In the Court of Appeal of Alberta

Citation: Center Street Limited Partnership v Nuera Platinum Construction Ltd, 2025 ABCA 290

Date: 20250826
Docket: 2401-0237AC
Registry: Calgary

Between:

Center Street Limited Partnership

Respondent

- and -

Nuera Platinum Construction Ltd. and Over & Above Reno and Contracting Ltd.

Appellants

The Court:

The Honourable Justice Dawn Pentelechuk
The Honourable Justice Anne Kirker
The Honourable Justice Tamara Friesen

Appeal from the Order by
The Honourable Justice J.C. Price
Dated the 10th day of August, 2023
Filed on the 19th day of September, 2024
(2024 ABKB 489, Docket: 1601 02191)

Memorandum of Judgment

The Court:

Introduction

[1] The genesis of this dispute is a property fire that occurred during a construction project on a property owned by the respondent, Center Street Limited Partnership. The fire damaged the property, and Center Street filed an action against Nuera Platinum Construction Ltd and Over & Above Reno and Contracting Ltd (Nuera parties), who were, respectively, managing and working on the project, and a separate action against Lloyd's of London, the project's insurer.

[2] The Nuera parties applied to have the claim against them dismissed for long delay. An applications judge dismissed that application, and a chambers judge dismissed their appeal. They now appeal to this Court.

[3] Two questions must be considered in determining whether the appeal should be granted. The first is whether the parties' agreement that the respondent would pursue the coverage action against the insurer and, if successful, abandon the trades action against the Nuera parties, is a standstill agreement. The second is whether advances in the coverage action should be considered significant advances in the trades action such that rule 4.33(2) of the *Rules* did not apply. If the answer to either or both questions is yes, then the appeal must be dismissed.

[4] We conclude the agreement is not a standstill agreement but the trades action was significantly advanced and dismiss the appeal.

Facts and Procedural History

[5] On March 7, 2015, during construction of a commercial project in Calgary owned by Center Street, a fire broke out on the roof that extensively damaged the property. Nuera was construction manager of the project and Over & Above was the roofing and waterproofing contractor retained by Nuera to conduct "hot works." On February 12, 2016, Center Street brought the within action against Nuera and Over & Above, alleging breach of contract and negligence in relation to the fire. This is referred to as the trades action.

[6] On June 13, 2016, Center Street also commenced an action against its insurer, Lloyd's of London, under a course of construction policy, seeking a declaration that the policy covered losses related to the fire. Lloyd's had denied coverage based on an exclusion in the policy regarding the hot works operation underway when the fire occurred. This is referred to as the coverage action.

[7] Lloyd's applied to consolidate the two actions. On April 20, 2017, Center Street and the Nuera parties agreed in writing to oppose the consolidation application. The agreement contemplated that if the actions proceeded separately, Center Street would pursue the coverage action to trial before the trades action and would not use certain evidence from the trial of the coverage action involving the hot works operation in the trades action, or raise issue estoppel against Over & Above. Center Street agreed to sign and file a consent dismissal order of the trades action as against the Nuera parties if it obtained "a final, non-appealable, judicial determination requiring Lloyd's Underwriters to provide coverage or indemnify Center Street, in whole or in part, under the policy." Lloyd's application to consolidate the actions was heard on April 20, 2017 and dismissed on April 28, 2017: 2017 ABQB 295. An appeal of this decision to a chambers judge was also dismissed.

[8] Center Street served supplemental affidavits of records in the coverage action on December 20, 2017 and May 28, 2018. Questioning proceeded on October 4 and 5, 2018. In December 2019, Center Street went into receivership and a receivership order was granted February 19, 2020 giving the receiver authority to continue the prosecution of both actions.

[9] On July 14, 2021, Nuera put Center Street on notice that it intended to seek dismissal of the trades action for long delay as no step had been taken to advance that action for over three years. Effective August 31, 2021, Center Street and Nuera made an agreement to temporarily toll all unexpired time periods under the *Alberta Rules of Court*, AR 124/2010 and the *Limitations Act*, RSA 2000, c L-12.

[10] The next step taken in the coverage action was on September 30, 2021, when Center Street served its answers to undertakings. The insurer served its answers to undertakings on December 29, 2021 and questioning of the insurer's representative on the undertakings occurred on January 17, 2022.

