Court of King's Bench of Alberta

Citation: Antiquarian Bookstore Ltd., v. Villetard's Eggs Ltd., 2024 ABKB 699

Date: 20241126
Docket: 1703 06151
Registry: Edmonton

Between:

Antiquarian Book Store Ltd., ABC Heating, Plumbing and Gas Fitting Ltd., ABC Trucking and Moving Ltd., and John Tiemessen

Plaintiffs/Respondents

- and -

Villetard's Eggs Ltd., Gary Villetard, Top Floor Coating Inc., Alberta Concrete Pumping Ltd., United Cribbing Ltd., XYZ Ltd., and John Agbam

Defendants/Applicants

Reasons for Decision of the Honourable Justice A.K. Akgungor

I. Introduction

[1] This is an application brought by the Defendants Villetard's Eggs Ltd. and Gary Villetard (the "Applicants") to have the Plaintiffs' action dismissed under Rule 4.33 on the basis that over three years have passed since the last significant advance in this action or, alternatively, under Rule 4.31 for inordinate and inexcusable delay. Top Floor Coating Inc. and Alberta Concrete Pumping Ltd. appeared through counsel to support the Applicants' application. These parties did

not make separate submissions but adopted the submissions of counsel for the Applicants. The Defendant John Agbam is a self-represented party. He was served with notice of the application but did not appear in Chambers on November 7, 2024.

II. Background

[2] The action in this matter was filed on March 29, 2017. The action relates to a fire which occurred on lands located north of Beaumont, Alberta, which are owned by the Defendant Villetard's Eggs Ltd. Located on the land was a 40,000 square foot outbuilding. The building space was rented to various tenants. The Plaintiffs rented approximately 2,000 square feet of the building using it for warehousing various ventures. The fire occurred on March 29, 2015 and destroyed the building and its contents. The fire resulted in three other lawsuits, all of which are now resolved.

III. Procedural History

[3] Following the filing of the Statement of Claim on March 29, 2017, subsequent pleadings were filed as follows:

- April 13, 2018 — Statement of Defence (Top Floor Coating Inc., Alberta Concrete Pumping Ltd. And United Cribbing Ltd.)
- October 10, 2018 — Third Party Claim (Antiquarian Book Store Ltd.)
- April 3, 2019 — Statement of Defence (Villetard's Eggs Ltd. and Gary Villetard)
- September 27, 2019 — Third Party Claim (Villetard's Eggs Ltd., and Gary Villetard)

[4] Two case management meetings occurred. One took place on November 14, 2019 and the other took place on February 18, 2020. At the February 18, 2020 meeting, the Plaintiff was directed to provide an Affidavit of Records by March 16, 2020. However, the Affidavit of Records was not filed and served until February 9, 2023.

[5] An informal settlement conference was held on September 9, 2020. Both parties agree that the action was not advanced at the settlement conference. It is my understanding that Plaintiffs' counsel at the time advised the mediator that there was nothing to talk about and the Plaintiffs did not participate in the settlement conference.

[6] Between September 9, 2020 and February 9, 2023, there were no steps taken in the action.

[7] On February 9, 2023, counsel for the Plaintiffs served their Affidavit of Records. Under Schedule 1 of producible records, the Affidavit stated "nil". A comment under Schedule 3 explained that "all relevant and material records were destroyed in the fire".

[8] There have been no agreements between the parties, express or otherwise, to delay the action or to enter into any periods of suspension. No Order or direction of this Court has stayed, adjourned or otherwise extended the time limits in this action.

IV. Rule 4.33 application

(a) Legal Framework

[9] Rule 4.33(2) of the Alberta Rules of Court states as follows:

> 4.33(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.

[10] 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. The question to be asked is whether there was a three-year period between these dates without any significant advance in the action: ***Rahmani v. 959630 Alberta Ltd***., 2021 ABCA 110 at paras 16-17.

[11] If the relevant period of delay includes March 17, 2020 to June 1, 2020, then Ministerial Order 27/2020 must be considered, as it suspended the operation of time limits under the *Rules of Court* 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 (the "COVID Suspension Period").

