of which has led to consistent treatment". He decided instead to refer to various possible advancements as "Occurrences". While any application under the drop dead rule must obviously have regard to what was done to advance the litigation, it would be a step backwards if the search for "steps" or "things" was now replaced by a search for "Occurrences".

[16] While on the subject, a few words are appropriate on the difference between "materially advances" the action as used in the original rule, and "significant advance" as found in the present rule. Shortly put, there is no material or significant difference between "material" and "significant". An examination of the dictionary definitions of these two terms shows that in this context they are synonyms. In legal terminology, the word "material" is best reserved to describe the probative relationship between a piece of evidence and a disputed fact. So, for example, under R. 5.2 the discovery obligations in litigation relate to "relevant and material" information. The change in terminology in R. 4.33 from "material" to "significant" was not intended to have any impact on the outcome of delay applications.

[17] The amendments embodied in the new Rules also confirmed the method of calculating the period during which there must have been a significant advance in the action. Rule 4.33(1)(d) confirms that any 3 year period of inactivity will require dismissal of the action, subject only to an exception where the defendant has participated in steps after the expiry of the 3 years to the extent that it would be unjust to dismiss the action. This entrenches the interpretation placed on the rule in ***Trout Lake Store Inc. v Canadian Imperial Bank of Commerce***, 2003 ABCA 259 at para. 33, 31 Alta LR (4th) 243, 330 AR 379.

[18] Another important aspect of the drop dead rule is R. 4.33(2):

> (2) If the Court refuses an application to dismiss an action for delay, the Court may still make whatever procedural order it considers appropriate.

Where there has been delay, it is seldom appropriate for the Court to simply dismiss an application to strike the action: ***Peking Gardens Restaurant Ltd. v Calidore Holdings Ltd.***, 1994 ABCA 326 at para. 8, 31 CPC (3d) 59. A procedural order of some kind is generally appropriate.

That order may include the imposition of a schedule or deadlines, provisions to remedy any prejudice, and often a requirement that the plaintiff post security for costs.

Significant Advance of the Action

[19] The appellant argues that the chambers judge erred by applying the wrong legal test. Further it argues that the chambers judge failed, in various ways, to properly assess the significance of the steps that were taken during the alleged period of delay.

[20] The legal error identified by the appellant is an overemphasis on the "outcome" of various steps that were taken. It points to the reasons of the chambers judge at paras. 99-100, where he observed that nothing meaningful appeared to happen as a result of, or shortly after the settlement discussions. The appellant argues that an action can be significantly advanced without the action actually being settled, and without the action actually being set down for trial. That is an accurate statement, because steps that serve to narrow the issues, complete the discovery of documents and information, or clarify the positions of the parties might well significantly advance the action. "Outcomes" should not be overemphasized.

[21] That is not to say, however, that the "outcome" of various steps is irrelevant. The chambers judge correctly embraced the functional test, following cases such as ***Nash v Snow*** which stated at para. 30:

> 30 Put another way, the court must view the whole picture of what transpired in the three-year period, framed by the real issues in dispute, and viewed through a lens trained on a qualitative assessment. This necessarily involves assessing various factors including, but not limited to, the nature, value and quality, genuineness, timing, and in certain circumstances, the outcome of what occurred.

The outcomes or consequences of anything done by the litigants are relevant to whether there has been a significant advance in the action. It was open to the chambers judge to observe that nothing came of the activities during the period of delay, and the languid pace of the action continued.

[22] The appellant advances arguments about the chambers judge's assessment of the steps taken in this litigation that overlap with its argument about the overemphasis on "outcomes". It argues that the chambers judge failed to properly consider all the issues in the litigation, mischaracterized some of the relevant steps, and failed to recognize the importance of the documents that had been disclosed. The appellant particularly focuses on the documents that were included in the correspondence dated October 22, 2012 from the respondents' counsel. The appellant cites a number of cases for the proposition that the production of new information or documents can significantly advance an action: ***Top Grade Solutions Inc. v Flying Pizza 73 Inc.***, 2009 ABQB 492 at para. 20, 480 AR 181; ***Huynh v Rosman***, 2013 ABQB 218 at para. 35, 559 AR 319; ***Pearson v Parkland (County)***, 2014 ABQB 690 at para. 34, 26 Alta LR (6th) 308.

All those cases confirm that the nature of the documents, and their importance to the litigation, must be examined.

[23] One of the issues in the litigation is how to calculate the amount the appellant is entitled to be paid. The appellant's position is that its payment would be based on its calculation of the weight of the gravel at the time it was crushed. The respondents' position is that there would be an initial estimate of weight, but it would be adjusted based on the weight of gravel that was actually sold and shipped by the respondents. The appellant argues that the respondents' calculation of how much gravel was sold represents an "admitted" portion of the appellant's claim. Since the stockpile of gravel was not completely sold until 2011, and since the respondents never disclosed in detail how much they had sold until October 22, 2012, the appellant argues that a "significant advance" occurred on that latter date.

