In the Court of Appeal of Alberta

Citation: Transamerica Life Canada v Oakwood Associates Advisory Group Ltd, 2019 ABCA 276

Date: 20190710
Docket: 1901-0044-AC
Registry: Calgary

Between:

Transamerica Life Canada

Respondent
(Plaintiff)

- and -

Oakwood Associates Advisory Group Ltd., The Oakwood Associates Business Advisory Group Ltd., The Goulet Family Trust Two, New Castle Capital Corporation, The Newcastle Group of Companies Ltd., Horizon Financial Consultants Inc., and George Goulet

Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Frederica Schutz

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice W.T. deWit
Dated the 23rd day of January, 2019
Filed on the 14th day of February, 2019
(Docket: 0701-01701)

Memorandum of Judgment

The Court:

[1] The defendants/appellants brought an unsuccessful application before a Master to dismiss this action for delay: ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2018 ABQB 320, 79 CCLI (5th) 185. A further appeal to a chambers judge was dismissed in unreported reasons, and the defendants/appellants now appeal further.

[2] The application for delay was brought under R. 4.31:

> 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.

Under R. 4.31(1)(a) the Court may dismiss an action for <u>any</u> delay if there is "significant prejudice". If the delay is found to be "inordinate and inexcusable", then R. 4.31(2) creates a presumption of "significant prejudice". Under either part of the rule, significant prejudice is a precondition to dismissal for delay.

<u>Facts</u>

[3] The defendant Goulet sold insurance products for the plaintiff Transamerica. Transamerica alleges that between 2001 and 2005 Mr. Goulet (and various business organizations owned by him) dishonestly took advantage of a commission miscalculation by Transamerica that Mr. Goulet should have realized was an error. Mr. Goulet responds that he calculated the commissions based on advice from an authorized representative of Transamerica.

[4] This action was commenced in February 2007. At the time that the application to dismiss was brought, the action was 10 years old, questioning had not been completed, and the action was therefore not yet ready to be set down for trial. The Master found at para. 17 that: "There is no question that there has been delay in the prosecution of this action". He dismissed the suggestion that the appellants had been the cause of most of the delay. The Master was also

not prepared to give any weight to Transamerica's expert opinion evidence that the delays were "not unusual". The inference that this sort of delay was normal in Alberta was contrary to the policy of R. 4.31 that delay was not acceptable if significant prejudice resulted: at paras 22-3.

[5] Several periods of delay were identified by the Master. The appellants delayed in filing their defences, but that was largely due to the absence of particulars that Transamerica was subsequently ordered to provide. Transamerica could not explain why its affidavit of records was not ready sooner, nor could it satisfactorily explain the delay in answering undertakings. There were long periods of inactivity. The Master held that a plaintiff who commences an action could not rely on shortages of resources or the staff needed to prosecute the claim in a timely way.

[6] The Master concluded at paras. 61-2, 65 that the total elapsed time since issuance of the claim was 10.5 years, of which approximately 35 months of delay could be attributable to the defendants. Some delay arose because of an application for summary dismissal (and subsequent appeal) brought by another defendant. In order to invoke the presumption of prejudice under the rule the delay must be both inordinate and inexcusable. Where the defendants had contributed in part to the delay, and had not expressed any concern about Transamerica's leisurely pace, the Master concluded that the presumption of significant prejudice in R. 4.31(2) had not been engaged: at paras. 66-70.

[7] Since the presumption was not engaged, the appellants had to prove prejudice. The Master noted at paras. 7-14 that Transamerica's claim alleged dishonesty and misconduct, which supported an inference that the appellants would suffer "non-litigation prejudice" if the litigation was allowed to linger. Mr. Goulet deposed that the allegations against him interfered with his business. The Master also noted at paras. 16, 72 that both parties were unable to locate or produce all the witnesses, some of whom were their own former employees. Other potential witnesses were elderly or deceased.

