Court of Queen's Bench of Alberta

Citation: Scott v Cargill Limited, 2019 ABQB 308

Date: 20190501
Docket: 0401 00526
Registry: Calgary

Between:

Charlene Scott

Plaintiff

- and -

Cargill Limited

Defendant

Memorandum of Decision
of
A.R. Robertson, Q.C., Master in Chambers

Introduction

[1] The defendant Cargill Limited applies to have this ancient wrongful dismissal action dismissed on the grounds of delay and prejudice under rule 4.31.

[2] The events that led up to the plaintiff's either resignation or dismissal (whether it is one or the other is part of the dispute) took place in September, 2003, over 15 years ago. The lawsuit was commenced on January 12, 2004. There have been long periods of inactivity by the plaintiff. Some witnesses have left Cargill's employment and, of course, no doubt everyone's memory has faded.

[3] Much of the debate is over who caused how much of the delay over the last 15 years, and whether there is evidence of actual significant prejudice in terms of lost witnesses, missing records, and failing memories.

[4] I have concluded that there has been some prejudice, but the defendant has not demonstrated significant prejudice. The presumption of significant prejudice does not apply because the delay, although inordinate, is not inexcusable. The delays caused by the defendant, even though the plaintiff has caused much of the delay, have excused the delay overall.

[5] Finally, I would have exercised my discretion not to dismiss the claim in light of the defendant's apparently deliberate attempt to frustrate the prosecution of the claim.

The Rule 4.31 Factors

[6] Rule 4.31 requires an examination of whether the delay has caused significant prejudice, or whether the delay is "inordinate and inexcusable". If the delay is inexcusable, as well as being inordinate, then significant prejudice is presumed.

Delay

[7] The plaintiff concedes that there was not continuous activity throughout the 15 years to try to get this case to trial. The plaintiff argues that during extended times, her counsel made significant attempts at trying to move the case forward, but got little response, often no response at all, from defence counsel, and despite urging from the plaintiff, the defendant did not even attempt to examine the plaintiff until close to 10 years after the claim was filed. Examinations by the plaintiff were eventually set up by using appointments, rather than cooperative means.

Discretion

[8] Once there has been delay and significant prejudice either proven or presumed (and not rebutted by the plaintiff), the Court has a residual discretion to decline the application to dismiss.

Inordinate and Inexcusable Delay

[9] It is conceded that there has been inordinate delay. It should not take 15 years for a wrongful dismissal action to get to this stage – being close to being ready for trial – even one where the defence includes (as was pled here) an assertion of either resignation or, alternatively cause for dismissal.

[10] The dispute is whether there has been inexcusable delay.

Actual Significant Prejudice

[11] If it is not "inexcusable" ("inordinate" being admitted), then the question is whether there is actual significant prejudice.

[12] Cargill argues that there is actual prejudice resulting from the delay. Some records are no longer available, and some witnesses may not be found for trial. The plaintiff says that the records no longer available do not result in significant prejudice to Cargill.

[13] The missing records fall into two categories.

[14] One set of records said to be no longer available is those records of Ms. Scott's regarding her attempts at mitigation, and she now asserts that there never were any. As plaintiff's counsel described it in argument, she "put her head under a pillow for two years" after the termination of her employment. She admits she made little attempt at finding a job. Other records that are missing and which might relate to mitigation are discussed below.

[15] The second category relates to medical records. Some are missing, having been lost in the 2013 southern Alberta flood. They are detailed records about Ms. Scott's medical condition. Plaintiff's counsel argues that the reason she was absent from work prior to the termination of her employment is not particularly material to the action. Cargill, her employer, knew she was absent from work for medical reasons. It is not material what those reasons were.

Admissibility of Evidence

[16] The plaintiff (respondent) argues that the defendant cannot rely on the affidavit of its deponent Mr. Sun, who freely admitted that he had no personal knowledge of many of the things set forth in his affidavit. Rule 13.18 requires an affidavit based on personal knowledge for an application that may result in a final ruling, such as a dismissal under rule 4.31.

[17] However, many of the things he deposed to were simply a description of broad-brush steps in the action. They were steps that could have been described by counsel and are not actually in dispute, such as the dates when examinations for discovery were held in 2006, when an examination of an employee was held in 2008, when questioning of Ms. Scott was done in 2013, when answers to undertakings were provided, and the like. Much of his evidence simply describes (and attaches) the correspondence between counsel. It is entirely based on what was told to him by Ms. Gill, the lawyer currently handling this matter for Cargill.