[24] The documents disclosed on October 22, 2012 included 44 pages of reports showing details of every invoice for gravel sold between 2008 and 2011. The reports summarized about 2,000 invoices generated over three years. The chambers judge did not discuss the significance of these documents in light of the outstanding issues in the litigation, a point that the respondents say was not emphasized during argument in the courts below. The chambers judge noted at para. 95 that there is "no evidence that the documentation in question led the [appellant] to reconsider its position, or that settlement discussions followed that production", and at para. 98 that "nothing seems to have happened". While he viewed the failure of the appellant to inspect the background invoices as an indication that they were not important, he did not observe that the covering reports summarized all the individual invoices, making inspection of the originals less critical. The invoices were directly relevant to a core outstanding sub-issue: the amount of gravel shipped.

[25] The respondents argue that the appellant is not entitled to rely on the new documents produced on October 22, because they were attached to a letter that included a without prejudice settlement offer. The newly produced invoices were relevant and material, and were producible. The respondents had an obligation under R. 5.10 to disclose them in a supplemental affidavit of records. A producible document cannot be clothed with a privilege by attaching it to a settlement letter, and the appellant was entitled to rely on them.

[26] The chambers judge concluded at para. 99 that no application for summary judgment resulted from the new documents, nor were settlement negotiations reactivated. In this last respect, the appellant points to certain overlooked affidavit evidence. The appellant's officer gave uncontradicted evidence that there were further unsuccessful settlement discussions between December 18, 2012 and April 22, 2013. These discussions followed the production of the new information on October 22, 2012, and overlapped the invitation to inspect the new documents sent on February 8, 2013.

[27] The appellant also relies on the filing of the Supplemental Affidavit of Records. The filing of that affidavit, however, was not a substantial advance. The fact that Schedule 1 was

inadvertently omitted is not the critical point. If anything important happened, it happened when the new documents were sent on October 22. The subsequent filing of the affidavit was merely a formalistic step that was not sufficient, under the functional approach, to advance the action.

[28] The overall assessment that there had been no significant advance in the action is entitled to deference, but the reasoning in support of that conclusion does not adequately deal with the importance of the new information produced on October 22. A significant advance does not have to be so definitive that it would support an application for summary judgment. It is quite true that the casual and dilatory pace of this litigation continued even after the disclosure of this information. The drop dead rule does not, however, require continuous and unbroken advancement of the action, only that there be a substantial advance at one point during the 3 year period. The dilatory pace of this litigation is not to be commended, but an application to strike for persistent delay is more properly brought under R. 4.31, which requires proof of prejudice, than under the drop dead R. 4.33.

[29] The new information provided on October 22 was important to both sides. It confirmed that the stockpile of gravel had now been sold, which crystallized the amount that the respondents possibly admitted was owing. It also provided a firm amount against which the competing claims could be measured: the appellant's measurement of the claim based on its estimates, and the respondents' measurement of the claim based on actual deliveries. The reasonable view is that this was a significant advance in the action.

Conclusion

[30] In conclusion, the appeal should be allowed, and the action restored. That, however, is not sufficient to dispose of the application. Rule 4.33(2) contemplates that a procedural order will be made even where an application under the drop dead rule is unsuccessful. The respondent in a drop dead application is well advised to propose specific terms for expediting the litigation. In this case, there has clearly been inordinate delay, and further directions are appropriate.

[31] This is a very simple lawsuit. It is a suit over a series of invoices. The plaintiffs were to crush gravel for $4.80 per tonne. There are no difficult issues of law. There is no question about the quality of the "crushing". The main issue is how to calculate how many tonnes the plaintiff is entitled to be paid for, and how much gravel was crushed. The outcome of the action turns on simple questions of fact, which should not have taken eight years to resolve.

[32] There has been $129,000 in trust since October 2008, and the respondents proposed that it be returned to them as a condition of allowing this litigation to proceed. This issue was not, unfortunately, explored in the courts below or in the factums, and payment out at this juncture has not been justified. However, as a condition of allowing this action to proceed, the $19,000 of security for costs posted in support of this appeal should remain in trust as security for costs of the action. Whether the appellant should receive interest on the claim during the period of delay is left for the trial judge.

[33] Since the parties have been unable to settle this dispute, it should be set down for trial without further delay. If the action is not set down for trial earlier, the appellant is to bring an application before the Court of Queen's Bench to obtain the necessary directions no later than June 17, 2016.

[34] Given all of the circumstances, neither party is entitled to costs of the application to dismiss for delay in the Court of Queen's Bench. The successful appellant is entitled to the costs of this appeal, assessed on Column 1, but payable only upon the final resolution of the claim.

Appeal heard on April 5, 2016

Memorandum filed at Edmonton, Alberta
this 22nd day of April, 2016

Slatter J.A.

Authorized to sign for: McDonald J.A.

Bielby J.A.

Appearances:

H.B. Madill Q.C. and G.G. Plester
for the Appellant

J.D. Poole
for the Respondents