[8] The Master reasoned that if the alleged "reputational prejudice" was really "oppressive" Mr. Goulet would not have contributed to the delay. There was also insufficient detail about the importance of the missing witnesses. As a result, the Master concluded at paras. 73-4 that the prejudice that had been established was not "significant" prejudice. The application was dismissed, but the Master granted a procedural order under R. 4.31(1)(b).

[9] On appeal, the chambers judge agreed with the chronology set out by the Master, but was of the view that the appellants were responsible for more of the delay than had been attributed to them. He concluded that the appellants were responsible for at least four years of the delay. While the overall delay here was "inordinate", it was found to be "excusable" because the defendants contributed to it. Even though the plaintiff has the ultimate responsibility for advancing the claim, the defendants also have an obligation to respond in a timely manner.

[10] The chambers judge agreed with the Master that some of Transamerica's explanations did not justify the delay: complexity of the case, changes of counsel, the heavy load of litigation at Transamerica, and having to deal with another defendant who applied for summary dismissal.

[11] The chambers judge noted that since "significant prejudice" was not to be presumed, prejudice had to be proven. Mr. Goulet had filed a further affidavit in support of his appeal, giving more details of the prejudice he had suffered, but the chambers judge was not convinced that any oppressive or significant prejudice had been shown. Specifically, Mr. Goulet had not demonstrated that the now elderly or unavailable policyholders had any material evidence to give. Rather, the case depended heavily on the documentary evidence demonstrating how commissions were to be calculated, and the unavailability of witnesses did not demonstrate significant prejudice. The defence was essentially that Transamerica had approved the method of computing compensation.

[12] In summary, both the Master and the chambers judge found that there had been delay in the prosecution of this action, but that it had not risen to the level of "inordinate and inexcusable delay". The Master focused on whether the delay was "inexcusable", more than on whether it was "inordinate". The chambers judge held that the delay was "inordinate", but agreed with the Master that it was partly excusable because of the conduct of the appellant. It followed that neither of them concluded that the presumption of significant prejudice had been engaged. Although the presumption of prejudice had not been triggered, both the Master and the chambers judge examined the evidence of actual prejudice, and concluded that it did not amount to "significant prejudice".

The General Approach to Delay in Litigation

[13] The appellants allege that the Master and the chambers judge applied the wrong legal test in assessing the delay in this case by departing from the decision in ***Humphreys v Trebilcock***, 2017 ABCA 116, 51 Alta LR (6th) 1 which, they state, reflects the binding law of the province. Specifically, the appellants argue that the trial court departed from a "settled principle" that it is up to the plaintiff to advance the litigation, and that the defendant has no obligation to take procedural steps or complain if the plaintiff is doing nothing to prosecute the claim.

[14] The *Rules of Court* are designed to resolve claims "in a timely and cost effective way": R. 1.2(1). The reasons for this are summarized in ***Humphreys v Trebilcock*** at para. 90:

> Litigation delay harms those who are directly and indirectly involved in an action tainted by inaction, the civil justice system as a whole and the greater community. Litigation is a form of stress that has the potential to make those directly and indirectly affected unhappy - litigation is expensive, introduces

> uncertainty and may undermine a person's ability to earn a livelihood and to plan ahead - and may diminish the productivity of the persons affected by the unresolved dispute. People understandably expect that the mechanisms our state has constructed for the resolution of disputes will process them at a reasonable rate and not allow stale actions to survive. When these legitimate expectations are not met, individuals most closely linked to actions and the greater community may lose confidence and respect for the manner in which justice is administered. Litigation delay is a corrosive force in a free and democratic state committed to the rule of law. (Footnotes omitted)

This passage outlines some of the policy reasons why we have limitation periods for commencing claims, and specific rules like R. 4.31 and R. 4.33 governing delay in prosecuting those claims once they are commenced.

[15] There are numerous decisions of this Court on the interpretation and application of the delay rules. The core source of the legal principles, however, remains in the *Rules of Court* themselves. While general principles have been established governing delay, each action is slightly different. The application of the rules to the particular facts will always engage an element of judicial discretion, reflected in the word "may" found in R. 4.31(1). There are many different ways that a Master or chambers judge can analyze a delay application; there is no universal mandatory formula.