[18] I assume, based on the number of years this dispute has been outstanding, that Ms. Gill has no personal recollection of any of the steps taken and correspondence either. She was not counsel for Cargill until very recently. She has gone through the file and prepared Mr. Sun's affidavit based on what she has concluded is relevant and material to the application.

[19] Mr. Sun was then cross-examined, gave undertakings, and he was cross-examined on those undertakings. Cargill argues that one cannot cross-examine, obtain answers, and then object to the admissibility of the evidence obtained in that fashion. However, much of the "information" obtained in cross-examination was essentially his *lack* of knowledge – for example, he was shown some of the correspondence between counsel that was not attached to his affidavit as exhibits, and he was unaware of until it was put to him in cross-examination.

[20] In particular, he had no personal knowledge of how faded the memories are of those witnesses who have been located. Apparently he had not spoken to them. He did not know what steps had been taken to locate former employees.

[21] As a result, much time and expense has been expended by Cargill simply trying to put before the Court the correspondence between counsel – both officers of the court who, in my view, are entitled simply to tell the Court what they wrote to each other – so that arguments could be made about who was responsible for delay, in order to address the question of whether the inordinate delay is "inexcusable".

[22] Notwithstanding the fact that officers of the court can tell the court what they wrote to each other and when, in a case such as this actually putting the record of their correspondence before the Court is important to have a clear record.

[23] But there would have been a simpler and probably better way to do this. A legal assistant, preferably one who worked for the senior lawyer representing Cargill (the applicant), could have assembled, in chronological order, all of the correspondence between counsel that occurred between the commencement of the action and the filing of this application (other than privileged settlement communications). If the legal assistant has worked as that senior lawyer's legal

assistant for an extended period, she would have personal knowledge of what had happened and, importantly, what had not happened.

[24] As it is, the correspondence is difficult to follow because it has been presented in bunches out of order, because the original affidavit in support from Mr. Sun was not complete. It did not include letters that should have been presented to tell the whole story. That led to exhibits being put to him in cross-examination, and more being presented in replies to undertakings.

[25] Unfortunately, the original affidavit was not merely incomplete. Both the affidavit and Cargill's brief told a less-than-accurate story, because they ignored a long history of defence counsel's stone-walling of plaintiff's counsel, causing delay that should not have occurred.

[26] But in the end, surely the evidence of the sending and receipt of letters between counsel should not be in dispute.

The Chronology

[27] The statement of claim was issued January 12, 2004. The statement of defence was filed March 30, 2004. The plaintiff's affidavit of records was filed June 14, 2004 and Cargill's was filed September 15, 2004.

[28] After many attempts by plaintiff's counsel to set up discoveries, the defendant Cargill's officer was examined November 28, 2006. The court file discloses that an appointment to establish a date and place was filed September 11, 2006. The replies to undertakings were not provided until August 8, 2007.

[29] To put this in context, Ms. Scott's employment had terminated over three years earlier by then.

[30] Cargill did not elect to examine Ms. Scott at that time.

[31] A former employee, Thomas Plunkett, was examined for discovery on March 19, 2008.

[32] Then there was much more delay. The plaintiff Ms. Scott was not examined by Cargill's counsel until March 18, 2013. That was about ten years after her employment terminated.

[33] The reasons for these delays from September 2004 to March 2013 bear examination in some detail to consider whether the delay is "inexcusable".

Admissible Evidence of Actual Prejudice

[34] The exhibited evidence about the correspondence, discussed above, was mixed together with Mr. Sun's bald assertion about the unavailability of a few witnesses. He had no knowledge of what steps were taken to find them, and he had no knowledge of whether they had clear or unclear memories of the events surrounding the termination of Ms. Scott's employment.

[35] The information on these topics has been presented as a reply to an undertaking. Technically, that makes it evidence of Mr. Sun but it seems clear that the answer is in the nature of a corporate response to the request. Not only did Mr. Sun have no personal knowledge, there is no pretence that Mr. Sun, himself, actually did anything to answer the undertakings.

[36] Oddly, an employee Mr. Hale, whose whereabouts were unknown by Cargill for an extended period in the 2012-to-2015 time frame has now returned to work for Cargill, effective November 29, 2018. The reply to undertaking says that "Cargill Limited has discussed with

[him] his recollection of the events" but gives no indication of whether he has a clear or faded recollection. Even if we accept that this evidence is admissible, the Court is left to assume that he might have a clear recollection.