[11] The parties' tolling agreement was subsequently terminated, and in April 2023 the Nuera parties applied to dismiss the trades action for long delay pursuant to r 4.33(2) of the *Rules*. Center Street opposed the application. An applications judge heard and dismissed the Nuera parties' application on August 10, 2023. He found that while the letter agreement of April 20, 2017 did not constitute a "standstill agreement," it inextricably linked the two actions such that r 4.33(2) did not apply. The Nuera parties appealed.

[12] On appeal, it was agreed that over three years had passed since Center Street took its last significant step in the trades action. The issues before the chambers judge were first, whether the agreement signed April 20, 2017 was an agreement to suspend time (a standstill agreement) and second, whether the trades action and the coverage action were inextricably linked.

[13] The chambers judge held that although the April 20, 2017 letter agreement was not as clearly drafted as a standstill agreement should be, it contained the essential terms required to signify the parties agreed to suspend the application of r 4.33(2) in the trades action pending the

outcome of the coverage action, citing ***Bugg v Beau Canada Exploration Ltd***, 2006 ABCA 201; ***Brian W Conway Professional Corporation v Perera***, 2015 ABCA 404; ***Flock v Flock Estate***, 2017 ABCA 67, leave to appeal to SCC refused 37552 (19 October 2017). She found the parties to the agreement were clearly identified, the date was April 20, 2017, and the agreement was to continue until a resolution to the coverage action occurred, provided it went to trial first. Referring to r 4.33(1)(c), the chambers judge found the suspension period could be determined by the happening of a specific event, rather than a specific calendar date. While the agreement was made in part to avoid consolidation of the actions, it did not solely pertain to that issue. The agreement brought significant benefit to both parties, but especially for the Nuera parties, as they had only to wait and see what might occur.

[14] The chambers judge went on to consider whether the actions were inextricably linked. She reviewed the factors a court considers when determining whether there is an inextricable link between two actions, citing ***Angevine v Blue Range Resources Corporation***, 2007 ABQB 443 at para 41. She determined that the ***Angevine*** factors should be considered in a functional rather than formalistic way, consistent with authorities on r 4.33 generally: ***Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc***, 2016 ABCA 123 at para 14; ***Ursa Ventures Ltd v Edmonton (City)***, 2016 ABCA 135 at para 18; ***Flock*** at para 17; ***Moman v Bradley***, 2024 ABKB 351 at para 13.

[15] Applying these principles, the chambers judge found that the issues in the two actions, though deriving from the same facts, were largely distinct with different defendants. However, she also found that based on the letter agreement, a decision in the coverage action that Lloyd's must provide coverage would end the trades action. She therefore agreed with the applications judge that the coverage action and the trades action were inextricably linked and concluded that r 4.33(2) did not apply as three or more years had not passed since significant advance in the coverage action.

[16] At the hearing of the appeal in this Court, counsel advised that the coverage action has been discontinued.

[17] Following the hearing, this Court released its decision in ***Round Hill Consulting Ltd v Parkview Consulting***, 2025 ABCA 195. In that case, this Court clarified that there is no inextricable link test, noting the chambers decision among examples of cases where this test had been employed. The parties accepted our invitation to provide further written submission on how ***Round Hill*** applies to this appeal.

Grounds of appeal

[18] The appellant says the chambers judge erred first, in finding the letter agreement was an agreement to suspend the application of r 4.33; and second, once she determined the trades action and the coverage action were inextricably linked, by failing to apply the correct test and failing to

consider whether a step taken in the coverage action significantly advanced the trades action. In its supplemental submissions, it added that, given ***Round Hill***, the chambers judge was wrong at law to rely on the inextricable link test instead of conducting a functional analysis of whether the questioning in the coverage action advanced the trades action.

Law

[19] Per r 4.33(1), also known as the "drop dead rule", an action must be dismissed if it has not been significantly advanced for three or more years:

> 4.33(1) In this rule,
>
> (a) "applicant" means a party to an action who makes an application to dismiss the action for delay as set out in this rule;
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> (b) "respondent" means a party who has filed a commencement document;
>
> (c) "suspension period" means, in subrules (5) to (9), a period that ends on
>
> (i) a specific date, or
>
> (ii) the happening of a specific event.
>
> (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
>
> (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.
>
> ...
>
> (5) If a respondent and an applicant agree in writing to a suspension period, the period of time under subrule (2) does not include the suspension period agreed to.