[16] For example, ***Humphreys v Trebilcock*** at paras. 20, 150-6 proposed a six step analysis:

> (1) Has the plaintiff 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?
>
> (2) Is the shortfall or differential of such a magnitude to qualify as inordinate?
>
> (3) If the delay is inordinate has the plaintiff provided an explanation for the delay? If so, does it justify inordinate delay?
>
> (4) If the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the defendant so as to justify overriding the plaintiff's interest in having its action adjudged by the court? Has the defendant demonstrated significant prejudice?
>
> (5) If the defendant relies on the presumption of significant prejudice created by R. 4.31(2), has the plaintiff rebutted the presumption of significant prejudice?

> (6) Having regard to the verb "may" in R. 4.31(1), is there a compelling reason not to dismiss the plaintiff's action?

This approach might be helpful in many cases, but it is not the only way to analyze delay.

[17] In some respects the test in ***Humphreys v Trebilcock*** merely restates or paraphrases the text of the rule. For example, the second step in the analysis merely asks whether the delay is "inordinate", as specified in R. 4.31(2). The fourth step is one possible way of analyzing whether there has been "significant prejudice". This is not the exclusive way of testing for prejudice, which is inherently a wide-ranging concept. For example, deciding whether the death of a key witness has "impaired a significantly important interest of the defendant" is not the only, or even the most obvious way of measuring the level of prejudice arising from the unavailability of that witness.

[18] There have been many other judicial formulations of the test. Some of them were cited in ***Arbeau v Schulz***, 2019 ABCA 204 at para. 36:

> Whether delay is "inordinate" is "to be determined in light of all of the circumstances of a particular case": *Kuziw v Kucheran Estate*, 2000 ABCA 226 at para. 30. Inordinate delay is that which is "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* at para 31 (emphasis added). "As a rule, until a credible excuse is made out, the natural inference would be that (inordinate delay) is inexcusable": *Lethbridge Motors Co v American Motors (Canada) Ltd*, 1987 ABCA 150 at para 12, quoting *Allen v Sir Alfred McAlpine & Sons Ltd*, [1968]1 All ER 543 at 561 (CA).

As noted, ***Kuziw v Kucheran Estate***, 2000 ABCA 226 at para. 31, 89 Alta LR (3d) 232, 266 AR 284 confirmed that 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".

[19] Parts of the test in ***Humphreys v Trebilcock*** may be difficult to apply to particular cases. This is particularly true of the first step, whether "the plaintiff has 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". There is such a wide variety in the detail of particular claims, and in the procedural journeys that particular litigation may follow, so as to make this test untenably theoretical.

[20] At the end of the day, there is no scientific method of determining what "point on the litigation spectrum" a reasonable litigant would have reached. Delay must always be a matter of degree. Secondly, the differential between that theoretical standard and any particular case is

incapable of precise definition. As noted in ***Allen v Sir Alfred McAlpine & Sons Ltd.***, [1968] 2 QB 229 at p. 268, [1968] 1 All ER 543 at p. 561 (CA):

> It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case . . .

The first and second steps of the proposed analysis in ***Humphreys v Trebilcock*** may merely give an artificial air of certainty and precision to the simple question: "Has there been delay?".

[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.

[22] In this case Transamerica introduced expert evidence directed at the first step in ***Humphreys v Trebilcock,*** namely, "the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review". As the Master correctly concluded at paras. 19-23, this evidence was merely impressionistic and anecdotal, and was deserving of no weight. Expert evidence of this type is not to be expected, even in those cases that choose to follow the analytical framework in ***Humphreys v Trebilcock***. As pointed out in ***Arbeau v Schulz*** at para. 36, whether there has been delay in any particular case is to be determined based on an examination of the record, the submissions of counsel, and the experience of the judiciary.

[23] In summary, ***Humphreys v Trebilcock*** is one of dozens of decisions of this Court on delay; it did not purport to displace all of the other jurisprudence on the issue. The basic test for dismissal for delay is found in the text of the *Rules of Court*, as interpreted in all of the many decisions on the topic. The appellants have not identified any conceptual error in the way that the Master and the chambers judge analyzed this application.

