In the Court of Appeal of Alberta

Citation: Royal Bank of Canada v Levy, 2020 ABCA 338

Date: 20200922
Docket: 2001-0021-AC
Registry: Calgary

Between:

Royal Bank of Canada

Respondent
(Plaintiff)

- and -

Devin Allibone, Kevin Kowbel and Charlene Kowbel

Appellants
(Defendants)

- and -

Ilan Levy, Tracy Levy, Harry Levy, Yuval Levy, Andrea Durnan, Denis Franks, Rachell Franks, David Steed, 1229637 Alberta Ltd., Hilltop Properties Inc., 1418650 Alberta Ltd., New Heights Custom Homes Inc., 1165696 Alberta Ltd., Zimmerman & Company, Foothills Real Estate Appraisals Ltd., B. Grant Banbury, Michael Davidson, Arlene Wiebe, Ronald Vogel, Barbara Sabo, Erik Larsen, Edmond Fouillard, Yiu W. Mak, 1235631 Alberta Ltd., Aubrey Fraser, Tim Abel, Karen Abel, Dean Mclean, Laurel Sim, Sascha Bouzaara, Jesse Collins, Jean-paul Fouillard, Michael Rocca, Barbara Rocca, Robert King, Jean King, John Macdonald, Cassandra M. Greve, Paul Thomson, Michael Glossop

Not Parties
(Defendants)

Corrected judgment: A corrigendum was issued on September 23, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Decision by
The Honourable Mr. Justice K.D. Yamauchi
Dated the 9th day of January, 2020
(2020 ABQB 500, Docket: 0901 08973)

Memorandum of Judgment

The Court:

[1] The appellants Devon Allibone, Kevin Kowbel and Charlene Kowbel are three of the remaining defendants, out of an original group of 43 defendants, who were sued by the Royal Bank for false pretenses related to an allegedly fraudulent mortgage scheme. They appeal the decision of the case management judge, who denied their application to dismiss the action for delay: ***Royal Bank v Levy***, 2020 ABQB 500.

Facts

[2] The statement of claim alleges that 20 mortgages were obtained based on false pretenses. It alleges that certain "Organizing Defendants" set up a scheme along the lines of the one described in ***Tran v Kerr***, 2014 ABCA 350 at para. 2, 584 AR 306. The allegation is that properties were purchased from third parties, the prices or values of the properties were artificially inflated, and the respondent Royal Bank was induced to fund mortgages on the properties based on those artificial values. As a part of the scheme, it is alleged that "Purchasers" were paid a fee to allow their names to be used as the purchasers of the properties, although they had no genuine or beneficial interest in the transactions.

[3] The statement of claim alleges that a "mortgage specialist" employed by the respondent was one of the instigators of the fraud. The appellants are not alleged to be central figures in the scheme, but rather they are alleged to be three of the "Purchasers" who allowed their names to be used in the transactions. Their defence is that the respondent's mortgage specialist represented to them that these were legitimate transactions, being used as a form of bridge financing by builders and developers. They allege that some of the information in the mortgage applications in their names was falsified by others.

[4] The respondent first became aware of irregularities concerning these transactions in 2009. The statement of claim was issued in June, 2009, and the appellants were added as defendants by an amendment in November 2009. The appellants argue that when the application to dismiss was brought, 10 years had passed since the action was commenced, and it is still not scheduled for trial. They argue that this delay is inordinate and inexcusable, and that they have suffered prejudice such that the action should be dismissed under R. 4.31 of the *Rules of Court*.

[5] The case management judge summarized the steps that had been taken in the action. The complexity of the case was recognized at an early stage, and there has been a case management judge in place since July 2009. The respondent's initial efforts were directed at disposing of the properties that are the subject of the litigation. There were applications for attachment orders, sales of some of the properties, and unsuccessful applications against some defendants for summary

judgment on the covenants in the mortgages: ***Royal Bank of Canada v Levy***, 2012 ABQB 310, 65 Alta LR (5th) 1. Those efforts were, to some extent, resisted by some of the defendants, and they dominated the litigation for the first two years: reasons at para. 7.

[6] The litigation then entered the discovery phase. Some individual defendants did not file their affidavits of records in a timely way, and did not attend at appointments for questioning: reasons at para. 44. Given the number of defendants and counsel involved, scheduling was challenging. Some of the defendants were self-represented from time to time.

[7] The person nominated by the respondent to be its litigation representative under R. 5.4(1) was questioned in November 2013, and gave a number of undertakings. The answers to undertakings came 13 months, 18 months, and 23 months after the questioning, on December 23, 2014, May 28, 2015, and October 27, 2015: reasons at para. 11.

[8] The appellant Kevin Kobel was questioned in April 2012; answers to his undertakings were not provided until January 2016, some 3.5 years later. The appellant Allibone was questioned in September 2012; answers to his undertakings were not provided until January 2016, not quite 3.5 years later: reasons at para. 45. It appears that discovery procedures respecting these appellants were completed then, and since that time the present appellants have been "mere spectators in this action": reasons at para. 46.

