Court of King's Bench of Alberta

Citation: Oleksyn v Hi Line Farm Equipment Ltd, 2024 ABKB 584

Date: 20241002
Docket: 1612 00088
Registry: Wetaskiwin

Between:

Dale Oleksyn, 1297750 Alberta Ltd., and 1833303 Alberta Ltd.

Plaintiffs/Respondents

- and -

Hi Line Farm Equipment Ltd., Amraa Industrial Supplies Ltd., Andy Vanderburg, and Fred Churchill

Defendants/Applicants

Memorandum of Decision of the Honourable Justice A. Loparco

I. Introduction

[1] Hi Line Farm Equipment Ltd. (Hi Line), Amraa Industrial Supplies Ltd. (Amraa), Andy Vanderburg (Mr. Vanderburg), and Fred Churchill (Mr. Churchill), (collectively the Defendants), apply for an order dismissing the action against them for long delay pursuant to *Rule* 4.33 or *Rule* 4.31 of the AB, *Rules of Court,* Alta Reg 124/2010 (commonly known as the Drop-Dead Rule).

II. Brief Conclusion

[2] The Defendants' application to strike pursuant to *Rule* 4.33 and *Rule* 4.31 is dismissed.

[3] There has not been a period of three years (plus 75 days) where no significant advance occurred. Further, I do not find that the current circumstances warrant exercising judicial discretion to dismiss the action pursuant to *Rule* 4.31.

III. Procedural History

[4] On March 21, 2016, the Plaintiffs commenced an action against the Defendants. The dispute is about whether Dale Oleksyn (Mr. Oleksyn), an independent contractor hired in 2012, is owed additional commission for the sale of farm equipment during a three-and-a-half-year period and whether he was defamed by an employee of the Defendants.

[5] Mr. Oleksyn was the sole shareholder and director of two Alberta numbered companies, 1297750 Alberta Ltd. and 1833303 Alberta Ltd. On December 1, 2021, both numbered companies were amalgamated into Oleksyn Enterprises Ltd. (the Plaintiff Corporations) with Mr. Oleksyn as the sole shareholder and director. The Plaintiff Corporations filed a Statement of Claim on March 21, 2016, seeking damages for breach of contract, wrongful dismissal, and defamation, naming as Defendants, Hi Line, Amraa, Mr. Vanderburg, and Mr. Churchill.

[6] For ease of reference, the procedural steps are set out below:

Date	**Event**
March 21, 2016	Statement of Claim filed
May 12, 2016	Statement of Defence and Counterclaim filed
June 8, 2016	Statement of Defence to Counterclaim filed
October 3, 2016	Plaintiffs provide their Affidavit of Records
December 13, 2016	Plaintiffs file application to compel production of Defendants' Affidavit of Records
March 28, 2017	Defendants provide their Affidavit of Records, pursuant to Court Order
October 10 and 13, 2017	Questioning of Mr. Vanderburg
June 5 and 6, 2018	Questioning of Mr. Oleksyn
January 14, 2019	Plaintiffs provide certain answers to undertakings given by Mr. Oleksyn during questioning
January 15, 2019	Further Questioning of Mr. Oleksyn (Last Uncontroversial Significant Advance)
March 1, 2019	Plaintiffs provide remaining answers to undertakings given by Mr. Oleksyn during questioning (March 1st Undertaking Responses)
March 5, 2019	Plaintiffs provide further answers to undertakings (March 5th Letter)

April 23, 2019	The parties scheduled further questioning of Mr. Oleksyn on May 29 and 30, 2019, and further questioning of Mr. Vanderburg on June 3 and 4, 2019. This questioning did not occur
October 1, 2019	Defendants serve Plaintiffs with Notice of Appointment for Questioning of Mr. Oleksyn, with questioning scheduled for November 6-8, 2019; questioning does not proceed
October 1, 2021	Plaintiffs sent to the Defendants a formal offer to settle, which the Defendants rejected on October 5, 2021.
February 18, 2022	Plaintiffs serve Notices of Appointment for questioning of Mr. Vanderburg and Mr. Churchill with conduct money, scheduled for March 15, 2022 (March 15, 2022 Appointments for Questioning)
March 8, 2022	Defendants inform Plaintiffs that they will not attend questioning given the delay on the file and return the conduct money. Defendants advised Plaintiffs' counsel that an application to strike would be filed if the Plaintiffs continued with the litigation
April 20, 2022	Plaintiffs' counsel wrote back advising they were bringing an application to schedule further questioning of the Defendants
April 28, 2022	Plaintiffs file Application to compel Mr. Vanderburg and Mr. Churchill to attend at questioning (the Questioning Application). The Questioning Application was ultimately scheduled to be heard on May 17, 2022
May 17, 2022	Defendants file dismissal for long delay Application (the Drop-Dead Application) pursuant to *Rules* 4.31 and 4.33 of the *Alberta Rules of Court*
May 17, 2022	Effective date of Standstill Agreement (the Standstill Agreement) to allow for the Drop-Dead Application to be heard before the action continued, with the Questioning Application being adjourned *sine die*

[7] The parties agree that the last uncontroversial significant advance in the action was the questioning of Mr. Oleksyn on January 15, 2019 (Last Uncontroversial Significant Advance).