The Obligation of a Defendant to Avoid Delay

[24] An examination of the progress of this litigation leads to the inescapable conclusion that there has been delay. There is no need to draw theoretical comparisons to a prototypical action of the same type to reach this conclusion.

[25] The appellants' argument focuses on circumstances that can "excuse" delay. The appellants assert, in particular, that inaction by the defendant does not "excuse" delay by the plaintiff.

[26] The appellants invoke the "sleeping dog" rule, set out in ***Fitzpatrick v Batger & Co.***, [1967] 1 WLR 706 at p. 710, [1967] 2 All ER 657 (CA) (quoted with approval in ***Lethbridge Motors Co v American Motors (Canada) Ltd***, 1987 ABCA 150 at para. 19, 53 Alta LR (2d) 326, 79 AR 321):

> . . . [The defendants] no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves; whereas if they were to take out a summons to dismiss the action, they would merely be waking the dog up for the purpose of killing it at great expense which they would have no chance of recovering. I am not surprised that they did not apply earlier, and I do not think that the plaintiff's advisers should be allowed to derive any advantage from that fact.

This metaphor has been used to support the proposition that the plaintiff is responsible for the prosecution of an action, and the defendant has no duty to move the litigation forward.

[27] It is correct to say that the plaintiff has the primary obligation in moving the litigation forward. The *Rules of Court* give the plaintiff many tools to ensure that happens. It does not follow, however, that a defendant has no obligation with respect to the pace of litigation. This was confirmed, for example, in ***Sir Alfred McAlpine*** at p. 260:

> Since the power to dismiss an action for want of prosecution is only exercisable upon the application of the defendant, his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely upon it. . . .

There is a significant difference between a defendant "doing nothing" in the face of inactivity by the plaintiff, and the defendant failing to discharge its procedural obligations. In ***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)) the Court held that:

> . . . there is a distinction, in my view, between "letting the dog lie" on the part of the defendants, and failing to comply with steps required by them to be taken by the rules, and failing to cooperate in an effective way with plaintiffs' efforts to move the matter along.

To the same effect is ***Owners Condominium Plan Calgary 8110301 v KJM Developments Ltd***, 1991 ABCA 120 at para 3: "While a defendant may have no duty to hurry up the plaintiff, he can scarcely complain if the plaintiff does not force the defendant to provide steps which the defendant owes".

[28] Many Alberta authorities confirm that defence delay is relevant: ***Lethbridge Motors*** at para. 22; ***KJM Developments*** at para. 3; ***Humphreys v Trebilcock*** at paras. 172, 175; ***Arbeau v Schulz*** at para. 40, ***Calgary General Hospital*** at paras. 23-5; ***Young (Next Friend of) v A Dei-Baning Professional Corp***, 1996 ABCA 213 at para. 19, 39 Alta LR (3d) 93, 184 AR 209; ***Turek v Oliver***, 2014 ABCA 327 at paras. 5-6, 13 Alta LR (6th) 74. As the respondent pointed out, defence delay is sometimes considered in deciding if the delay is "inordinate", sometimes in examining whether it is "excusable", and sometimes when the court is exercising its ultimate discretion to dismiss the action. Defence delay might also be relevant in assessing "prejudice", in that the defendant cannot fairly complain about prejudice that is directly and primarily caused by its own delay.

[29] The *Rules of Court* expressly impose obligations on all parties to advance the action. For example, R. 1.2(2)(d) obliges the parties to "communicate honestly, openly and in a timely way". Rule 1.2(3)(a) confirms that the parties must "jointly and individually during an action . . . facilitate the quickest means of resolving the claim at the least expense". Rule 4.1 states the general responsibilities of the parties to manage litigation:

> 4.1 The parties are responsible for managing their dispute and for planning its resolution in a timely and cost effective way.

Rule 4.2 confirms that this responsibility falls on all the parties, and that it includes responding "in a substantive way and within a reasonable time to any proposal for the conduct of an action".