[37] In further examination on this undertaking, despite the assertion that "Cargill Limited" has spoken to him, Mr. Sun acknowledged that he had not spoken to him, and he still had no knowledge of the quality of Mr. Hale's memory despite the fact that that was what the undertaking was about.

[38] In answer to the undertaking about another witness (Mr. Plunkett), the reply was that his recollection was discussed with him before he was examined in 2008 – which of course is not what this application is about. When plaintiff's counsel attempted to ask about whether Cargill had made any effort to contact Mr. Plunkett to determine the quality of his recollection, Cargill's counsel initially objected, even though it is Cargill's application and Cargill is attempting to show prejudice from delay. When he was allowed to answer the question about Mr. Plunkett, Mr. Sun admitted he had no knowledge, but as a kind of alternative he volunteered that his own memory has faded.

[39] As to the balance of the witnesses who were the subject of the undertaking, the reply was simply that their whereabouts are unknown and Mr. Sun acknowledged that he had no knowledge of whether any steps had been taken to locate them.

[40] The reply went on to say that no discussions had been had with the former corporate litigation representative since her retirement in 2011.

[41] In the result, my view is that the evidence of the correspondence between counsel is admissible (although not presented in the most efficient manner) but the evidence of actual prejudice from the alleged unavailability of witnesses is not, because the evidence has been given by a witness who has no knowledge of whether they may be located, and in the case of Mr. Hale (who is clearly now available) Cargill has consciously *not* provided any evidence that Mr. Hale cannot clearly recall the events.

[42] Accordingly, in light of rule 13.18, Cargill's admissible evidence of fading memories is limited to Mr. Sun's own volunteered assertion that his memory has faded.

[43] In respect of significant prejudice, Cargill's application is therefore substantially based on (a) the assertion that the lack of medical evidence is due to the delay and that the medical evidence is material to its application, (b) the fact that Mr. Sun's own memory has faded, and (c) some other records that have been lost, which I will discuss below.

Inexcusable Delay

[44] That takes the analysis back to whether the delay is inexcusable.

[45] My review of the correspondence shows that the defendant seems to have tried to delay the process. A detailed review of what should have been routine letters between legal counsel setting up examinations for discovery (as they were called at the outset of this claim) or questioning (as the process is called now) reveals many instances of "stonewalling" by defence counsel.

[46] On June 10, 2005, plaintiff's counsel tried to set up examinations for discovery.

[47] Two-and-a-half months later, defence counsel suggested provided available dates, but the plaintiff then tried to fix dates and had to write five times from September 14, 2005 to March 14, 2006 – a period of six months – requesting or suggesting dates. It is disappointing to find that this became the regular pattern in their communications.

[48] Defence counsel did not respond until March 21, 2006. The defendant did not then offer dates, but rather advised that it was naming a new human resources manager and advising that it would not be available until the fall for discovery.

[49] On May 9, 2006, the defendant gave two dates when its new corporate officer would be available, but those dates were not acceptable to the plaintiff and the plaintiff sent letters May 23 and June 13, 2006.

[50] Defence counsel did not reply.

[51] Finally, the plaintiff served an appointment for the examination for discovery, and the parties then agreed to delay it to November 28, 2006.

[52] It had taken 17 months to set up an examination for discovery of the defendant. That should have taken, at most, four months and there is really no reason why it could not have happened much sooner than that. However, for purposes of my analysis, I will assume that the delay caused by the defendant at this stage can be quantified at 13 months.

[53] On October 5, 2006 the plaintiff asked whether the defendant intended to examine the plaintiff on November 28.

[54] Defence counsel did not reply.

[55] The plaintiff sent further letters on October 20 and November 1, 2006.

[56] Defence counsel finally responded November 3, to the effect that she would not be examining Ms. Scott then, requesting dates.

[57] Plaintiff's counsel responded the next day requesting dates from the defendant.

[58] Plaintiff's counsel sent four letters to the defendant about examining Mr. Plunkett and Mr. Hale, former Cargill employees. They were dated December 7, 2006, January 25, February 26, and March 19, 2007.

[59] Defence counsel did not reply to any of them.

[60] Finally, the plaintiff simply served Mr. Plunkett with an appointment for discovery.