[8] There is no dispute that Ministerial Order 27/2020 suspending limitations periods for 75 days applied during the period in question.

[9] The Defendants argue that there was a period of three years plus seventy-five days afforded under Ministerial Order 27/2020 where there was no significant advance in the litigation. Since the Last Uncontroversial Significant Advance occurred on January 15, 2019, the Defendants state that the Plaintiffs failed to take a significant step to advance the litigation on or before March 31, 2022 (Drop-Dead Period).

[10] However, the Plaintiffs state that there are numerous other steps that significantly advanced the action before the expiry of the Drop-Dead Period, namely, the March 1st Undertaking Responses, the March 5th Letter, the Formal Offer to Settle, the March 15, 2022 Appointments for Questioning, and service of their Questioning Application returnable May 17, 2022.

IV. Plaintiffs'/Respondents' Position

[11] The Plaintiffs argue that the March 1st Undertaking Responses and the March 5th Letter significantly advanced the action by providing crucial clarifications and corrections to the previously provided discovery materials, thus moving the matter closer to resolution.

[12] They further submit that had the Defendants participated in the scheduled questioning on March 15, 2022, that questioning would have elucidated new information that would have advanced the action before the expiry of the Drop-Dead Period.

[13] They further argue that it would be a contrary to the principles of equity to dismiss the action for long delay as it is a direct result of the Defendants' own misconduct by refusing to attend the questioning on an erroneous point of law, namely that they believed the Ministerial Order adding 75 days to the Drop-Dead Period did not apply.

[14] The Plaintiffs submit that the Defendants' strategy in seeking to strike this claim should be seen as an abuse of the *Rules* and contrary to the principles of equity and justice.

[15] In response to the application to strike pursuant to *Rule* 4.31, the Plaintiffs argue that the Defendants' claim of significant prejudice is unsubstantiated. Apart from the generic claim of fading memories over time, the Defendants have failed to provide concrete examples of how the delay has resulted in an unfair disadvantage or materially affected their ability to defend against the Plaintiffs' claims. Much of the evidence is in the form of documents, which have been preserved.

V. Defendants'/Applicants' Position

[16] The returnable date for Plaintiffs' Questioning Application was May 17, 2022, which the Defendants contend was more than three years and 75 days after the Last Uncontroversial Significant Step.

[17] While the Defendants acknowledge receipt of the March 1st Undertaking Responses and the March 5th Letter within the Drop-Dead Period, they argue that these do not rise to the standard of a significant advancement; they state they were purely perfunctory.

[18] They further state that even if the Court accepts the March 1st Undertaking Responses as being a significant advance, the action ought to still be dismissed since, in that circumstance, the Drop-Dead Period would be from March 1, 2019 to May 16, 2022 (one day before the returnable date of May 17, 2022 for the Plaintiffs' Questioning Application).

[19] They also submit that they were entitled to refuse to attend the March 15, 2022 Questioning because at that time, it was unknown whether the Ministerial Order would apply in this case. Without the additional 75 days, the Drop-Dead Period would have been exceeded by March 15, 2022. They disagree that taking this position, which was ultimately shown to be mistaken, amounts to an abuse of process that resulted in further delay.

[20] Finally, they argue that the delay in prosecuting this action has been inordinate and inexcusable and has resulted in significant prejudice to them, including the result of fading memories and probable loss of the Plaintiffs' financial records held by a former accountant. Accordingly, the Defendants submit that the action ought to nevertheless be dismissed pursuant to *Rule* 4.31.

VI. Issues

[21] Is a three-year (plus 75 day) period where no significant advance occurred?

[22] The following steps in this litigation need to be considered in determining whether they amount to significant advancements during the Drop-Dead Period:

(a) March 1st Undertaking Responses;

(b) March 5th Letter;

(c) The Plaintiffs' Settlement Offer;

(d) March 15, 2022 Appointments for Questioning; and

(e) Questioning Application returnable May 17, 2022.

[23] Second, if *Rule* 4.33 does not apply, should the claim be dismissed pursuant to *Rule* 4.31?

VII. Analysis

1. Pursuant to *Rule* 4.33, is there is a three-year period (plus 75 days) where no significant advance occurred?

[24] *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
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> > (a) the action has been stayed or adjourned by order, an order has been made under subrule (9) or the delay is provided for in a litigation plan under this Part, or
> >
> > (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.