[30] The *Rules of Court* also impose a number of specific duties on a defendant in support of these general obligations. Some examples are:

> (a) The defendant must file a statement of defence, presumptively within 20 days of service: R. 3.31(3)(a);
>
> (b) Each party must file an affidavit of records within fixed time periods: R. 5.5(1);

(c) Each defendant is subject to questioning by the plaintiff: R. 5.17(1)(a). When the plaintiff indicates an intention to question, the defendant has an obligation to provide reasonable and realistic dates without delay, and without the plaintiff having to repeat the request;

(d) If a defendant undertakes during questioning to provide further information, the defendant has an obligation to do so without further demand and "within a reasonable time" (having regard to the nature of the undertaking): R. 5.30(1);

(e) A defendant must respond to a Notice to Admit within 20 days: R. 6.37(3);

(f) A defendant must respond in a timely way to correspondence from the plaintiff inquiring about or suggesting the procedure to be followed in resolving the claim: R. 1.2(2)(d), 4.2(b), 4.4(2);

(g) The defendant must obviously comply with the provisions of any procedural order.

These are just examples. The rules contain many steps that call for a response by the defendant within a fixed or a reasonable time. Some, such as R. 6.37(3), contain their own remedy. Sometimes the parties will acquiesce in a leisurely pace of the litigation, but when that happens in the face of positive procedural obligations on the defendant, the defendant cannot subsequently rely on the resulting delay in an application to dismiss.

[31] It follows that, within limits, a defendant may be entitled to be recumbent in the face of plaintiff delay or inactivity. It does not follow that a defendant has no responsibility for the timely resolution of the dispute, or that the plaintiff cannot rely on the actions of the defendant as "excusing" delay.

[32] This record discloses several examples of defence delay. One is that the appellants waited for more than six years before they initiated questioning of the respondent's representatives. Questioning of the opposing party is virtually universal in civil litigation. The appellants did nothing to initiate this step, which was entirely for their benefit and under their control, but then complained that when they finally got around to it some of the witnesses could not be located. There are two other specific examples of defence delay that deserve discussion: the delay in filing the statement of defence, and the delay in answering undertakings.

The Particulars and the Defence

[33] The appellants' initial response when served with the statement of claim was to demand further particulars. The chronology is outlined in the reasons of the Master at paras. 34-43, and can be summarized as follows:

(a) The statement of claim was issued on February 27, 2007, and served on most defendants shortly thereafter. In May Transamerica demanded defences by June 1, 2007;

(b) At the last minute, on May 31 and June 1, 2007, the defendants demanded further particulars;

(c) On June 18, 2007, Transamerica provided some particulars, and demanded defences by June 27. When defences were still not filed, Transamerica demanded defences by July 6;

(d) Defences were still not filed, rather on July 5 and 10 the defendants demanded better particulars;

(e) There followed a series of correspondence in which the parties debated whether sufficient particulars had been given. Transamerica made further demands for defences, and the defendants made further demands for particulars. On November 20, 2007 Transamerica demanded either a defence or an application for particulars by December 11.

(f) On December 11, 2007 (about nine months after they were served with the claim), the defendants brought a special application for particulars. On March 6, 2008 Transamerica was ordered to provide further particulars;

(g) Transamerica provided the ordered particulars on April 21, 2008. The defendants were obliged to file their statements of defence on April 29, 2008, but failed to do so;

(h) About one year later, on April 27, 2009, Transamerica changed its counsel. After a further period of inactivity, it demanded defences by August 12, 2010;

(i) On August 5, 2010 (about 27 months after Transamerica had provided the ordered particulars), the defendants took the position that the particulars still did not comply with the order;

(j) The defendants eventually filed their statement of defence on September 15, 2010, about 40 months after the statement of claim was issued.

The delay to this point was clearly unacceptable. The appellants argue that they were vindicated in the end, because the court ordered Transamerica to provide the demanded particulars. The present appeal, however, is not about particulars; it is about delay.