[61] On November 27, 2007 the defendant acknowledged that Mr. Plunkett had been served. That correspondence was the first letter from defence counsel since plaintiff's counsel's letter of November 4, 2006 - over a year previous.

[62] Mr. Plunkett's examination was adjourned by agreement to March 19, 2008. The examination of Mr. Hale was scheduled in June of 2008, but it did not occur.

[63] For purposes of my analysis, I will assume that the examination of Mr. Plunkett was delayed by 14 months (it took 18 months to make it happen, and I will assume that four months was in the realm of a reasonable time to do so).

[64] New counsel assumed conduct of Ms. Scott's claim in 2010 and she proposed dates to examine Mr. Hale by letter of May 13, 2010.

[65] No reply. She followed up on June 29, 2010.

[66] On August 30, the defendant advised that it was trying to locate Mr. Hale and would advise if it were able to arrange dates.

[67] Nothing happened. Defence counsel did not address Mr. Hale's availability until March 21, 2012, and only after much prodding, as the following sequence describes.

[68] In 2011 plaintiff's counsel tried to move the matter forward again. There was considerable correspondence between counsel – mostly from plaintiff's counsel – in 2011 into 2013.

[69] Defence counsel, again, simply ignored most of the plaintiff's correspondence.

[70] Plaintiff's counsel wrote January 27, 2011 about examining Mr. Hale. She followed up eight times, on May 10, 2011, June 28, 2011, September 17, 2011, November 3, 2011, December 20, 2011, January 26, 2012, February 16, 2012, and on March 21, 2012 before she received the courtesy of a reply.

[71] Having not received a reply in 14 months despite eight previous attempts, she made reference in her March 21, 2012 letter to the Code of Conduct.

[72] Only then did she receive a reply from defence counsel. It came the same day, saying, "We are in receipt of your recent correspondence." Plaintiff's counsel had written nine letters over a 14-month period. Many of them could not be described as "recent".

[73] The answer was that Mr. Hale was no longer employed by Cargill, and the company might not be able to secure his attendance. It should not have taken 14 months to determine that Mr. Hale no longer worked at Cargill. It should have taken a phone call to Cargill and a letter to plaintiff's counsel. The time for that response should have been measured in days, not months.

[74] However, plaintiff's counsel did not pursue the matter immediately. She did not correspond again until May 31, 2012 - a little over two months - when she tried to arrange for Cargill's questioning of Ms. Scott. But then she had to follow up on July 3, 2012, and again on August 3, 2012.

[75] After these three letters, she finally received a letter from defence counsel dated August 9, 2012 - acknowledging only the letter of August 3, and ignoring the letters of May 31 and July 3. She said that dates in November and December were being "canvassed", although no dates were suggested.

[76] However, when plaintiff's counsel tried to set up questioning in November or December – the time frame suggested by defence counsel – (she offered 10 proposed dates in her letter of August 16, 2012) she received no reply.

[77] She had to follow up on September 21, 2012, and then defence counsel responded on October 1 advising that she was not available until March 25, 26, or 27, 2013 – despite the fact that it was she who had suggested that the questioning might take place in November or December.

[78] Plaintiff's counsel wrote October 2, 2012 expressing frustration because she had been trying to advance the questioning for over two years, she had received the advice that defence counsel was "canvassing" November and December, tried to follow up on that, but when she attempted to schedule questioning then defence counsel only offered the dates in March.

[79] She followed up again on November 13, 2012, again on November 26, and finally received a reply on November 27, 2012. Surprisingly, the response was to blame delay on *plaintiff's* counsel.

[80] Apparently 16 letters were not enough.

[81] And once again, defence counsel did not acknowledge the earlier letters. In her November 27 letter, she wrote the following:

> We are in receipt of your correspondence dated November 26, 2012. Further to our correspondence of October 1, 2012, the writer is unavailable to conduct the questioning of your client in December as she will be attending numerous hearings. *As you are aware, you have failed to take any steps on this file for several years. It is unreasonable to take no steps to move this file and then demand that questioning be conducted in a short time frame.*
>
> (My emphasis.)

[82] By this time, plaintiff's counsel had been trying to move questioning forward since at least her letter of January 27, 2011, or close to two years, and she had mostly been stonewalled by defence counsel, as had previous plaintiff's counsel.

[83] In the brief filed in support of this application, defence counsel asserted that "there had been no steps to advance the Action during the period from March 19, 2008 until March 18, 2013", being a period of five years less one day. At that time, the "drop dead" period of inactivity was five years: rule 15.4.