[25] The caselaw relating to *Rule* 4.33 is well established. *Rule* 4.33 is mandatory and grants no discretion to allow the action to continue if the conditions of the rule are met. Prejudice, the strength of the claim, the reason for the delay, or sympathy do not play into this determination: see ***Babiuk v Heap***, 2023 ABKB 410 at para 44 [***Babiuk***], ***Stylecraft Developments (1984) Ltd v Carscallen LLP*** 2023 ABKB 504 [***Stylecraft***].

[26] The relevant period of delay must be determined by starting with the last uncontroversial significant advance up to the date the dismissal application was filed (not the date it was heard): see ***Rahmani v 959630 Alberta Ltd.***, 2021 ABCA 110 at paras 16-17; ***Vanmaele Estate (Re)***, 2023 ABKB 456 at para 21; ***Taschuk v Taschuk***, 2022 ABKB 786 at para 13; ***Babiuk*** at para 48.

[27] The question to be asked is: "was there a three year period between these dates without any significant advance in the action?": ***Rahmani*** at para 17. If the relevant period of delay includes March 17, 2020 to June 1, 2020, then the COVID-19 Ministerial Order 27/2020 must be considered, as it suspended the operation of time limits under the *Rules* for 75 days from March

17, 2020 to June 1, 2020, subject to the court's discretion: ***Coble v Atkin***, 2023 ABKB 10 at para 28.

[28] A party resisting the dismissal can point to any step in the action by any party, and related to only some, but not all defendants, as long there has been a significant advancement of the action as a whole: ***Flock v Flock Estate***, 2017 ABCA 67 at para 17-7; ***1499925 Alberta Ltd. v NB Developments Ltd.***, 2023 ABKB 114 at para 57 (and cases cited therein).

[29] Whether a step significantly advances the action is determined by a functional, context-specific, substance-over-form approach: ***Rahmani*** at paras 14 and 22; ***Flock*** at paras 17-1 and 17-2; ***Patil v Cenovus Energy Inc.***, 2020 ABCA 385 at para 7.

[30] A significant advance is one that moves the action forward in an essential or meaningful way, reflecting important or notable progress towards the resolution of an action: see ***Loncikova v Goldstein***, 2023 ABCA 358 at para 9; ***Patil*** at para 7; ***Rahmani*** at para 14; ***Jacobs v McElhanney Land Surveys Ltd.***, 2019 ABCA 220 at para 86. This is assessed by viewing the whole picture of what transpired during the relevant period, framed by the real issues in dispute, and viewed through a lens trained on qualitative assessment: ***Ro-Dar Contracting Ltd. v Verbeek Sand & Gravel Inc.***, 2016 ABCA 123 at para 21.

[31] The assessment requires the Court to ask:

> Has anything that happened in the applicable period increased by a measurable degree the likelihood either the parties or a court would have sufficient information – usually a better idea of the facts that can be proven – and be in a better position to rationally assess the merits of the parties' positions and either settle or adjudicate the action?
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> Are the parties at the end of the applicable period much closer to resolution than they were at the start date?
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> (see ***Loncikova*** at para 9; ***Morrison v Galvanic Applied Sciences Inc.***, 2019 ABCA 207 at para 35; ***Jacobs*** at para 86; ***Weaver v Cherniawsky***, 2016 ABCA 152 at para 26.)

[32] Answering these questions involves an assessment of the nature, quality, genuineness, and timing of the step: ***Patil*** at para 7; ***Rahmani*** at para 14; ***Ursa Ventures Ltd. v Edmonton (City)***, 2016 ABCA 135 at para 19; ***Ro-Dar*** at para 21. Steps that narrow issues, clarify positions, complete discovery of documents and information, or ascertain relevant facts or law, may significantly advance an action, but outcomes should not be overemphasized: ***Ro-Dar*** at para 20; ***Stylecraft*** at para 13.

[33] The onus is on the party making the dismissal application to lead evidence that no significant advance has occurred within the three year Drop-Dead period: ***Taschuk*** at paras 37-40; ***Nahal v Gottlieb***, 2019 ABQB 650 at para 11. However, while the overall legal or persuasive burden is on the applicant, if the party resisting the application relies on specific matters as significantly advancing an action, they may have an evidential burden to demonstrate or prove how they do so: see, for example, ***Taschuk*** at paras 38-40.

[34] The general rule is that a party who asserts a proposition of fact has the burden of proving it: ***Emeric Holdings Inc. v Edmonton (City)***, 2009 ABCA 65 (per Slatter JA, in dissent) at

para 43, citing ***Robins v National Trust Co***, 1927 CanLII 469 (UK JCPC), [1927] AC 515 at p 520 (JCPC, Ont).

a) Do the March 1st Undertaking Responses constitute a significant advance of the action?

[35] The Defendants argue that the March 1st Undertaking Responses do not rise to the level of a significant advancement as they are merely perfunctory, with nothing hinging on the responses.

