In the Court of Appeal of Alberta

Citation: Stabilized Water of Canada Inc v Better Business Bureau of Southern Alberta, 2019 ABCA 146

Date: 20190423
Docket: 1801-0007-AC
Registry: Calgary

Between:

Stabilized Water of Canada Inc. and Envirosoft Water Inc.

Appellants
(Plaintiffs)

- and -

Better Business Bureau of Southern Alberta

Respondent
(Defendant)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Elizabeth Hughes

Memorandum of Judgment

Appeal from the Decision by
The Honourable Mr. Justice B.E. Mahoney
Dated the 4th day of December, 2017
(2017 ABQB 736, Docket: 0201 18472)

Memorandum of Judgment

The Court:

[1] The appellant corporations appeal the decision of a chambers judge at 2017 ABQB 736 upholding the decision of a master at 2016 ABQB 543, which dismissed the underlying defamation action the appellants filed against the respondent. Both courts concluded that the action should be dismissed for long delay under Rule 4.31. The master was not persuaded that there was three years of inactivity under Rule 4.33 so he did not invoke that rule: 2016 ABQB 543 at para 40.

[2] The alleged defamation occurred in notifications issued by the respondent in the spring and fall of 2000 and July, 2001 informing the public as to the alleged ineffectiveness of a water softening system then being marketed by the appellants. The defamation action was launched over one year after the last alleged defamatory notification, in October, 2002.

[3] As described by the master, the suit moved at a leisurely, if not glacial, speed until something of an impasse by December 2, 2014: 2016 ABQB 543 at para 10. That impasse arose at least in part from the failure of the appellants, after twelve years, to have provided "full financial information and technical data regarding the water softener equipment": 2016 ABQB 543 at para 10. The appellants did not reply to this letter. The respondent moved for dismissal on February 29, 2016.

[4] The appellants complained to the master and to the chambers judge that the sprinkling of events between April 16, 2009 (when the respondent's corporate nominee was questioned) and December, 2014, was attributable to the respondent's dilatory reaction to interrogatories sent to the respondent for further answers from a representative of the respondent. But those responses were completed on December 19, 2013, albeit with many answers being that the respondent could now not acquire the information sought. The appellants also complained that the respondent took the position in 2014 that they would not examine the appellants' representatives without the financial and technical information.

[5] The master was unmoved by the appellants' contention that their delay should be excused saying it could be chalked up to the respondent's insistence on complete discovery of those records. The master said those records were relevant and should have been disclosed long before. The master also found no merit in the appellants' contention that they had no ability to force the respondent to examine their representative. The master noted steps available under the rules, and said it was their duty to keep moving, citing *XS Technologies Inc v Veritas DGC Land Ltd,* 2016 ABCA 165, [2016] AJ No 528. The master found the delay inordinate and inexcusable.

[6] Insofar as prejudice to the respondent is concerned, the master was persuaded that since defences such as responsible communication, fair comment, qualified privilege and absence of malice involve assessment of the state of mind of the alleged defamatory speaker, the delay had produced serious prejudice. This followed from the fact that "numerous individuals" connected to the respondent from 1999 to 2001 were "gone or deceased" including "essentially every support staff or lower level manager … involved in vetting the articles in question …": 2016 ABQB 543 at paras 26 and 34. The master found significant prejudice and dismissed the action under Rule 4.31.

[7] The chambers judge concurred with the master's conclusion. The chambers judge took into account delays by the appellants prior to 2009. He rejected any suggestion that the respondent had in effect ambushed the appellants by its own conduct. The chambers judge applied the reasoning in *Humphreys v Trebilcock*, 2017 ABCA 116, 2017 AJ No 375, leave to appeal to SCC refused, [2017] SCCA No 228 and found both inordinate and inexcusable delay by the appellants and serious prejudice to the respondent.

[8] We agree with the parties that this appeal attracts a deferential standard of review. The master and the chambers judge made no palpable and overriding error.

[9] Whether the delay in this action has resulted in significant prejudice is fact driven. This reality was fully appreciated by the master and chambers judge who in carefully prepared reasons found that the delay was inordinate and inexcusable, and resulted in significant prejudice to the respondent. While the appellants filed additional evidence before the chambers judge about correspondence between 2004 and 2008, this evidence did little to change the overall narrative of the action. There is no merit on this record in the suggestion that the respondent ambushed the appellants.

[10] It is now almost 20 years since the first alleged defamation in the spring of 2000. The action was properly dismissed for delay. The appeal is dismissed.

Appeal heard on April 11, 2019

Memorandum filed at Calgary, Alberta
this 23rd day of April, 2019

Authorized to sign for: Watson J.A.

Veldhuis J.A.

Hughes J.A.

Appearances:

C.R. Jones
for the Appellants

R.M. Phillips/C. Stokes
for the Respondent