[12] Whether a step significantly advances an action is determined by a functional, context-sensitive, substance-over-form approach. Our Court of Appeal described the functional approach as follows in ***Covey v Devon Canada Corporation,*** 2020 ABCA 445 at para. 8 citing ***Weaver v Cherniawsky***, 2016 ABCA 152 at para. 18:

> Under the delay *Rules*, the functional approach requires the chambers judge to determine whether the step said to be a "significant advance in an action" actually moves the lawsuit forward in a meaningful way considering its nature, value, importance and quality. The genuineness and timing of the step is also relevant. The focus is on the substance of the step taken and its effect on the litigation, rather than its form [citations omitted].

[13] 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. 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: ***Abou Shaaban v. Baljak***, 2024 ABKB 28 at para. 63. As noted in ***Abou Shaaban*** at para. 64:

> This 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?

> Are the parties at the end of the applicable period much closer to resolution than they were at the start date? [citations omitted]

[14] Steps that narrow the 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 Contracting Ltd v Verbeek Sand & Gravel***, 2016 ABCA 123 at para. 20.

[15] The onus is on the party making the dismissal application to lead evidence that no significant advance has occurred within the three-year period. 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: ***Taschuk v Taschuk,*** 2022 ABKB 786 at paras. 37-40.

(b) Positions of the parties

[16] The parties agree that the last uncontroversial significant advance of this action occurred at the case management conference on February 18, 2020. The Plaintiffs fairly concede that the September 9, 2020 settlement conference did not constitute a significant advance of the action. The Plaintiffs' Affidavit of Records was filed on February 9, 2023. As such, it falls within the three-year window which follows February 18, 2020.

[17] The COVID Suspension Period applies to the applicable time period in this case. However, the application for long delay was filed on November 14, 2023. The period from February 18, 2020 to November 14, 2023 encompasses more than three years plus the COVID Suspension Period. It is uncontested that the only step taken during this period was the filing of the Plaintiff's Affidavit of Records. The key point of dispute between the parties is whether the Affidavit of Records amounts to a "significant advance of the action".

(i) Applicants

[18] The Applicants describe the Affidavit of Records filed by the Plaintiffs as "blank". They state there are no electronic records or bank statements, and there is no tax information, no shipping information and no information to show what the corporate representative affiant's relationship is to the companies. The Applicants submit that this Affidavit of Records is not a significant advance of the action. It is not an advance at all. They contend that they are in the same place they were three years ago and now, nine years after the fire, they still have no documents. The Applicants note that the Plaintiffs' claim is for $5 million. It is difficult to imagine that there is not some shred of documentary evidence of their claim, e.g. a photograph or a handwritten note listing the losses.

[19] The Applicants state that, as a starting point, an affidavit of records may or may not constitute a significant advance in an action. The Applicants stress that we no longer apply the law under ***Alberta v Morasch,*** 2000 ABCA 24 to conclude that a mandatory step under the Rules will always significantly advance an action: ***Ursa Ventures v. Edmonton (City)***, 2016 ABCA 135 at paras. 21 and 24. Rather, a functional approach is used to determine whether the steps actually move the lawsuit forward in a meaningful way considering its nature, value, importance and quality. The genuineness and timing of the step are also relevant. The focus is on the substance of the step taken rather than its form: ***Covey*** at para. 8.

[20] The Applicants submit that at the end of the day what we have is multiple corporate plaintiffs who stored items in the warehouse, a $5 million claim and a deficient Affidavit of

Records that has no records whatsoever. The Applicants don't know the relationship of corporate representative to the corporate plaintiffs, and they don't know what searches were conducted in that regard. The Applicants don't know this because the Plaintiffs chose not to file an Affidavit in response to the Rule 4.33/4.31 application. The Applicants submit that an adverse inference ought to be drawn against the Plaintiffs for their failure to file a responding Affidavit.

[21] The Applicants point out that paragraphs 10 and 11 of the Statement of Claim refer to ABC Trucking's forklift. The Applicants allege that the fire commenced from an electrical failure on the forklift. However, the Applicants point out that no invoice for the forklift has been provided nor are any electronic records available. Counsel for the Applicants referred to the general lack of documents as "highly improbable", "impossible" or "ludicrous".

[22] The Applicants submit that the timing should also be considered. The Affidavit of Records was filed very close to the end of the three-year drop dead timeline. The Applicants note that the Plaintiffs were directed to file their Affidavit of Records by March 16, 2020. They did not and are now using the very late filing of the Affidavit of Records on February 9, 2023 almost as a weapon to reset the three-year clock.