[84] The reason that there had been no steps (using the functional approach mandated by the Court of Appeal when considering rule 4.33) is that no questioning had actually taken place. Writing to opposing counsel to try to set dates does not count for purposes of that "drop dead" rule. Of course, it would be easy to conclude from a review of this correspondence that the defendant was trying to *prevent* the plaintiff from taking a step until five years had passed, by simply refusing to respond to, or even acknowledge correspondence from, plaintiff's counsel.

[85] After giving up on the examination of Mr. Hale, plaintiff's counsel was trying to arrange for Cargill's examination of her own client. Simply serving an appointment and conduct money was not an option open to her. The only realistic option, besides expecting courteous cooperation, would have been to bring a court application to get a litigation plan, have a judge appointed for case management, or try to have the case set down for trial without the defendant's examination of her client.

[86] Only after relentless letter-writing by plaintiff's counsel did defence counsel agree to questioning within the five-year deadline, having delayed the action for about two years during this period – mostly by not responding to correspondence.

[87] My view is that two years were lost by this exchange, in addition to the 13 month and 14 month periods I have estimated above resulting from previous stone-walling by defence counsel. That is well over four years' delay clearly caused by the defendant.

[88] However, subsequent delay seems to have fallen at the feet of the plaintiff.

[89] On March 18, 2013 Ms. Scott was finally examined, and she gave several undertakings. Following the examination, defence counsel wrote to plaintiff's counsel on May 2, 2013 and

listed a number of records that Cargill wanted produced. She advised that she wanted to examine Ms. Scott further once they were produced and undertakings were fulfilled.

[90] There was no quick response. Defence counsel followed up on August 6, 2013. However, Ms. Scott did not answer the undertakings until December 23, 2014, about 17 months after the questioning. Her counsel suggested that the further questioning take place on January 6, 7, or 8, 2015 – almost immediately after the Christmas/New Year's Day break, only a little over two weeks later.

[91] The continued questioning was finally conducted on June 16, 2015. That was when the plaintiff acknowledged that she did not have some records (discussed above) and she had no recollection of her attempts at mitigation. She gave 25 undertakings, including undertakings to produce records that had been requested by defence counsel in 2006 and in 2013.

[92] Then nothing.

[93] The matter seems to have gone to sleep for three years less two days, when she provided responses to the undertakings given in June, 2015 and her counsel provided a form 37 to request the matter be set down for trial. Rule 4.33, the "drop dead" rule, which now says that after three years of inactivity a claim must be dismissed, operates like a limitation period: ***Ursa Ventures Ltd v Edmonton (City)***, 2016 ABCA 135 at para. 11. If the action is taken within three years, the rule is not in play, although the almost-three-years delay is still to be considered in the analysis under rule 4.31.

Analysis

Actual Significant Prejudice

[94] There is a modest bit of evidence of mitigation that is missing, and perhaps it is as a result of the delay.

[95] Ms. Scott recalls working for a Mrs. Druken for about two months in 2004, but she can locate no records and Mrs. Druken has passed away. I assume there was no income tax declaration or T-4 issued, or records would have been located. This means that Cargill has lost the ability to show the extent of possible mitigation that would reduce its exposure, but the reduction seems to have been modest at best, and it relates to a period about a year following the termination of Ms. Scott's employment – neither side addressed the question of whether mitigation in that time frame would seriously likely affect any award that a trial judge might otherwise make, although the amount claimed is based on15 months' reasonable notice, as disclosed in reply to one of Ms. Scott's undertakings.

[96] I expect that a trial judge could likely draw inferences in Cargill's favour about this missing evidence. An inability to document mitigation efforts may well favour Cargill. I do not see this absence as demonstrating that there is actual significant prejudice.

[97] There is some additional evidence about missing diaries and calendars, a newspaper article about a trip to the Caribbean (the relevance of this was not explained), some Workers' Correspondence forms, and some Great-West Life Insurance forms. The materiality of these missing items was not explained, although I presume that the diaries and calendars were sought to address steps taken in mitigation.

[98] However, as mentioned Ms. Scott admits her attempts were modest at best. That prejudice, therefore, is substantially to Ms. Scott, not Cargill. The burden to prove the plaintiff's failure to take reasonable steps to mitigate lies on the defendant (***Red Deer College v. Michaels***, [1976] 2 SCR 324, 1975 CanLII 15), but the plaintiff has given a substantial admission.