[34] Both parties bear some responsibility for failing to resolve the issue of particulars in a timely way, and getting the defence filed. With hindsight, it is easy to see that Transamerica should have acted more decisively. It was not until November 20, 2007, once Transamerica had provided the particulars it thought it was required to provide, that it issued the ultimatum: "File your defence within 10 days, or bring an application for particulars, or we will note you in default". This should have been done earlier, and had the appellants ignored this ultimatum, Transamerica would have been entitled to note them in default.

[35] The appellants, on the other hand, were not entitled to simply sit back and send endless demands for particulars. If the appellants felt they were entitled to particulars, and Transamerica stated definitively that it would not provide any more particulars, the appellants had an obligation to do one of two things in a timely way: bring an application for particulars, or file a defence. Further, when the particulars were eventually filed, the appellants had an obligation to file their statements of defence without delay. Even in the face of inactivity by Transamerica, it was unacceptable for the appellants to wait a further 27 months before alleging that the particulars did not comply with the order.

[36] The appellants further attempted to explain the delay in filing a defence because they were awaiting the outcome of collateral regulatory proceedings. It is not clear why those proceedings precluded filing a defence, but if it was reasonable for the appellants to await the outcome, it was arguably reasonable for Transamerica to do so as well. Collateral proceedings before other tribunals can, in some cases, explain (if not excuse) delay: ***Heikkila v Apex Land Corp***, 2011 ABCA 87 at para. 44, 42 Alta LR (5th) 204, 502 AR 243

[37] Transamerica and the appellants bear joint responsibility for at least 30 months of the delay that occurred between the service of the statement of claim and the filing of the statement of defence. Transamerica is entitled to advance the joint conduct of the parties as a partial "excuse" for this portion of the delay.

The Undertakings

[38] Mr. Goulet was questioned in July 2011, and he gave five undertakings. These undertakings were not answered until the continuation of the questioning in January, 2012, at which time he gave six more undertakings. The second set of undertakings were also not answered in a timely way.

[39] The appellants argue that the first set of undertakings were "provided promptly when requested and in advance of previously scheduled questioning". That, however, is not the standard to be met. When undertakings are given, they should be answered without any further demand being made. When a continuation of questioning is scheduled, undertakings should generally be answered well in advance of that.

[40] A defendant might delay answering undertakings in the hope or expectation that the plaintiff will not press for answers. That sort of approach has its dangers, and if it is followed the court is entitled to consider the defendant's conduct when measuring delay.

Summary

[41] Whether the plaintiff has provided a satisfactory explanation or "excuse" for any delay is largely a question of fact. The conclusion of the trial court on justification for any delay is entitled to deference, unless it is based on an error of law or principle. There was no error of principle on the part of the Master or chambers judge in relying in part on the defendants' conduct in explaining or excusing the delay.

Prejudice

[42] While there has clearly been delay in the prosecution of this action, R. 4.31 requires "significant prejudice" arising from delay before an action will be struck. The text of the rule makes it clear that prejudice is the most important factor in the analysis.

[43] The initial burden of proving prejudice is on the defendant who is applying to strike out the action. However, if the defendant can establish "inordinate and inexcusable" delay, then significant prejudice is presumed: R. 4.31(2). In that event, however, the presumption is still rebuttable: ***Kuziw*** at para. 50; ***Ravvin Holdings Ltd v Ghitter***, 2008 ABCA 208 at paras. 38-9, 44, 437 AR 66, 96 Alta LR (4th); ***Humphreys v Trebilcock*** at para. 155. It is still open to the plaintiff to show that, despite the presumption, there is insufficient prejudice to warrant striking out the action.

[44] The appellants allege some "non-litigation prejudice". They argue that they have had a $6.4 million claim hanging over their heads for over 10 years. The ordinary burden of such litigation is compounded by the fact that Transamerica has pleaded forms of misconduct amounting to deceit and fraud: ***Humphreys v Trebilcock*** at para. 178. Transamerica unsuccessfully reported the underlying events to industry regulators.