[9] The respondent's litigation representative retired in 2016, but a replacement was not named for approximately two years, in March 2018. Attempts were made in 2018 to schedule questioning on the respondent's representative's answers to undertakings, and the continuation of questioning of another defendant named Banbury, but Banbury could not immediately be located: reasons at paras. 12-13. The follow-up questioning of Banbury and the representative did not happen until July and September 2019. There was no meaningful activity for about 24 months between March 2016 and March 2018, followed by several months of attempting to schedule further questioning. In the end it took about 42 months to schedule and complete that questioning on undertakings (March 2016 to September 2019).

[10] Along the way, the respondent discontinued the claim against some defendants, settled with some, and obtained summary judgment against others: reasons at para. 47. The Procedure Card is 49 pages long, although the last five years are covered in only three of those pages. Overall there has been progress; there remain only 6 separate interests out of the original 43 defendants.

Standard of Review

[11] Whether an action should be dismissed for delay engages a certain element of discretion. Unless the exercise of that discretion is based on an error in principle, or is clearly unreasonable, deference is warranted on appeal: ***Canada (Attorney General) v Fontaine***, 2017 SCC 47 at para. 36, [2017] 2 SCR 205. A case management judge, who would have a detailed knowledge of the progress of the action, is well positioned to measure the reasons for and effects of delay. There

is no fixed methodology or line of analysis that must be followed in delay applications: ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2019 ABCA 276 at paras. 15-16, 23, 92 Alta LR (6th) 41; ***4075447 Canada Inc v WM Fares & Associates Inc***, 2020 ABCA 150 at paras. 13-14. The thoroughness of the analysis, and the level of detail in the reasons, seldom generate stand-alone reviewable errors.

[12] Whether there has been delay in the prosecution of an action, whether the delay is "inordinate and inexcusable", and whether there has been "significant prejudice" are largely questions of fact. The decision of a chambers judge on such factual issues, and the ultimate question of whether the action should be dismissed for delay, will not be disturbed on appeal unless it discloses palpable and overriding error: ***Transamerica*** at para. 41; ***Humphreys v Trebilcock***, 2017 ABCA 116 at para. 157, 51 Alta LR (6th) 1.

Dismissal for Delay

[13] Rule 4.31 permits an application, at any time, to dismiss an action for delay:

> 4.31(1) If delay occurs in an action, on application the Court may
>
> > (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.

This rule is prejudice-based; "significant prejudice" is a precondition to dismissal for delay. If the court determines that delay is "inordinate and inexcusable", there is a presumption of significant prejudice. However, the applicant can also prove actual prejudice, whether or not the presumption has been triggered.

[14] There is no fixed test for measuring "delay" or "inordinate delay", because every action is slightly different. Inordinate delay simply means "much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case": ***Kuziw v Kucheran Estate***, 2000 ABCA 226 at para. 31, 89 Alta LR (3d) 232, 266 AR 284; ***Transamerica*** at para. 18. Since every application for delay must be considered in the specific context in which it is brought, there is no presumptive number of years after which inordinate delay is presumed, and before which there is no presumption of delay: ***Transamerica*** at para. 20; ***WM Fares*** at para. 19. Both the overall delay, and gaps between steps, are relevant in assessing whether delay is inordinate, and whether it is excusable. "Significant prejudice" resulting from delay can arise at any time during the litigation.

[15] The appellants fairly argue that it is clearly a matter of concern when 10 years have passed and the action is still not ready to be set down for trial, especially where the action has been case managed throughout. That is particularly so when allegations of fraud are made. A defendant accused of fraud is entitled to have those allegations resolved in a timely manner: ***Humphreys*** at paras. 32, 123. In this case, the delay has been contributed to by the large number of challenged transactions, and the large number of defendants involved in them.

[16] The case management judge agreed that there had been delay, but whether that delay is "inordinate and inexcusable" is a matter of degree. So too is whether there has been "significant prejudice", and whether, at the end of the day, the action should be dismissed.

[17] The appellants list 16 other cases that have recently been struck for delay, arguing that the delay in this case is at least as long. Comparisons with the time taken to complete other actions, even of the same type, are not decisive because every action is distinct: ***Transamerica*** at paras. 15, 18, 48; ***WM Fares*** at para. 14. Further, the degree of prejudice is generally more important than the raw passage of time, or the similarities in the causes of action: ***Transamerica*** at para. 21.

[18] The appellants point out that the respondent, when "considered on its own", is a sophisticated and well-resourced litigant that can be expected to pursue litigation with diligence. The case management judge, however, held that it had done so, and was not proceeding "slowly and cheaply" as the appellants argued: reasons at paras. 42-43.

[19] This was not a situation where there has been no activity in the action as a whole:

> 47. Quite correctly, and in accordance with the *Rules*, RBC has, from the time it commenced its action to 2019, taken steps to streamline the litigation. It has entered into settlements with certain defendants by way of Pierringer Agreements. It has and continues to discontinue the claim against other defendants, and has obtained summary judgment against three defendants. These steps fit within the *Rules* and "accords with the functional approach to litigation," in that the number of defendants is reduced, and the issues are narrowed, such that "necessary trial time is also reduced" . . .