Standard of Review

[20] The appellants argue that the chambers judge's finding that the letter agreement is a standstill agreement involves extricable questions of law consisting of misapplication of contractual interpretation principles, reviewed on a correctness standard: ***Geophysical Service Incorporated v Plains Midstream Canada ULC***, 2023 ABCA 277 at para 9; ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 53. Conversely, the respondent submits that the appropriate standard is that of palpable and overriding error, as extricable questions of law rarely arise in contractual interpretation: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 at para 104 (concurrence); ***Perera*** at paras 9-11. It also points to ***Perera*** at para 31, where this Court applied a reasonableness standard in reviewing a decision as to whether an email exchange constituted a standstill agreement.

[21] With respect to whether the trades and coverage actions are inextricably linked and steps in the coverage action significantly advanced the trades action, the appellants submit that the appropriate standard of review is correctness as these issues involve errors of law as to the legal test applicable: ***Housen v Nikolaisen***, 2002 SCC 33 at paras 27, 31, 33, 36; ***Ledcor Construction*** at paras 100-101 (concurrence). Once again, the respondent takes the position that these questions are reviewed on a palpable and overriding error standard, relying on this Court's determination that whether an action was significantly advanced under r 4.33 is entitled to deference: ***Swaleh v Lloyd***, 2024 ABCA 9 at para 10. See also, to the same effect, ***XS Technologies Inc v Veritas DGC Land Ltd***, 2016 ABCA 165 at para 6.

[22] We agree with the respondent that the questions to be resolved in this appeal are questions of mixed fact and law, and as such, a deferential standard of review should be applied.

Is the letter agreement a standstill agreement?

[23] The entirety of the April 20, 2017 letter agreement is as follows:

> Center Street Limited Partnership (**Center Street**), Nuera Platinum Construction Ltd. (**Nuera**), and Over & Above Reno and Contracting Ltd. (**Over & Above**) have reached an agreement whereby Nuera and Over & Above will support Center Street in opposing Lloyd's Underwriter's Application that will be heard in Master's Special Chambers on Thursday, April 20, 2017, on the following terms and conditions:
>
> 1. Center Street agrees that if Action Number 1601-07825 (the **Coverage Action**) proceeds to trial before Action Number 1601-02191 (the **Trades Action**) (which is its current intention, assuming that Lloyd's Underwriters Application is dismissed), Center Street will not in the Trades Action:

> (a) Seek to use a transcript of the evidence led or findings of fact made at the trial of the Coverage Action concerning the hot works issues, which for greater certainty include any facts regarding how close the workers were working to combustible materials and the duration or sufficiency of the fire watch performed by the roofers; or
>
> (b) Raise an issue estoppel against Over & Above.
>
> 2. Center Street agrees that it will sign and file a consent dismissal order of the Trades Action as against Over & Above and Nuera if Center Street obtains a final, non-appealable, judicial determination requiring Lloyds Underwriters to provide coverage or indemnify Center Street, in whole or in part, under the policy.
>
> 3. Nuera agrees that it will also be bound by 1(a) and (b) above.

[24] This is not enough to constitute a valid standstill agreement. Most importantly, there is nothing in the text of the letter agreement clearly indicating it was the parties' intention to hold the coverage action in abeyance to avoid dismissal for delay: ***Flock*** at para 17. If parties wish to rely on an agreement that litigation be put on hold under r 4.33(5), the agreement must state this with clarity and precision, and not be left to inference: ***Perera*** at para 26.

[25] We recognize that ***Perera*** and ***Flock*** were decided under the language of the former r 4.33(1)(a); however, the 2016 amendments parallel the reasoning in these older cases. Rule 4.33(5) provides that if "a respondent and an applicant agree in writing to a suspension period", that period does not count towards the period of three or more years after which the action must be dismissed. The rule sets out a process for entering into agreements for time suspensions, or seeking court orders suspending time failing consensus, including notice requirements for all parties to the action: rr 4.33(5)-(9). Notably, a respondent may serve an applicant "a written proposal setting out a suspension period and requesting that the suspension period not be included in computing the period of time under subrule (2)": r 4.33(6). If time is suspended by agreement or court order, a respondent must notify all other parties to the action "what the suspension period is, when it was agreed to and by whom": r 4.33(8).