[36] The Plaintiffs, on the other hand, claim that they provided crucial clarifications and corrections to the previously provided discovery material, thus moving the case close to resolution.

[37] The general rule is that the provision of an answer to an undertaking is usually a thing that materially advances an action: see ***Kuziw v Kucheran Estate***, 2000 ABCA 226 [***Kuziw***] at para 15; see also ***Alderson v Wawanesa Life Insurance Company***, 2020 ABCA 243 [***Alderson***]. The rationale behind the rule is that an undertaking given at an examination for discovery is really an extension of the discovery process, no one would seriously deny that an examination for discovery is a thing that materially advances an action, and the Court of Appeal finds no reason to treat a response to an undertaking differently: see ***Ravvin Holdings Ltd. v Ghitter***, 2008 ABCA 208 at para 24.

[38] The general rule is subject to an exception, namely whether the answer is merely perfunctory and nothing hinges on the response: see ***Kuziw*** at para 15 and ***Alderson*** at paras 15-19.

[39] More recently in ***Kahlon v Khalon***, 2021 ABQB 683 [***Kahlon***], Justice Michalyshyn held at para 11:

> Noting that an undertaking response will usually advance the action in a material way, it is also necessary to ask—as an exception to this general rule—whether *functionally* the undertaking response or responses significantly advance the action in an essential way, having regard for their nature, quality, genuineness and timing. What is also consistent with the newer authorities is the test articulated at para 25 in ***Raviin*** —whether the undertaking response is perfunctory and nothing hinges on its response.

[40] To determine whether or not responses are merely perfunctory, or whether anything hinges on the undertakings, requires a functional approach: see ***Kuziw***, ***Alderson*** and ***Kahlon*** at para 20.

[41] The March 1st Undertaking Responses and the March 5th Letter are analyzed below.

March 1st Undertaking Responses

[42] The March 1st Undertaking Responses included a number of undertakings, some of which involved a review of particular transactions or groups of transactions. Beyond the responses described below, a spreadsheet entitled "Exhibit 7" was attached which was described as "…a comprehensive spreadsheet cataloguing each transaction within the disputed period May 31, 2012 to December 31, 2015 inclusive".

Undertaking #10 - Review Exhibit D-5 and advise if any discrepancies, errors, or omissions are found

[43] For Mr. Oleksyn to be able to advise if any discrepancies, errors, or omissions existed in Exhibit D-5 (created by the Defendants), he was required to review the Exhibit provided and cross-reference the summaries with the source sales records, a task he states required the assistance of his accountant. Mr. Oleksyn noted 11 entries which he took issue with and provided revised numbers. This resulted in Mr. Oleksyn claiming that $1,404,513.65 had been paid to him rather than $1,511,101.39, a difference of $106,587.74 (and a decrease of 7.05%).

[44] I disagree with the Defendants that this did not bring the parties closer to resolution. It was essential that Mr. Oleksyn sharpen his pencil so that the damages could be ascertained in a more precise manner. The difference of roughly 7% is significant. Although it increased the Plaintiffs' damages and put the parties further apart quantitatively, it narrowed the uncertainty of their overall claim (and the counterclaim) and therefore was significant in advancing the litigation.

[45] Although there are similarities between Exhibit 7 and Exhibit D-5, given that they are both summaries of the same sources, I accept the Plaintiffs' argument that the difference between the two documents represents the factual dispute regarding the amount claimed in the litigation. Those differences, highlighted in the undertaking responses, are important and not merely perfunctory. The ultimate *quantum* hinges on these responses.

[46] The Defendants insist that these responses do nothing to define the terms of the Contract and the basis on which Mr. Oleksyn was to be compensated. That may be the case; however, the action has multiple facets, and *quantum* is a key factor.

[47] In ***Reihs Estate (Re)***, 2021 ABQB 821, the Court stated at para 35:

> To establish that gathering records has significantly advanced an action, there must be some evidence that something has been done besides mere collection. Has the party in receipt of the records reviewed them, particularly when they are voluminous, to determine what, if any, portions of the records are relevant and material to the action? Have the relevant records been identified and correlated to outstanding issues? Have the records been provided to the other side for review?

[48] From a functional perspective, the response to Undertaking #10 was not merely perfunctory with nothing hinging on the response; rather, I conclude that it would have moved the parties closer to resolution by putting a fine point on the calculation of damages.

Undertaking #13 - Provide an accounting underlying the $380,000.00 figure

[49] This response clarified an amount paid by Hi Line.

Undertaking #14 - Provide an accounting of what underlies the 2015 figure of $305,215.65

[50] This response required Mr. Oleksyn to provide an accounting of the amount he claimed was owing to him as of the end of 2015. He undertook the necessary calculations to refine his claim for the purpose of properly quantifying his damages.

[51] I disagree with the Defendants' argument that the overall delta in the *quantum* (being 4.12%) is the only relevant factor, which they claim is insignificant. As with Undertaking #10,

this response narrowed the uncertainty of their overall claim, bringing the parties closer to resolution, and therefore was significant in advancing the litigation.