[99] Otherwise, Cargill must rely on the presumption of significant prejudice under rule 4.31, which requires a conclusion that the delay is both inordinate (which is admitted) and inexcusable.

Inexcusable Delay

[100] This is not a case where the plaintiff has made allegations of impropriety by the defendant that have, or might have, impaired its ability to continue in business because of the allegations, as discussed by the Court of Appeal in ***Humphreys v. Trebilcock***, 2017 ABCA 116.

[101] In fact, the behaviour of the defendant throughout has made it clear that it is happy to delay and ignore the claim. Certainly, there has been virtually no cooperation in moving it forward. Admittedly, the Foundational Rules were not in existence at the outset of the claim, but they came into force November 1, 2010, and rule 1.2 directs, in simple terms, the approach to be used by the parties and the court that has been in play since then:

> **1.2(1)** The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> **(2)** In particular, these rules are intended to be used
>
> ...
>
> (b) to facilitate the quickest means of resolving a claim at the least expense,
>
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
>
> (d) to oblige the parties to communicate honestly, openly *and in a timely way*, and
>
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.
>
> **(3)** To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,
>
> (a) identify or make an application to identify the real issues in dispute *and facilitate the quickest means of resolving the claim at the least expense*,
>
> (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,
>
> (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

(My emphasis.)

[102] Obviously, that approach was not followed here.

[103] Rule 4.31 talks of "inexcusable" delay. What is "inexcusable" must be looked at in context, as the Court of Appeal made clear in ***Humphreys***. When the defendant has caused much of the delay, its behaviour has effectively "excused" it, particularly in light of rule 1.2.

[104] In my view, although the delay has been inordinate (as the plaintiff admits) the defendant cannot complain that the delay has been "inexcusable" when it has been significantly contributing to the delay in the face of repeated attempts by plaintiff's counsel to move the case forward – not on one or two isolated occasions, but repeatedly, over a period of years, refusing to acknowledge correspondence, and then blaming the delay entirely on the plaintiff or her counsel.

[105] The defendant's delays seem to have been to the point of causing the plaintiff to almost run out of steam after years of stonewalling. That would seem to be the best explanation for the plaintiff's more recent delays.

[106] However, the defendant is not the sole cause of the 15-year delay. After a reasonably prompt first few steps, the plaintiff did not prosecute the claim quickly in the early years. Perhaps plaintiff's counsel's description that the plaintiff "put her head under a pillow" after her employment terminated affected her ability or willingness to instruct counsel early on.

[107] And more recently, there has been significant delay caused by the plaintiff, in simply responding to undertakings. Accordingly, it is clear that much of the delay was caused by the plaintiff's reticence to move the claim forward.

[108] However, taking into account the entire chronology, in my view the better analysis is that there has not been "inexcusable" delay despite the many years that have transpired.

[109] There can really be no question that this case would have benefitted from a litigation plan or case management. However, neither a litigation plan nor case management should be necessary when the claim is for wrongful dismissal and where there are only two counsel involved. The court expects counsel to cooperate in moving cases forward to resolution.

Significant Prejudice

[110] In my view although there has clearly been some prejudice resulting from the delay, it is not clearly prejudice that adversely affects the defendant. It is likely to affect the plaintiff's claim more. In any event, I do not find that there is evidence of "significant" prejudice, which is what the rule addresses.

Discretion

[111] Finally, rule 4.31 reserves a discretion. Even if I had not determined that there is no significant prejudice, or that that the delay was not inexcusable, in light of the apparent deliberate attempt to delay and frustrate the plaintiff's claim I would have found a compelling

reason not to dismiss the claim (as described in ***Humphreys***) and exercised my discretion to decline to dismiss the claim.

Conclusion

[112] For these reasons, the application is dismissed.

[113] As to costs, I would take into account the mutual contribution to delay and make an award of party-and-party costs under Schedule 3 in the cause. However, as counsel have not addressed costs and there may be factors of which I am unaware, counsel may contact the masters' chambers clerk within three weeks of the date of release of this memorandum to schedule an appointment to discuss costs. If no such contact has been made within that time, the costs shall be as I have indicated.

Heard on the 4th day of April, 2019.
Dated at the City of Calgary, Alberta this 1st day of May, 2019.

A.R. Robertson, Q.C.
M.C.C.Q.B.A.

Appearances:

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