(ii) Respondents

[23] The Respondents take issue with the Applicants' characterization of the Affidavit of Records as "blank". They state that the records are clearly listed within the Affidavit as "nil". That is not a blank Affidavit of Records. That is a sworn Affidavit of Records. Under cross-examination on Affidavit, the defendant Mr. Villetard agreed that all the contents of the warehouse were destroyed in the fire. Accordingly, the Affidavit of Records reflects this state of affairs where it indicates that "all relevant and material records were destroyed in the fire".

[24] While the Applicants argue that the Affidavit of Records could have contained records such as corporate searches, that is not necessary as these types of records are government documents that could be relied on in a lawsuit in any event. An Affidavit of Records full of the results of searches from Government registries does nothing to significantly advance the action. What does significantly advance the action is swearing an Affidavit telling the other parties that the Plaintiffs don't have documents.

[25] Under Rule 5.6, the Plaintiffs must disclose all relevant and material records. By swearing the Affidavit of Records, the Plaintiffs have provided an admission, under oath, to the Applicants that they have no records. The Plaintiffs have indicated that they are only in a position to prove the nature, description and value of the assets lost based on memory and not records. This indicates that there will be no surprises at trial. Further, under Rule 5.3, the Plaintiffs are exposed to costs, denial of interest and other sanctions for swearing an Affidavit of Records that does not disclose all required records.

[26] With respect to the timing of the Affidavit of Records, the Respondents submit that the Court ought not to read into the timing that the Affidavit of Records was not genuine or that it did not significantly advance the action. The Respondents acknowledge that the Affidavit of Records was served just under the wire (although I note that there is a bit more breathing space on the timing of when the Affidavit of Records was filed and served if one adds in the COVID Suspension Period, which may be done here) but states that the reason for that is simply because

previous counsel passed away in December 2022 and new counsel, on review of the file in early 2023, noted that an Affidavit of Records needed to be filed and took steps to do so.

[27] The Respondents assert that the Applicants could have brought an application for summary judgment but they did not. Instead, they chose to pursue the application for long delay and to suggest that the Plaintiffs' Affidavit of Records did not significantly advance the action. It is now open for the Defendants to decide what they would like to do with the lawsuit in light of the fact that the Plaintiffs do not have any records. Counsel for the Plaintiffs fairly noted that the Plaintiffs' claim is not without hurdles. However, the Plaintiffs assert that Rule 4.33 is not one of them.

(c) Analysis

(i) Case law

[28] The parties agree that an assessment of whether the Affidavit of Records significantly advanced the action is to be guided by the functional test.

[29] The Applicants rely on ***Covey* v. *Devon Canada Corporation,*** 2020 ABCA 445. In this case, an Affidavit of Records was filed on the last day of the three-year long delay window. The Rule 4.33 application was first heard by a Master who found that the Affidavit of Records did not significantly advance the action because it was incomplete, had the appearance of having been put together in haste at the last minute and left out numerous relevant material records that should have been included. The affidavit of records was not adequate to serve the function for which such documents are prepared – to inform the other party of the case it has to face. Further, within three or four months, a supplemental affidavit of records was filed which added significant documentation. The Chambers Judge largely agreed with the reasoning of the Master and noted as well that the supplementary Affidavit of Records was filed without any interposing discoveries or other event taking place and it was inaccessible having inadvertently listed privileged documents. The Court of Appeal upheld the decision of the Chambers Judge.

[30] The Applicants further rely on ***Llan* v. *The Church of Jesus Christ of Latter-Day Saints in Canada,*** 2024 ABKB 60. Also, at issue in ***Llan*** was whether an Affidavit of Records significantly advanced a wrongful dismissal action. The affidavit contained 22 documents, of which 17 were corporate searches obtained through a public registry. The remaining 5 documents were: the plaintiff's offer of employment, termination letter, a pay statement, an international qualifications assessment, and an older version of a curriculum vitae which did not reflect the employment with the defendant or any employment following termination by the defendant. Moore J. did not see how the corporate searches or the qualifications assessment were relevant to the claim and noted that the defendant already had copies of the offer of employment, the termination letter and the pay statement.

[31] Moore J. found that, while there were 22 records in the Affidavit of Records, none of them materially advanced the action. The plaintiff did not include an updated CV or any information about mitigation efforts or his new employment. He also did not provide any records which were responsive to his claim that he had incurred expense to obtain medical care, counselling, therapy and prescription drugs. In the circumstances, Moore J. found that nothing had occurred in the relevant period which placed the parties in a better position to either settle or adjudicate the action. Accordingly, the Affidavit of Records did not constitute a significant advance in the litigation for the purposes of Rule 4.33.