Undertaking #15 - Provide the tax filings for 1833303 Alberta Ltd. for 2015 and 2016, if they exist, or confirm that the have not been filed

[52] This answer, although it did not provide the actual tax documents, was significant in that it provided a response as to whether they exist. The answer is not merely perfunctory as it may lead to another round of questioning that could result in the production of the filed tax returns.

[53] Had the undertaking responses been merely perfunctory, obvious, or unnecessary, the Defendants would presumably not have made the request. Analyzing the mass of data previously provided in order to refine the claim was a necessary task that could only be properly performed by Mr. Oleksyn, even if he was provided with the Defendants' summary of the transactions.

b) Does the March 5th Letter constitute a significant advance of the action?

[54] The March 5th Letter provided updated answers to the undertakings provided on March 1, 2019. Specifically, Mr. Oleksyn corrected two entries on the spreadsheet labelled Exhibit 7, resulting in the updated "Exhibit 7a".

[55] Based on these two corrected entries, he modified the answer to Undertaking #14 to indicate that the claimed balance owing to Mr. Oleksyn was $329,445.66, not $317,790.66 (a difference of $11,655). The total amount that Mr. Oleksyn claimed was owing thus increased to $329,445.66 from $317,790.66 (a 3.67% increase).

[56] He also corrected the answer to Undertaking #17 to reference Exhibit 7a rather than Exhibit 7.

[57] The March 5th Letter was not merely a typographical correction; the letter indicates that counsel had another meeting with Mr. Oleksyn and that he identified new information that changed the spreadsheet. I disagree that it is inconsequential.

[58] I note that they also updated Undertakings 14 and 15, which provide relevant information on invoicing and payments. As with the March 1st Undertaking Responses, the March 5th Letter further finetunes the quantification of the claim.

[59] As a result of the March 5th Letter, which required further work cross-referencing the voluminous sales records and providing more refined calculations, the parties had greater certainty of the precise *quantum* of the claim; Mr. Oleksyn's claim increased by 3.67%.

[60] Thus, in my view, the parties were again even closer to resolving the claim.

[61] I am mindful of the potential for updated responses to undertakings being used to gain time in a litigation inappropriately. However, in this case, there was no advantage gained by providing further amendments to the responses four days after the March 1st Undertaking Responses. This was provided well within the Drop-Dead Period. The significance of the March 5th Letter only became a critical factor once the Questioning Application was filed and made returnable for May 17, 2022. However, at the time the Plaintiffs provided the March 5th Letter, there was no intent to merely use the step strategically to delay matters.

c) Is the Settlement Offer a significant advance

[62] Settlement discussions and offers generally do not constitute significant advances in an action. See ***Delver v Gladue***, 2019 ABCA 54 [***Delver***], and ***McKay v Prowse***, 2018 ABQB 975 [***Prowse***].

[63] The Plaintiffs attempt to distinguish ***Delver*** by stating that in ***Delver*** (a case where an action was dismissed for long delay), the only things that occurred in the preceding three years was the exchange of "letters between legal counsel contemplating settlement", whereas in the present matter, the Plaintiffs served a Formal Offer on October 1, 2021, "as well as a copy of an updated exhibit". This formal offer to settle, the Plaintiffs' claim, "gathered information for settlement purposes" and applying the reasoning in ***Prowse***, "materially advanced the action".

[64] The Plaintiffs reproduce paragraphs 38-41 of the Court's decision in ***Prowse***. However, they fail to reproduce, or even mention, Justice Ross' conclusion following her review of previous case law, including the case law cited at paras 38-41. In ***Prowse***, the Court concluded that for a genuine but unsuccessful settlement offer to constitute a significant advance in an action, there "must be something additional, in the form of narrowing of issues or production of relevant information": see ***Prowse*** at para 48.

[65] A mere unilateral without prejudice offer, which simply asserts damages far less than those contained in the Statement of Claim, which does not contain useful admission or results in back-and-forth negotiations, and which does not result in an informal agreement on any issues, does not constitute a significant advance in an action: paras 48-49.

[66] The evidence before the Court does not show any new information was provided to the Defendants by way of the Settlement Offer. It contained no new information, no admissions and no back-and-forth negotiations. It did not result in an informal agreement on any issues.

[67] The formal offer to settle was simply a request for the Defendants to pay the Plaintiffs a certain sum in settlement of the present action, with a condition of settlement being the discontinuation of another action involving some of the same parties. Furthermore, as explained below, there was no "updated exhibit" contained in the October 1, 2021 communication from the Plaintiffs' counsel.

[68] The Plaintiffs' October 1, 2021 Formal Offer to Settle in the present matter was thus no different in substance from the plaintiff's settlement offer in ***Delver***—which did not constitute a significant advance.