They were numerous defendants, and while each defendant is entitled to expect that the claim against him or her will be pursued diligently, there are practical limits to that proposition.

[20] The respondent alleged a large fraudulent scheme, involving many defendants, and reasonably elected to pursue them all in one action. As the case management judge noted at para. 46, there was never an application to sever the claims, and any such application would likely have been unsuccessful. Even though the respondent's litigation activity might not always have been focused on the appellants, leading them to perceive they were mere "spectators in the action", the case management judge was entitled to conclude that, overall, the delay was not inordinate.

[21] The conduct of the defendants is relevant in assessing the causes and impact of delay: ***Transamerica*** at para. 27, citing ***Calgary General Hospital v Stevenson Raines Barrett Christie Hutton Seton & Partners*** (1994), 27 CPC (3d) 310 at para. 23, aff'd (1995), 39 CPC (3d) 293 at para. 5 (CA)). While the appellants took approximately 3.5 years to answer their undertakings, it is not clear that caused any additional delay. It did perhaps signal that the appellants were content with, or resigned to the pace of the litigation.

[22] The respondent attributes part of the delay to the conduct of the appellants respecting a litigation plan. The respondent first applied for a litigation plan in December 2018, and admitted in the application that there were potential issues with respect to delay: reasons at para. 50. The requirement for a litigation plan in complex cases has been in place since the new *Rules* were implemented in 2010: R. 4.5. There is no explanation why the respondent waited 10 years to propose such a plan. The litigation plan did not directly involve the appellants, and there is no indication on this record that the appellants' response to the proposed plan caused any delay. The three months it took to finalize the plan was insignificant when compared to the 10 years it took to reach that point.

[23] There is nothing on this record that would support a finding that the appellants waived or acquiesced in the delay. There is no rule that a defendant cannot apply for dismissal due to delay unless an objection is made at what is perceived, with the benefit of hindsight, to be the earliest possible opportunity. Delay is usually incremental. It is very difficult to fix the specific point at which the passage of time becomes "delay", and then the point at which it becomes "inordinate". Participation in a step in the litigation, or the failure to expressly indicate that a defendant is proceeding "without prejudice", does not stop the clock. When the respondent brought an application for a litigation plan, the appellants could have brought a cross application to dismiss for delay. Alternatively, they could have suggested that the litigation plan include the scheduling of such an application. However, neither the failure to proceed in that precise manner, the failure to object to the litigation plan, nor the failure to indicate that the appellants were proceeding "without prejudice" amounted to acquiescence in the delay that had accumulated incrementally in the previous 10 years, or waiver of any prejudice that resulted.

[24] The appellants argue that their evidence of actual prejudice was uncontradicted. The test, however, requires "significant prejudice", and it must also be prejudice that is caused or contributed to by the delay. For example, the stigma of an allegation of fraud arises from the claim itself. That stigma may be exacerbated by delay, but it is only the incremental prejudice that is relevant on an application to dismiss for delay. As another example, the appellants point to the costs they have incurred in defending the litigation, but only the incremental costs resulting from delay are relevant on this application. Further, any prejudice arising from incremental costs related to delay can be dealt with when the costs of the action are set. Unsuccessful allegations of fraud can generate significant costs awards.

[25] Common sense recognizes that allegations of fraud that are outstanding for a long period of time can cause prejudice of the type deposed to by the appellants: ***Humphreys*** at paras. 31, 123. The case management judge's characterization of this prejudice as "some embarrassment" perhaps understated the degree of prejudice, but his conclusion that there was no "significant" prejudice as required by the rule does not reflect the level of palpable and overriding error that would invite appellate intervention.

Conclusion

[26] In conclusion, this is clearly a borderline case. The delay of 10 years is itself of concern, particularly for an action that has been in case management throughout. The respondent's representative's delay in answering undertakings is puzzling, as is the unreasonable amount of time it took to replace him when he retired. Whether delay is sufficiently inordinate to justify the terminal remedy of striking out the entire claim is a matter of degree. The case management judge considered all the relevant factors, and stated the correct legal test. His decision was one that was available on this record, and no basis has been shown for appellate intervention.

[27] The appeal is dismissed. Normally the costs of the appeal would follow the outcome. However, considering all of the circumstances here, including the admitted periods of delay, it is appropriate that the costs of this appeal be in the cause.

Appeal heard on September 10, 2020

Memorandum filed at Calgary, Alberta
this 22nd day of September, 2020

Authorized to sign for: Paperny J.A.

Slatter J.A.

Authorized to sign for: Veldhuis J.A.

Appearances:

E.C. Lew
for the Respondent

R. Jadusingh
for the Appellants

Corrigendum of the Memorandum of Judgment

Para 4 has been revised from “R. 3.41” to “R. 4.31”.