In the Court of Appeal of Alberta

Citation: Round Hill Consulting Ltd v Parkview Consulting, 2025 ABCA 195

Date: 20250603
Docket: 2301-0223AC
Registry: Calgary

Between:

Round Hill Consulting Ltd

Appellant

- and -

Parkview Consulting Ltd and Glen Ortt

Respondents

- and -

Evan Welbourn and Trio Ventures Inc

Not Parties to the Appeal

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Bernette Ho

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice R.A. Neufeld
Dated the 16th day of August, 2023
Filed on the 29th day of September, 2023
(Docket: 1401 11758)

Memorandum of Judgment

The Court:

[1] Trio Ventures issued a statement of claim against the appellant for appropriation of corporate opportunities. The appellant counterclaimed for an accounting of the profits of a previous development. A chambers judge struck out the counterclaim for delay under R. 4.33, but left the claim intact. The appellant appeals this decision.

Facts

[2] The parties developed a seniors' care facility in Lethbridge through Trio Ventures. Round Hill Consulting is a 50% owner of Trio Ventures. Evan Welbourn, the owner of Round Hill Consulting, was one of the directors of Trio Ventures. The other 50% owner of Trio Ventures is Parkview Consulting, owned by Glenn Ortt, who is presently the only remaining director of Trio Ventures.

[3] Trio Ventures sued Welbourn and Round Hill, alleging that they had developed a number of seniors' care facilities in other Alberta locations to the exclusion of Trio Ventures. The allegation is that this appropriated corporate opportunities of Trio Ventures in breach of fiduciary director's duties owed by Welbourn.

[4] Round Hill counterclaimed against Trio Ventures, Parkview Consulting and Ortt, claiming an accounting of the profits of the Lethbridge project. Round Hill pleaded that the Lethbridge project was now completed, there was no reason why any profits of that project should not be distributed, and the failure to distribute those profits amounted to corporate oppression.

[5] The claim and counterclaim proceeded slowly, but in parallel. The parties filed affidavits of records covering the claim and counterclaim. There was some questioning.

[6] A dispute arose in the claim over the production of records, and allegations of privilege. While that issue was being resolved, no discrete action was taken to advance the counterclaim. The appellant was largely successful in asserting its claim of privilege over the disputed records, but the resolution of that issue took some time. The respondents brought an application for dismissal of the counterclaim for long delay under R. 4.33 arguing that nothing had been done for over three years to significantly advance the counterclaim. They argued that the counterclaim was a separate action, and advances in the claim were not advances in the counterclaim. The appellant replied that resolution of the record production issue advanced both the claim and the counterclaim.

[7] The chambers judge stated that the issue was whether the claim and the counterclaim were "inextricably linked", such that steps taken in one would advance the other. He concluded that steps taken in this claim did not materially advance the counterclaim. There was no evidence that

materials discovered during document production were relevant and material to the counterclaim. There was no claim of setoff that might have linked the claim and the counterclaim. The attendance of Ortt during questioning did not advance the counterclaim. As a result, the counterclaim had to be dismissed under R. 4.33.

[8] The counterclaim was only dismissed, however, as against Parkview Consulting and Ortt. It could continue against Trio Ventures, which had not brought an application for dismissal for delay.

Striking an Action for Long Delay

[9] The respondents brought their application under the so-called "drop dead rule", R. 4.33:

> 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.

The rule is mandatory, requiring dismissal of the action if there has been no significant advance in the previous three years.

[10] The modern approach to the drop dead rule uses a functional approach. As stated in ***Ursa Ventures Ltd v Edmonton (City)***, 2016 ABCA 135 at paras. 18-19, 40 Alta LR (6th) 224:

> 18 The new *Rules* use a functional approach. Their purpose and intent, as emphasized in the foundational rule 1.2, is to provide fair and just resolution of claims in a timely and cost effective manner. The foundational rules parallel a cultural shift in litigation that deemphasises trial as the dominant mechanism of resolving civil disputes in favor of procedures such as summary dismissal and alternative dispute resolution: . . .
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> 19 Under the delay *Rules* the functional approach inquires whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality. The genuineness and the timing of the advance in the action are also relevant. This analysis is undertaken in the context of the

> particular lawsuit. The focus is on substance and effect, not form: *St Jean Estate v Edmonton (City)*, 2014 ABQB 47 at para. 19, 585 AR 81.