[45] It is often difficult for a defendant to prove "reputational prejudice". It was perhaps unrealistic to expect Mr. Goulet to provide specific examples of such prejudice. However, the Master and chambers judge did note that Mr. Goulet had successfully continued to work in the industry, and that other insurers had sponsored his licence notwithstanding Transamerica's allegations. Further, they reasoned that if the reputational prejudice were as severe as suggested, the appellants would have been more proactive in bringing the action to trial. These were findings available on the record.

[46] The appellants argue that the memories of witnesses will tend to fade over time. This is a common concern, and one of the reasons that the delay rules exist. On the other hand,

Transamerica's claim is largely "document-based". It depends on the proper interpretation of the contracts under which the commissions were paid, as well as communications between the parties at the time interpreting those contracts. A key factor will be Mr. Goulet's testimony as to how he came to trigger and calculate his claims for commissions. The inability of Transamerica to produce some of the contemporaneous witnesses will likely hurt it more than the appellants.

[47] The appellants argue that the original policyholders are elderly, and some of them are deceased. It has not been demonstrated, however, that these policyholders would have any relevant and material evidence on the method that Mr. Goulet used to calculate his commissions.

[48] The appellants argue that the delay here is "at least as bad" as that in ***Humphreys v Trebilcock***, where the action was dismissed for delay. Firstly, delay cases are decided largely on their facts, and it is seldom possible to compare the outcome of one case with another. Secondly, ***Humphreys v Trebilcock*** did not include any element of "defence delay". Thirdly, the primary consideration in a delay case is "significant prejudice"; if one is to compare cases, the critical comparison is between the amount of prejudice, not just the extent of the delay.

[49] The chambers judge's conclusion that there was no "significant prejudice" is a mixed question of fact and law. Whether the court should, in the end, dismiss the action for delay is discretionary. Both aspects of the chambers judge's decision are entitled to deference on appeal. The appellants have failed to demonstrate any errors that would justify appellate intervention.

Conclusion

[50] Whether or not to dismiss for delay turns on prejudice, indeed substantial prejudice. That there was delay in this case cannot be denied. That the delay was inordinate likewise cannot be denied. For the purposes of invoking the presumption in R. 4.33(2), the issue was whether the delay was excusable because the appellants contributed to it. As discussed, *supra* para. 28, a defendant's conduct may render inordinate delay excusable; but in the end, this case turns on whether there was substantial prejudice. The concurrent findings of the Master and the chambers judge that there was no substantial prejudice to the appellants was not unreasonable and ought not to be disturbed.

[51] The appeal is dismissed. Unless there are special circumstances, the respondent is entitled to assessed costs of the application and appeals, but they will not include any fees or disbursements relating to the evidence of the expert witness.

[52] A Master in Chambers, a judge in chambers, and a panel of this Court have agreed that this application to dismiss for delay cannot succeed. That obviously should not be interpreted as any sort of approval of the pace at which this litigation has been conducted. The parties to any

litigation, and their counsel, have obligations under the *Rules of Court* to advance litigation in a timely way.

[53] The Master granted a procedural order, as is contemplated by R. 4.31(1)(a) following an unsuccessful application to dismiss for delay. Such an order should routinely be made. In addition, there are other remedies for delay available to the trial judge. The trial judge might possibly deny the plaintiff interest for some of the periods of delay: *Judgment Interest Act*, RSA 2000, c. J-1, s. 2(3); ***Baud Corporation, NV v Brook***, [1979] 1 SCR 677 at pp. 679-80; ***Rayani v Yule & Company (Hong Kong)Limited***, 1996 ABCA 35 at paras. 27-9, 36 Alta LR (3d) 217, 178 AR 231. Any award of costs could also be moderated in the appropriate case. Those issues are left for the trial judge.

Appeal heard on June 14, 2019

Memorandum filed at Calgary, Alberta
this 10th day of July, 2019

Slatter J.A.

O'Ferrall J.A.

Authorized to sign for: Schutz J.A.

Appearances:

A.S. Dosanjh
for the Respondent

P.R. Leveque
for the Appellants