[32] In ***Ursa Ventures Ltd.*** **v** ***Edmonton (City),*** 2016 ABCA 135, the only step taken during a three-year window after the filing of the Statement of Defence was the filing of an Affidavit of Records. The affidavit contained 26 records. As in the present case, the question was whether the Affidavit of Records significantly advanced the action.

[33] The Court of Appeal confirmed that the approach under ***Alberta v Morasch,*** 2000 ABCA 24 that a mandatory step under the *Rules of Court* will always significantly advance an action is no longer the correct analysis. The Court noted that an Affidavit of Records is an example where the functional approach may or may not lead to a conclusion that a particular Affidavit of Records significantly advanced an action: para 21.

[34] In ***Ursa***, the City submitted that all the records listed in the respondent's affidavit were already in its possession because it created them or sent them to the respondent. It argued that an affidavit without any substantive evidence or new information cannot significantly advance the action. The chambers judge rejected this argument and found as follows as stated as para. 28:

> Specifically, Ursa's Affidavit of Records discloses to the City the records in Ursa's possession and which records Ursa might use to attempt to prove its case at trial. The fact the records might be the same or identical to the records of the City does not impact Ursa's claim nor does it mean Ursa's Affidavit of Records does not significantly advance the action. To the contrary it advises the City of the nature, quality and quantity of Ursa's records. It further allows the City to know the nature of Ursa's production evidence which the City possibly will have to meet in order to defend the claims of Ursa at trial.

[35] The chambers judge went on to state that "both parties, perhaps, would be reassured that there would be no new evidence or new information emanating from records other than from those records already in the common possession of both parties. […] There would be no surprises at trial through document production."

[36] The Court of Appeal upheld the decision of the chambers judge that the affidavit of records materially advanced the action. The Applicants rely on the law as set in ***Ursa*** but submit that the result in ***Ursa*** can be distinguished from the present case given that records were actually listed in the Affidavit of Records at issue in ***Ursa***.

[37] The Respondents, however, rely on both the result and the law as set out in ***Ursa***. In particular, the respondents point me to commentary at both paragraphs 22 and 30 of ***Ursa***. At paragraph 22, the court considered a blank affidavit of records. It noted that, under ***Morasch***, completing this mandatory step would always materially advance the action. However, under the functional approach, the court could consider the genuineness and timing of the affidavit and balance that against a possible competing argument that even knowledge that the plaintiff has no relevant and material documents can significantly advance an action.

[38] Further, at paragraph 30, the Court of Appeal stated: "Suppose that the City had filed its affidavit, and the respondent simply wrote a letter stating that it had no additional documents, and would be relying at trial on the records listed in the City's affidavits. Surely, this would significantly advance the action because the City would know that there were no other relevant records."

[39] The Respondents also rely on ***Droog*** **v.** ***Hamilton,*** 2024 ABKB 243. While in ***Droog***, the affidavit of records was filed outside of the applicable three-year window, Jones J. went on to

consider whether the affidavit of records in question would have significantly advanced the action. In ***Droog***, it was argued that the affidavit of records did not significantly advance the action because 11 of the 12 records contained in the Affidavit of Records were already in the defendants' possession and so did not serve the purpose of informing the defendants of the case they had to meet. Jones J. found that ***Ursa*** and ***Llan*** did not support the defendants' position that an affidavit containing records already in their possession was sufficient to negate the possibility of an Affidavit of Records being a significant advance in the action. Rather, in this case, the records, while sparse, indicated the plaintiff's case in sufficient detail.

[40] With respect to the notion of "genuineness and timing" referred to in ***Ursa***, Jones J. noted that each case must be assessed individually and that he did not take ***Covey*** as making a blanket statement that the court should be parsing degrees of haste or imputing *mala fides* to a litigant merely because of an attempt to avoid Rule 4.33. Rather, as noted by Jones J, the Rule requires a significant advance within the prescribed period. If a litigant makes such an advance at the eleventh hour, the requirement is met.

(ii) The Plaintiff's Affidavit of Records is a significant advance of the action

[41] Having considered the submissions of the parties and the authorities provided to me on Rule 4.33, I have concluded that the Plaintiffs' Affidavit of Records filed on February 9, 2023 amounts to a significant advance of the action.