The functional approach to a "significant advance" is not driven by identifying "steps", "things" or "links": ***Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc***, 2016 ABCA 123 at para. 14, 37 Alta LR (6th) 258. The analysis requires a balancing of the objectives of the fair and just resolution of claims with the timely resolution of those claims: ***Jacobs v McElhanney Land Surveys Ltd***, 2019 ABCA 220 at paras. 64-65, 90 Alta LR (6th) 245.

[11] This appeal involves a sub-class of cases, in which an advance in one action is said to "significantly advance" another action. In this case the two actions are a claim and a counterclaim. Rule 4.33 states that there must be a "significant advance in an action" within the three years prior to the application. Rule 3.58 provides that: "A counterclaim is an independent action". However, a counterclaim is not given a discrete action number by the Court of King's Bench, and while a counterclaim is an "independent action" it usually has a close relationship to the original claim.

[12] The old delay rules specifically dealt with counterclaims:

> 244.2 Notwithstanding Rule 244 or 244.1, where in an action
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> (a) there are cross actions, or
>
> (b) there is a counterclaim or a plea of set off,
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> any order made under Rule 244 or 244.1 may be made subject to those terms or conditions that the Court considers necessary to prevent any substantial injustice.

This rule was applied in ***Trout Lake Store Inc v Canadian Imperial Bank of Commerce***, 2003 ABCA 259, 31 Alta LR (4th) 243 to dismiss the claim and the counterclaim. Although the Alberta Law Reform Institute recommended that this rule be carried forward, that did not occur: see Consultation Memorandum No. 12.14, *Miscellaneous Issues*, para. 149. The issue must therefore be dealt with by application of the general rules.

[13] It is not uncommon for related actions to be proceeding in parallel. An example is ***Calgary (City of) v Chisan***, 2000 ABCA 313, 271 AR 384. In ***Chisan*** an application for a finding of contempt of an enforcement order was proceeding parallel to an appeal of the underlying conviction for breach of the bylaw. The contempt application was in abeyance while the appeal was pursued. The application to dismiss the contempt action for delay was dismissed, because:

> 3 Rule 244.1 refers to "things", not procedural steps. The appropriate inquiry is whether, looking back, a thing done in fact moved the lawsuit closer to trial in a meaningful way: *Morasch v. Alberta* (2000), 75 Alta. L.R. (3d) 257 at 261 (C.A.). Rule 244.1 refers to a "thing done in an action that materially advances the action."

> 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.

Some subsequent cases[1] have read the reference to the actions being "inextricably linked" as being the legal test for when advances in one action significantly advance another.

[14] Two observations can be made about the decision in ***Chisan***:

(a) Firstly, this was a brief oral decision given from the bench. It is unlikely that the Court would define a legal test in this format.

(b) Secondly, this decision was decided under an earlier version of the drop dead rule, when the focus was on "things", specifically "things done in an action". The modern test, based on different wording, applies a functional approach which is not driven by "steps", "things" or "links".

On a proper interpretation, the reference to proceedings being inextricably linked was merely a factual description of the two actions in ***Chisan***, driven by the specific wording of the rule at the time, not a statement of a legal test. The 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".

[15] There are relatively few decisions concerning delay when there was both a claim and a counterclaim: see ***Direct Horizontal Drilling Inc v North American Pipeline Inc***, 2017 ABQB 653 (a claim on a construction contract and counterclaims on different construction contracts which were said to create a set off), ***Dobransky v Roteliuk***, 2019 ABQB 32, 45 CPC (8th) 164 (conflicting rights to jointly owned property) and ***Brar v Pawa***, 2010 ABQB 779 at paras. 31-33, 506 AR 325 (claim and counterclaim over purchase and sale of movie theatres). The decision under appeal appears to be the only case where a counterclaim has been dismissed, but the main action continues.

[16] ***Field, Field & Field Architecture-Engineering Ltd v Temp Construction (2000) Ltd,*** 2015 ABQB 471 involved an application to dismiss a counterclaim. A claim was brought for a debt owing under a contract. The counterclaim alleged negligence in the performance of the contract and breach of contract. Because of the allegation of negligence separate counsel for the plaintiff's insurer became involved. The claim and counterclaim related to the same parties and the same contract, and set-off was claimed. Common affidavits of records were prepared. Applying

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[1] A few examples include ***Angevine v Blue Range Resource Corp***, 2007 ABQB 443, 78 Alta LR (4th) 341; ***330626 Alberta Ltd v Ho & Laviolette Engineering Ltd***, 2018 ABQB 398, 79 CLR (4th) 242; ***Neitz v Jordan***, 2015 ABQB 732; ***Danek v Levine***, 2016 ABQB 422, 43 Alta LR (6th) 118; and ***Center Street Limited Partnership v Nuera Platinum Construction Ltd***, 2024 ABKB 489 at para. 32.

the law as it was understood, the chambers judge concluded that the two actions were inextricably linked and declined to strike the counterclaim.