[69] At para 23 of the Plaintiffs' Brief, they state that the October 1, 2021 Formal Offer to Settle sent by the Plaintiffs to the Defendants was accompanied by "a copy of an updated exhibit". However, the Applicants point out that there was no "updated" exhibit, or any other updated record, attached to the October 21, 2021 email to which the Formal Offer to Settle was attached. Instead, as noted by the Plaintiffs' counsel in the October 1, 2021 email, a spreadsheet prepared by previous counsel for the Plaintiffs was attached, but the then current counsel believed that the spreadsheet was already in the Defendants' possession: "I believe you already have this, but in case you do not, it is attached".

d) Do the March 15, 2022 Appointments for Questioning constitute significant advances?

[70] The Plaintiffs argue that despite serving formal Appointments for Questioning for March 15, 2022, and providing conduct money, which date would fall within the relevant time period, the Defendants refused to comply. The Plaintiffs assert that this was a strategic move by the Defendants, who sought to delay the proceedings and allow the long delay period to expire.

[71] The Court of King's Bench of Alberta has consistently held that a mere attempt to commence the questioning of a party does not constitute a significant advance for the purposes of *Rule* 4.33. See: ***Janstar Homes Ltd. v Elbow Valley West Ltd.***, 2016 ABCA 417 [***Janstar***]; ***Matthews v Lawrence***, 2021 ABQB 776 [***Matthews***]; and ***Kerr v McDonald & Bychkowski Ltd.***, 2015 ABQB 473 (AJ) [***Kerr***].

[72] The Plaintiffs argue that the Defendants' refusal to comply with the Appointments for Questioning ought to be considered. I find that in the present circumstances, it does not remove the Plaintiffs' obligation to move the matter forward. The Defendants' conduct will be discussed further below.

e) Is the Filed but Unheard Questioning Application a significant advance?

[73] The Plaintiffs argue that their Questioning Application, returnable on May 17, 2022, ought to count as a significant advance.

[74] Filed but unheard applications do not significantly advance an action. See: ***Jacobs***; and ***Nammo v Canada***, 2019 ABQB 300 (AJ)[***Nammo***] (affirmed on appeal).

[75] I dealt with a similar issue in ***Taschuk***. Counsel for the respondent to a drop-dead application argued that because their application was filed first, it should have been resolved first since it could have prevented the drop-dead application. However, I noted that the application was adjourned *sine die* by consent and not by Court order. For the application to have been counted as a significant advance, the respondent ought to have secured a court date for the hearing (either by consent or by Court Order) before the drop-dead application was filed.

[76] When counting time in a drop-dead application, parties should not be disadvantaged by decisions of the Court - such as an adjournment to a special chambers date - over which they have no control. However, in this case, the decision to set the hearing for May 17, 2022, knowing that it was beyond the Drop-Dead Period, was within their control. There were further options available to ensure the delay would not prejudice their claims, e.g., they could have rescheduled it to a date certain prior to the Drop-Dead Period and waited for court direction, or, they could have addressed the proposed suspension of time in a proper standstill agreement or litigation plan.

[77] In conclusion, the delay in setting down the Questioning Application was not outside of the Plaintiffs' control – as was the case in ***Taschuk***. It does not constitute a significant advance.

[78] Conclusion on whether pursuant to *Rule* 4.33, there is a three-year period (plus 75 days) where no significant advance occurred

[79] While Mr. Oleksyn's March 1st Undertakings Responses and the March 5th Letter took him approximately nine months to provide, this is not unusual or extraordinary, particularly given the voluminous nature of the records to be reviewed.

[80] Given my finding that the March 1st Undertaking Responses and the March 5th Letter are each a significant advance to the action and that they fall within the alleged Drop-Dead Period, the Defendants application pursuant to *Rule* 4.33(2) is dismissed.

2. Should the claim be dismissed pursuant to Rule 4.31?

[81] *Rule* 4.31 states:

> 4.31(1) If delay occurs in an action, on application the Court may
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> > (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
> >
> > (b) make a procedural order or any other order provided for by these rules.
>
> (2) Where, in determining an 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.
>
> (3) In determining whether to dismiss all or any part of a claim under this rule, or whether the delay is inordinate or inexcusable, the Court must consider whether the party that brought the application participated in or contributed to the delay.

[82] *Rule* 4.31 requires a more holistic analysis, with the test centered on inordinate and inexcusable delay. This does not involve a "bright line" analysis like *Rule* 4.33; rather, the "action as a whole" must be considered: see ***Babiuk*** para 60, ***4075447 Canada Inc v WM Fares & Associates Inc***, 2020 ABCA 150 at para 14.