[42] The Applicants state that if I find in this case that the Affidavit of Records is a significant advance of the action, then we have simply returned to ***Morasch*** where any mandatory step would have been considered a significant advance of the action. However, I do not find here that the Plaintiffs' Affidavit of Records is a significant advance of the action simply because the Plaintiffs have taken a mandatory step.

[43] Rather, I have reached that conclusion on the basis of the functional approach and a consideration of whether or not the Affidavit of Records moves the action forward in an essential or meaningful way.

[44] I agree with the Respondents that the Affidavit of Records should not be characterized as "blank" in the sense that it contains no information at all. Rather, as argued by the Respondents, the Affidavit of Records is a sworn document which verifies for the Applicants that the Respondents have no records. That information is significant for the Applicants for a number of reasons:

- It completes the discovery of records on the Plaintiffs' side. This, in turn, assures the Applicants that there will be no new evidence or new information emanating from any records. There will be no surprises at trial through record production. Since a major objective of discovery is to avoid surprise, the knowledge that there are no "surprise documents" is important: *Ursa* at para. 31.
- It shapes the focus of the litigation. The Applicants now know that the Plaintiffs are not seeking to establish their claim through records. The focus will be on viva voce evidence. The Applicants may now assess that information and determine their next steps in the conduct of the litigation.

- It puts the parties in a better position to rationally assess the merits of the parties' positions and either settle or adjudicate the action. The absence of any records to substantiate the nature, description or value of the assets lost in the fire may well impact the Plaintiffs' ability to establish their claims. While this is ultimately an issue for the trial judge, for the purposes of the Rule 4.33 application, the Plaintiff's lack of records is important information for the Applicants' in assessing the merits of the Plaintiffs' claims and a corresponding course of action.

[45] The Applicants urge me to distinguish the result in ***Droog*** because in ***Droog*** at least some records were provided and this allowed Jones J to find that, while sparse, the records set out the plaintiff's case in sufficient detail. Here, there are no records provided. As put by the Applicants, the Plaintiffs could not have done less.

[46] While it may seem counterintuitive that an Affidavit of Records which ultimately contains no records can be found to significantly advance an action whereas an Affidavit of Records which contains some records, as in ***Covey*** and ***Llan***, can be found not to significantly advance an action, the question of whether a particular Affidavit of Records significant advances an action does not turn solely on whether the Affidavit of Records in question contains records or not. Rather, the question is whether the content of the particular Affidavit of Records significantly advances the action in the context of the lawsuit as a whole.

[47] Here, the Affidavit of Records has alerted the Applicants that the Plaintiffs have no records and they will not be not be relying at trial on any of their records, as they have none. As noted at paragraph 30 of ***Ursa***, surely this would significantly advance the action because the Applicants would know that there are no relevant records forthcoming.

[48] The Applicants assert that there must be some records related to the action such as electronic records or emails that would exist on servers outside the warehouse, financial information, invoices related to the items stored in the warehouse or even corporate records which show the relationship of the corporate affiant to the Plaintiffs. In these circumstances, having provided an Affidavit of Records devoid of any records whatsoever, it cannot be that the Plaintiffs filed an Affidavit of Records which significantly advanced the action.

[49] It may well be, as was the case in ***Covey***, that when an Affidavit of Records is filed that leaves out numerous relevant and material documents, that the Affidavit of Records does not significantly advance the action. But here, the Plaintiffs did not fail to leave out relevant and material records. They have no records. The Applicants can rest assured that that there are no relevant records forthcoming.

[50] Further, the Applicants' suggestions of what records ought to be in the Plaintiffs' Affidavit of Records are met by the fact that the Plaintiffs have now sworn under oath that there are no records. This binds the Plaintiffs to making their case without records unless the parties agree or the Court directs otherwise under Rule 5.16.

[51] As noted in ***Ursa*** at para. 19, the genuineness and timing of the advance in the action are also relevant. The Applicants contend that filing a "blank" Affidavit right near the end of the three-year period should not be viewed as a genuine advance of the action. In this case, the timing of the filing of the Plaintiffs' Affidavit of Records does not detract from my finding that it amounts to a significant advance in the action. First, I am satisfied that there is a reasonable explanation as to why the Affidavit of Records was filed when it was. Original counsel for the

Plaintiffs unfortunately passed away in December 2022. There is no evidence before me as to why the Affidavit of Records was not filed prior to December 2022. When current counsel took over the file in January 2023, he came up to speed, recognized that the Affidavit of Records needed to be filed and proceeded with the same.