[26] The language of rr 4.33(5)-(8) indicates that a document relied upon in a delay application must through its written terms clearly and explicitly indicate an agreement to suspend time periods for the purpose of computing delay under r 4.33. No matter the precise requirements for an agreement to suspend time periods under the current r 4.33(5), the letter agreement in this case falls short. This Court continues to encourage litigants to be explicit that an agreement suspends time periods under r 4.33: ***Bugg*** at para 18; ***Perera*** at para 32; ***Flock*** at para 22. Parties who wish to rely on such agreements in long delay applications are well advised to follow the process the rule sets out. This enhances certainty, ensures fairness through proper notice, and encourages

litigants to pursue their claims with alacrity and make efficient and discriminating use of scarce judicial resources: r 1.2.

[27] We now turn to the question of whether any advance in the coverage action significantly advanced the trades action.

Are the advances in the coverage action significant advances in the trades actions?

[28] The coverage and trades actions are independent, but in our view are based on the same or similar facts, and involve many of the same parties. In ***Calgary (City of) v Chisan,*** 2000 ABCA 313, independent but related actions proceeded in parallel. One action was an appeal of the conviction for breach of the bylaw while the other was an application for a finding of contempt of an enforcement order flowing from that breach. The contempt order was held in abeyance pending the conclusion of the bylaw appeal. This Court dismissed the application for dismissal of the contempt action for long delay, finding that the reference to a "thing" in r 244.1, as it then was, refers to an action which moves the lawsuit closer to trial in a meaningful way, and not just a procedural step.

[29] This Court in ***Chisan*** stated: "In our view, the thing may be an event in the actual action under consideration, or in a closely related action, when the proceedings are inextricably linked." In the years following release of ***Chisan***, the language of "inextricably linked" was plucked from this quotation, and used as a legal test for determining whether an advance in one action constitutes a significant advance in another: ***Angevine*** at para 41; ***TRG Developments Corp v Allan Beach Resort (2013) Ltd***, 2018 ABQB 304 at paras 10, 14; ***Whalen v Callihoo, 2050787 Alberta Ltd, Kreutzer, Kreutzer and Bates***, 2024 ABKB 402 at paras 23-24; ***Dejanovic v Axa Pacific Insurance Company***, 2015 ABQB 200 at paras 1, 8; ***Direct Horizontal Drilling Inc v North American Pipeline Inc***, 2018 ABQB 1006 at paras 16, 27-28; ***Moman*** at paras 12-13; ***Danek v Levine***, 2016 ABQB 422 at para 8.

[30] In the ***Round Hill*** case decided after we heard the matter before us, this Court emphasized that when dealing with an application to strike for long delay, the Court must take a functional approach focused on the substance and effect of a purported "advance in an action" rather than on its form, "not driven by identifying 'steps', 'things' or 'links'": at para 10. It explained that the brief reference in the oral decision in ***Chisan*** to an inextricable link between the proceedings was only a factual description of the two actions at issue in that case based on the wording of the rule as it then existed, rather than a statement of a legal test, and "[t]he proper present test is a functional examination of whether there has been a 'significant advance' in the action which is the subject of the application for dismissal, not a formalistic search for 'an inextricable link'": at para 14.

[31] Thus, the crucial question is not whether there is an "inextricable link" but simply "whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality": ***Ursa Ventures*** at para 19. A functional examination of whether

there has been a significant advance in the action which is the subject of the application for dismissal allows the court to balance "the objective of the fair and just resolution of claims with the timely resolution of those claims": ***Round Hill*** at para 10, citing ***Jacobs v McElhanney Land Surveys Ltd***, 2019 ABCA 220 at paras 64-65.

[32] The appellants do not dispute the chambers judge's finding that there is an "inextricable link" between the trades action and the coverage action in this case. Rather, they submit that she would have reached a different conclusion under the proper functional analysis set out in ***Round Hill***. They explain that unlike cases involving claims and counterclaims, the parties, issues, proceedings, and court documents in the two actions here are distinct and findings of fact in the coverage action could not be legally determinative of any issue in the trades action.

[33] They also emphasize that the chambers judge ought to have gone further and determined whether steps in the coverage action significantly advanced the trades action. The appellants argue that no such significant advance has occurred here, as the questioning of Lloyd's and Center Street's corporate representatives on October 4 and 6, 2018 are the only applicable steps taken in the coverage action in the past three years. They say the questioning did not significantly advance the trades action because first, the appellants are not parties to the coverage action and the implied undertaking rule has not been waived in the coverage action; and second, the letter agreement expressly states that the evidence and findings of fact from the coverage action cannot be used in the trades action in relation to the hot works issues.