[83] The Court of Appeal in ***Humphreys v Trebilcock***, 2017 ABCA 116 at paras 150-156, laid out six questions to help determine the application of *Rule* 4.31:

> 150 In order to apply r. 4.31 an adjudicator must answer six distinct questions.
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> 151 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?
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> 152 Second, is the shortfall or differential of such a magnitude to qualify as inordinate?
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> 153 Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
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> 154 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?
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> 155 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?
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> 156 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).

[84] The Court of Appeal later suggest that the approach in ***Humphreys*** is helpful, but it is not the only approach to the analysis required pursuant to *Rule* 4.31: ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd.***, 2019 ABCA 276 [***Transamerica***], see generally paras 13-23. The Court stated at para 21:

> The objective of the exercise must be remembered. It is to determine whether the delay is inordinate, inexcusable, or otherwise, has caused significant prejudice to the defendant. Any particular class of proceedings will include some that proceed quickly, some that proceed slowly, and a great many in the middle. In determining the reasonable expectation of progress for the purpose of striking out an action for delay, regard must be had to all categories. Delay is not fatal just because the litigation has not progressed to the point that the "fastest" or even the "average" proceeding of that type would have reached. In order to be struck, the action must generally fall within the slowest examples of that type of proceeding, and it must be so slow that the delay justifies striking out the claim. Further, even very short delays can be grounds for striking the action if significant prejudice has resulted. "Significant prejudice" remains the ultimate consideration.

[85] In ***Morrison v Galvanic Applied Sciences Inc.***, 2019 ABCA 207, the Court of Appeal laid out a framework for *Rule* 4.31:

> 10 Rule 4.31 authorizes a court to dismiss an action that features inordinate and inexcusable delay and significantly prejudices the moving party.
>
> 11 To determine whether inordinate delay is present an adjudicator compares "the point on the litigation spectrum that the nonmoving party has advanced an action as of a certain time and that point a reasonable litigant acting in a reasonably diligent manner and taking into account the nature of the action and stipulated timelines in the rules of court would have reached in the same time frame".
>
> 12 If the inquiry discloses a discrepancy between the two points, the court must determine whether the "differential between the norm and the actual progress of an action is so large as to be unreasonable or unjustifiable". Delay of this magnitude is "inordinate".
>
> 13 A characterization of delay as "inordinate" triggers the next query. Has the nonmoving party accounted for the delay and does the explanation justify the pedestrian pace at which the action has been prosecuted?
>
> 14 If the adjudicator concludes that the delay is both inordinate and inexcusable, the rebuttable presumption recorded in r. 4.31(2) comes into play: "Where ... 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."
>
> 15 It is the burden of the nonmoving party to demonstrate on a balance of probabilities that the delay has not caused the moving party significant prejudice.

[86] The Defendants argue that claim should be dismissed pursuant to *Rule* 4.31 because they have suffered significant prejudice because of the Plaintiffs' inordinate delay. The significant prejudice cited is that memories naturally fade over time and because of the passage of time, they

would be unable to conduct a meaningful cross examination of Mr. Oleksyn. In addition, they fear that some of the financial records held by a former accountant of the Defendants may have been lost.

[87] The Plaintiffs argue that the Defendants have provided no tangible evidence that they have suffered significant prejudice and add that much of the alleged delay is directly attributable to the Defendants' conduct.

[88] There are two periods were a gap occurred in this action: (1) from June 5-6, 2018 (when Mr. Oleksyn was questioned for discovery) to January 14 and 15, 2019 (answers to undertaking were provided and further Questioning occurred)— a total of 7 months and 8 days (the First Gap); and (2) Following the March 1st Undertakings Responses and March 5th Letter, no further steps were taken until the March 15, 2022 Appointments for Questioning (the Second Gap). This period of inaction was 3 years and 10 days.

[89] I do not find that the First Gap is inordinate. Given the nature of the action, a reasonable litigant acting in a reasonably diligent manner would have likely moved the action forward in in a similar manner.

[90] As for the Second Gap, I find that the delay is inordinate. After the March 5th Letter was provided, the Plaintiffs took no further steps for a period of over 3 years. But for the additional 75 days provided by the Ministerial Order, they would have been out of time serving the March 15, 2022 Appointments for Questioning.

[91] A reasonably diligent litigant could have moved this matter forward in that period. No progress during a period of over three years is a clear deviation from the course of a diligent litigant in even a complex matter.

[92] Having found that the Second Gap is inordinate, the next query is to determine if the Plaintiffs have accounted for the delay and whether the explanation justifies the pedestrian pace at which the action has been prosecuted: see ***Morrison*** at para 13.

[93] The Plaintiffs did not lead sufficient evidence to allow me to conclude that the delay was excusable. In Questioning, Mr. Oleksyn stated that one of the reasons he could not move the matter forward was because he could not afford to retain legal counsel. While that may have been a contributing factor to the Second Gap, without more, it does not generally constitute an excuse under *Rule* 4.31(2): see ***Davenport Homes Ltd. v Cassin***, 2015 ABQB 138 at para 24.