[52] Further, and in any event, I would adopt the reasoning of Jones J. in ***Droog*** – as long as a step is taken that significantly advances the action within the three-year period, then the requirements of Rule 4.33 are met. It is ultimately of no consequence if the requirements are met at the eleventh hour.

[53] Having found that the Plaintiffs' Affidavit of Records filed on February 9, 2023 is a step that significantly advanced the action, the drop dead application pursuant to Rule 4.33 is dismissed.

[54] Prior to considering the application under Rule 4.31, I will address briefly the Applicants' contention that an adverse inference should be drawn against the Respondents as the Respondents did not file an Affidavit in response to the Applicants' Rule 4.33/4.31 application. The suggestion appears to be that not having filed a response Affidavit we do not know what steps were taken by the Plaintiffs to discover or locate records. Accordingly, an adverse inference should then be drawn that the Plaintiffs do actually have records and have simply failed to produce them, with the result the Affidavit of Records does not significantly advance the action.

[55] I am not prepared to draw an adverse inference of this nature where the Plaintiffs have sworn under oath to the fact that they have no records. The Affidavit of Records explains why there are no records – they were destroyed in the fire. As noted by the Respondents, filing an affidavit in response to the Rule 4.33/4.31 would not have conveyed any more information than was already contained in the Affidavit of Records itself. In the face of a sworn statement that there are no records, I am not prepared to draw an adverse inference that there must have been records and they were just not produced.

V. Rule 4.31 application

(a) Legal framework

[56] The Applicants further submit that there has been inordinate and inexcusable delay, and the application should be dismissed under Rule 4.31.

[57] Rule 4.31 provides as follows:

> 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.

> (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.

[58] Under R. 4.31(1)(a) the Court may dismiss an action for any 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: ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd.***, 2019 ABCA 276 at para. 2.

[59] As noted in ***Transamerica*** 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.

[60] Delay or prejudice occasioned by the passage of time before an action is commenced is not delay which allows the court to dismiss a claim under Rule 4.31: ***Edmonton (City) v. Alberco Construction Ltd***. 2021 ABQB 1006 at paras 166-174.

[61] Rule 4.31 requires a review of the entire action and not segments: ***Cochrane (Town) v Austech Holdings Inc.,*** 2022 ABCA 377 at para. 25.

(b) Positions of the parties

[62] The Applicants assert that if the Plaintiffs knew they had no documents, they should have prosecuted the action much more diligently. Part of the test under Rule 4.31 is whether the Plaintiffs have advanced the action where a reasonable litigant would. The Applicants stress that it has been nine years since the fire and there have been no questionings and witness memories have likely faded. They note that business records are only kept for 5-7 years, and we are now outside that time frame. This is inordinate and inexcusable delay and should be presumed to have resulted in significant prejudice.

[63] The Respondents concede that there was a period of three years following the February 18, 2020 case management meeting where very little was done. However, the Respondents submit that this three-year period does not amount to inordinate and inexcusable delay in the context of this action in its entirety and in our litigation system as a whole.

[64] The Respondents note that after the Statement of Claim was filed in March of 2017, it took another two and a half years for the pleadings to close by the time all the Statements of Defence and Third Party Claims were filed. The Court is entitled to take note of the Applicants' delay here. The Respondents further note that the Applicants' own Affidavit of Records should

have been filed 60 days after February 9, 2023, but it was not filed until after September 9, 2023 and it was only filed on prompting from Plaintiff's counsel and without prejudice to the Applicants' Rule 4.33/4.31 application.

[65] Further, the Respondents assert that there is no evidence of actual prejudice. Once records become the subject of litigation then the business records retention rules are altered, and the records must be preserved for the purposes of litigation. As such, the fact that the action now falls outside the timeframe for the business records retention rule does not amount to prejudice.

[66] As for faded memories, the Respondents assert that this is an ongoing issue with the slowness of litigation in our court system generally and does not amount to prejudice in this case. The Respondents further note that the Defendant, Mr. Villetard, was questioned on Affidavit on November 9, 2023 and he had no difficulty providing answers on what he recalled being in the warehouse.