[17] In ***AIG Insurance Co of Canada v Kostic***, 2023 ABKB 702 the insurer sued for a declaration that it had no further obligations to its insured. The defendant insured counterclaimed for damages for breach of the insurer's obligations under the policy. The case management judge held at para. 32 that the claim could not be struck while allowing the counterclaim to proceed, because the "two actions are joined, and a step in one is something that moves the whole action towards trial".

[18] ***Brar v Pawa*** (decided when R. 244.2 was in place) observed at paras. 29-31 that the plaintiff by counterclaim was not in control of the litigation, and it would be inequitable to look in isolation to things done in the counterclaim. The entire action had to be considered, and if the action as a whole was being moved towards trial that was a significant advance in the claim and the counterclaim.

[19] As noted in these decisions, claims and counterclaims often proceed on a parallel course: see for example ***Brar v Pawa*** and ***Kostic***. The pleadings are linked and the parties usually overlap significantly. Frequently the claim and the counterclaim arise out of the same or related transactions. Sometimes the counterclaim is in the nature of a defence or set off to the claim. There is frequently a single affidavit of records, and questioning is done collectively. In most cases it is anticipated that there will be a single trial, and both the claim and the counterclaim are generally settled together. The expectations and assumptions of the parties about how the claim and the counterclaim will proceed may be relevant.

[20] Rule 4.33, like its predecessor R. 244.1, requires consideration of whether there has been a significant advance in the action as a whole, rather than an advance in relation to the parties that have brought the application to dismiss for long delay: see ***Apex Land Corp v Heikkila***, 2011 ABCA 87 at para. 32, 42 Alta LR (5th) 204; ***1499925 Alberta Ltd. v NB Developments Ltd.***, 2023 ABKB 114 at paras. 55-57, 61 Alta LR (7th) 459; ***Hawreschuk v Condominium Plan No 782 2678***, 2024 ABKB 350 at paras 29-32; ***Abou Shaaban v Baljak***, 2024 ABKB 28 at para 61. It is significant that Trio Ventures has not brought an application to dismiss the counterclaim, meaning that it proceeds against it. This is also reflective of the close connection between the claim and counterclaim.

[21] The claim and the counterclaim underlying this appeal proceeded in tandem. The claim alleged appropriation of corporate opportunities. The counterclaim alleged that the profits of the previous Lethbridge project had not been distributed, even though there was no obvious reason why that had not happened. The pleaded facts invite an inference that the Lethbridge profits were being retained as a set off against the claim for damages, or for tactical reasons; Trio Ventures' defence to counterclaim specifically pleads set off. The appellant's counterclaim adopts its statement of defence in the main action, and Trio Ventures' statement of defence to counterclaim adopts the statement of claim in the main action. There is a significant, although not complete,

overlap between the individual and corporate parties. Multiple applications were filed without distinguishing whether they were filed in the claim or the counterclaim. The claim and the counterclaim were under common case management. There was never an application to sever the claim from the counterclaim. There was never an application for the independent summary dismissal of the counterclaim. Simply put, the reasonable expectation was that the two actions would advance together even when delay in the counterclaim arose from delays in the main action caused by a dispute over record production.

[22] This counterclaim is not the type of claim that was intended to be dismissed by the drop dead rule in circumstances such as those revealed by this record. The advances by the parties significantly advanced both the claim and the counterclaim.

Conclusion

[23] In conclusion, the appeal is allowed. The application to dismiss the counterclaim for long delay is dismissed.

Appeal heard on January 16, 2025
Written submissions filed April 15 and 30, 2025

Memorandum filed at Calgary, Alberta
this 3rd day of June, 2025

Slatter J.A.

Strekaf J.A.

Ho J.A.

Appearances:

J.J. Bourchier
C. Webster
for the Appellant

K.R. Anderson, KC
A. Kosa (no appearance)
for the Respondents