[34] The respondents, for their part, emphasize that because the coverage action is potentially determinative of the trades action, it is most efficient to first resolve the coverage action. They point out that, at the time of the consolidation hearing, counsel for the appellants repeatedly argued for reasons related to minimizing use of legal resources and judicial economy that the coverage action should proceed first, and to its conclusion, prior to proceeding with the trades action. At one point, counsel for the appellants said that if Center Street attempted to proceed with the construction litigation and place the trades action in abeyance, he would bring an application to have the coverage action heard as a preliminary matter of law. The respondent says that its only communications with the appellants after the consolidation application were discussions about whether questioning had been completed in the coverage action. It suggests that the appellants' position that Center Street should take no steps in the trades action until the coverage action is resolved and the appellants' interest in the status of questioning in the coverage action indicate the importance for the trades action of procedural steps in the coverage action.

[35] The respondent adds that, as resolving the coverage action is a barrier to proceeding with and resolving the trades action, significant advances in the coverage action are necessarily significant advances in the trades action because they bring the trades action closer to resolution. On this basis, Center Street says it is not relevant that the letter agreement restricts the usefulness of the discovery evidence in the trades action. It argues that "significant advance" as it is used in r 4.33 simply refers to any action that moves the primary litigation forward and that the action in

question need not be significant to the advancement of the secondary action. Having regard to ***Round Hill***, it submits that the related actions should be reviewed together as a whole to determine whether advances in one action are functional advances of the other action toward overall resolution, rather than search for advances distinctly attributable to each.

[36] The respondent distinguishes between applications for long delay involving claims and counterclaims, as in ***Round Hill***, and applications involving a potentially dispositive action and a dependent action, as in ***Chisan***. In the first, decisions in one action may have no legal impact on the other, but parties nevertheless may reasonably expect them to proceed together in parallel for efficiency such that they advance together for the purposes of r 4.33. In the second, as the dispositive action can have a legal impact on a material issue in the dependent action, it would be inappropriate for the actions to proceed in parallel. To avoid advancing what may be an unnecessary dependent action and the associated waste of resources, parties reasonably expect advances in the potentially dispositive action to be treated as functional advances toward the overall resolution of both actions.

[37] The respondent emphasizes that the parties' expectations as to how the claims would proceed in each context are a material consideration, in reliance on ***Round Hill*** at paras 19, 21. It takes the position that the chambers judge's decision is consistent with the functional ***Round Hill*** approach, especially having regard to the parties' expectations in this case that the coverage action should be determined first and the trades action would proceed only if the coverage action is unsuccessful.

[38] We agree with the respondent's approach. The appellants' argument places form over function. Here, while resolution of the coverage action is not a "condition precedent" to the trades action, the fact that resolution of the coverage action in favour of Center Street would put an end to the trades action is a sufficient basis for dismissing the r 4.33 application. In the unique circumstances of this case, particularly the expectations and understanding of the parties reflected in the letter agreement as to how the two actions would proceed and the appellants' representations to the court below that they would seek an order to have the coverage action heard first, the advancement of the coverage action constitutes a significant advance in the trades action, as it would move the trades action forward, either towards a trial on the merits or abandonment. In this case, the ultimate usefulness of the discovery evidence in relation to the trades action is irrelevant to the question of whether the discovery evidence moved the coverage action closer to its conclusion. It did. Therefore, r 4.33(2) does not apply.

[39] However, this should not be taken as suggesting that parties can rely on advancements in secondary related litigation as a workaround for mandatory dismissal under r 4.33(2). As in ***Round Hill***, this appeal involves a specific sub-class of cases where an advance in one action may be said to significantly advance another: at para 11. Unlike ***Round Hill***, which involved a claim and counterclaim that proceeded in tandem or at least in no particular order, we are dealing with a situation where the parties agreed to proceed sequentially as it was most efficient or otherwise

appropriate to resolve one case before proceeding with the next. This is entirely consistent with the foundational rules of court, particularly r 1.2(3), that require parties to manage their litigation, and makes eminently good sense.

[40] We see no basis to interfere with the chambers judge's apparent conclusion that the advance in the coverage action significantly advanced the trades action.

Conclusion

[41] The appeal is dismissed.

Appeal heard on February 10, 2025
Further written submissions filed on July 18 and 31, 2025

Memorandum filed at Calgary, Alberta
this 26th day of August , 2025

Pentelechuk J.A.

Authorized to sign for: Kirker, J.A.

Friesen, J.A

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