(c) Analysis

[67] In assessing an application under Rule 4.31, the Court should first address issues of delay and inordinate and inexcusable delay and thereafter turn to the question of prejudice: ***Arbeau v Schulz,*** 2019 ABCA 204 at paras. 24-46.

(i) Has there been delay?

[68] The Statement of Claim was filed on March 29, 2017. Pleadings closed on September 27, 2019 subsequent to a Statement of Defence being filed by the Applicants on April 3, 2019 and then a Third Party Claim by the Applicants being filed on September 27, 2019.

[69] Case management meetings then took place on November 14, 2019 and February 18, 2020. A settlement conference took place on September 9, 2020 but it is agreed that the Plaintiffs did not take meaningful part in the settlement conference.

[70] Between February 18, 2020 to February 9, 2023, when the Plaintiffs' Affidavit of Records was filed, there was no activity on the file. Subsequent to that date, the Applicants' Affidavit of Records was filed at some point after September 9, 2023. I do not understand any questionings on the main action to have taken place to date. In order to be ready for trial, it is likely that questionings will need to occur, answers to undertakings will need to be exchanged, expert reports, if any, will need to be prepared and exchanged and dispute resolution will need to occur.

[71] In other words, at a point more than five years after the close of pleadings, the action is far from being ready for trial. I am satisfied in the circumstances that the Plaintiffs, to borrow the wording from ***Arbeau*** at para. 34, have failed to advance their action to the point on the litigation spectrum that a litigant acting reasonably would have attained over this period of time.

(ii) Is the delay inordinate and inexcusable in the circumstances?

[72] Rule 4.31 distinguishes between "delay" (rule 4.31(1)) and delay that is "inordinate and inexcusable" (rule 4.31(2)). In both cases, an action may be dismissed if significant prejudice is established. However, in the case of "delay", the onus is on the moving party to establish that they suffered significant prejudice. In the case of delay that is "inordinate and inexcusable", there is a rebuttable presumption that significant prejudice was suffered "unless the non-moving party has proven on a balance of probabilities that the moving party has not suffered significant

prejudice". It is, therefore, necessary to consider what sort of delay is at issue in this action: ***Arbeau*** at para. 35.

[73] Rule 4.31(3) requires the Court, when assessing whether the delay is inordinate and inexcusable, to consider whether the moving party participated in or contributed to the delay.

[74] I will first note that the Applicants have cast their submissions on delay as running from the time of the fire in March 2015. In view, and as noted in ***Alberco,*** the time preceding the filing of the Statement of Claim should not count towards the overall period of delay. As noted by the Respondents, they were entitled, by virtue of the *Limitations Act*, to a period of two years before deciding to file their claim. In my view, the assessment of delay should be viewed from the point at which the Statement of Claim was filed on March 29, 2017.

[75] I have considered, as urged by the Respondents, that the Statement of Claim was filed on March 29, 2017 and pleadings did not close until September 27, 2019. While it is customary between counsel to allow a grace period for filing a Statement of Defence given the relatively brief 20-day deadline under the *Rules*, it is not clear on the evidence before me why it then took over a year, until April 13, 2018, before the first Statement of Defence was filed by Top Floor Coating Inc., Alberta Concrete and Pumping and United Cribbing Ltd. The Applicants did not file their Statement of Defence until April 3, 2019, over two years after the Statement of Claim was filed. Again, it is unclear why, although I note that the Applicants' materials state that the parties have not agreed, expressly or otherwise, to delay the action. The Applicants then filed a Third Party Claim on September 27, 2019, two and a half years after the Statement of Claim was filed.

[76] Whatever the reasons were for the filing timelines of the Statements of Defence, it is clear that no one was in any particular rush to move matters forward in the earlier days of the action. Over two years passed between service of the Statement of Claim and the Applicants filing their Statement of Defence.

[77] As noted by the Respondents, the foundational rules place obligations on both parties to move the action along. In particular, Rule 1.2(3)(a) provides that to achieve the purpose and intention of these rules, the parties must, jointly and individually, during an action identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense.

[78] I do not agree with the Respondents' assertion that the Applicants could or should have brought an application to compel the Plaintiffs' Affidavit of Records when it was not provided by the original timeline of March 16, 2020. As stated by the Applicants, it is not their job to ensure that the Plaintiffs comply with court orders. However, I do accept that, during periods where the ball was in the Applicants' court, they likewise had a duty to move the ball along in a timely fashion.