[94] The Plaintiffs are responsible for moving the action along; the Defendants are not responsible for taking any steps or pushing the Plaintiffs along: see ***Kuziw*** at para 15. However, a defendant may not rely on its own delay in responding to the plaintiff: see ***Riviera Developments Inc. v Midd Financial Corp.***, 2002 ABQB 954 at para 23; see also ***Arbeau v Schulz***, 2019 ABCA 204 at para 37. Three attempts were made to question the Defendants, which culminated in the Questioning Application.

[95] Although I concluded above that merely serving the March 15, 2022 Appointments for Questioning was not a significant step per se, I note that the Defendants refused to attend because they believed this date exceeded the Drop-Dead Period. However, at that time, they failed to add on the additional 75 days provided by the Ministerial Order, which would have resulted in the March 15, 2022 Appointments for Questioning falling properly before the Drop-Dead Period.

[96] While I conclude that the Defendants' position was not taken in bad faith given that the law was not entirely clear on that point until the decision of ***Ross v Rancho Realty (Edmonton) Ltd.***, 2022 ABKB 820, issued on December 7, 2022, it was nevertheless an error on the Defendants' part, which caused further delay in this litigation. Although not deliberate and within their rights to contest the issue, it is one of several factors in my assessment under *Rule* 4.31 as to whether there was a reasonable excuse for the Plaintiffs' delay.

[97] Despite the incorrect position taken by the Defendants on this point, I conclude that the delay of over three years since the March 5th Letter is nevertheless inordinate and inexcusable. The Plaintiffs offered no other reason why they could not have taken an earlier step.

[98] Given my finding that the Second Gap is inordinate and inexcusable, the rebuttable presumption in *Rule* 4.31(2) comes into play. It is the burden of the Plaintiffs to demonstrate on a balance of probabilities that the delay has not cause the Defendants significant prejudice: see ***Morrison*** at para 15. Significant prejudice is the ultimate consideration when dealing with a 4.31 application: see ***Transamerica*** at para 21.

[99] The Defendants argue that they fear that the passage of time has resulted in fading memories and as such, this causes them a significant prejudice.

[100] The Plaintiffs, however, indicate that questioning of the parties has already occurred and generated thousands of pages of transcripts and documents, which forms the basis of their claim. Mr. Oleksyn deposed that the terms of the verbal contract are supported by the copious amounts of records, including email correspondence, corporate policies, discounts and commissions, invoices, cheque stubs, and other financial records, which all remain available. Further, he states that he and Mr. Andrew Vanderburg have been questioned extensively.

[101] In response to the Defendants' argument that Mr. Churchill's whereabouts are not known, the Plaintiffs' state that this was the Defendants' own fault as they have not demonstrated having taken any steps to reach him since filing their defence.

[102] They further point to a lack of evidence to support the assumed fear that witnesses' memories are becoming less clear.

[103] I conclude that the Plaintiffs have demonstrated on a balance of probabilities that the delay has not caused the Defendants significant prejudice. The mere 'fear' of fading memories, without more, does not lead to an inexorable conclusion that memories have indeed faded and significant prejudice arises. Mr. Vanderburg, a key person in this litigation who was privy to the alleged verbal agreement, had been previously questioned and is still available. There is no evidence that his memory has faded.

[104] Moreover, I agree with the Plaintiffs that the Defendants have not demonstrated any steps taken to reach Mr. Churchill since the beginning of the litigation. Simply stating that they have not had contact with him is insufficient to establish that he is not reachable. Further, the individuals to whom Mr. Churchill allegedly made defamatory statements may still be available to confirm what they heard. The Defendants have not indicated otherwise.

[105] Given the above findings, it is not appropriate to dismiss the action pursuant to *Rule* 4.31.

VIII. Conclusion

[106] The March 1st Undertaking Responses and the March 5th Letter are significant advancements in the action; as such, there was not a three-year (plus 75 day) period where no significant advance occurred.

[107] I further find that present circumstances do not warrant exercising judicial discretion to dismiss the action pursuant to *Rule* 4.31.

[108] The Applicants' application to dismiss this action pursuant to *Rule* 4.33 and *Rule* 4.31 is denied.

[109] I am putting in place the following Procedural Order pursuant to *Rule* 4.33(3) with deadlines that are peremptory on the Plaintiffs.

- Questioning to be complete by December 31, 2024;
- Any responses to Undertakings must be completed by March 1, 2025;
- Any further questioning on Undertakings must be completed by May 31, 2025;
- Some form of Alternative Dispute Resolution must be completed by August 31, 2025, and;
- Parties must agree to a process to set the matter down for trial by September 30, 2025.

[110] If the parties cannot agree on costs, they may be spoken to in morning chambers.

Heard on the 27th day of June, 2024.
Dated at the City of Wetaskiwin, Alberta this 2nd day of October, 2024.

A. Loparco
J.C.K.B.A.

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