[79] Given that the pleadings took two and a half years to close after the filing of the Statement of Claim and given that this was a period of time where the ball was in the Applicants/Defendants' court it appears clear to me that the Applicants participated or contributed to the delay in the early years of the action. If we consider that from the point that the Statement of Claim was filed on March 29, 2017 to the point that the Affidavit of Records was filed on February 9, 2023 is a period of just under six years, it appears that the Applicants were responsible for almost half of that period of delay.

[80] Counsel did not point me to any cases addressing delay in the context of Rule 4.31. However, I note here that in ***Arbeau*** the Court of Appeal found that a period of 6 years and 9 months, which reflected the time from the commencement of the action to the filing of the application to dismiss for delay, did not amount to inordinate and inexcusable delay.

[81] While more steps had been taken in ***Arbeau*** to move the matter towards trial than have been taken in the present case, I find that when I take the pace of the action as a whole into consideration as well the period of delay that can be attributed to the Applicants, in addition to the result in *Arbeau*, I am not satisfied that the circumstances of the present case amount to inordinate delay as contemplated by Rule 4.31(2).

[82] In other words, as put in ***Transmerica***, I am not satisfied that this action falls within the slowest examples of this type of proceeding, or that it is so slow that the delay justifies striking out the claim.

(iii)If the delay is not inordinate or inexcusable, have the Applicants demonstrated significant prejudice?

[83] Where the presumption of significant prejudice under rule 4.31(2) does not apply, the court must consider whether the applicant has established actual significant prejudice caused by the delay: ***Arbeau*** at para. 43.

[84] The Applicants argue that the length of the delay is in and of itself prejudicial to their ability to defend this matter. However, having found that the delay was not inordinate or inexcusable, the Applicants, for the purpose of a Rule 4.31 application, cannot avail themselves of the presumption of prejudice.

[85] The Applicants offer two other instances of prejudice. First, the Applicants have suggested that because the action is now outside the period for which business records are retained that prejudice will arise presumably because relevant records will not have been retained and will no longer be available. However, as argued by the Respondents, business record retention rules are altered once a Statement of Claim is filed. Once a matter becomes the subject of litigation the records associated with that litigation cannot be destroyed or this would amount to the destruction of evidence.

[86] Further, the Applicants have not identified how specifically they have been prejudiced or will be prejudiced as a result of being outside the timeframe for the retention of business records. Ultimately, the Plaintiffs have no records. It is difficult to see any prejudice arising to the Applicants with respect to the possibility of missing records when the Plaintiffs have sworn that no records exist in the first place.

[87] Second, the Applicants assert that they are prejudiced as witness memories are likely to have faded over time. While this may be a generalized concern in any litigation, the Applicants have not pointed to any specific prejudice that they will suffer as a result of fading witness memories, nor have they pointed to any specific witnesses whose memories are at risk of fading. As noted by Loparco J. in ***Oleksyn* v *Hi Line Farm Equipment Ltd***, 2024 ABKB 584 at para. 103, "the mere 'fear' of fading memories, without more, does not lead to an inexorable conclusion that memories have indeed faded and significant prejudice arises." I make the same finding here.

[88] Further, there is no evidence that the key players in this litigation are no longer available. Indeed, as submitted by the Respondents and demonstrated by the cross-examination transcript

in evidence before me, the Defendant, Mr. Villetard, was questioned on Affidavit on November 9, 2023 and he did not appear to have difficulty providing answers on what he recalled being in the warehouse.

[89] Given the absence of actual significant prejudice, there is no basis to dismiss the action for delay pursuant to rule 4.31.

VI. Conclusion

[90] The application to dismiss for long delay under Rule 4.33 is dismissed.

[91] The application to dismiss for delay under Rule 4.31 is dismissed.

[92] The Respondents are entitled to one set of costs under Schedule C.

[93] The parties are directed to contact the Civil Trial & Specials Coordinator by no later than December 6, 2024 to schedule a Rule 4.10 Case Conference in order to formulate a litigation plan for this matter. The parties must attend the Rule 4.10 Case Conference with a draft litigation plan already prepared.

[94] I thank counsel for their able and helpful submissions in this matter.

Heard on the 7th day of November, 2024.
Dated at the City of Edmonton, Alberta this 26th day of November, 2024.

A.K. Akgungor
J.C.K.B.A.

Appearances:

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for the Respondent/Plaintiffs