Court of King's Bench of Alberta

Citation: Protection of the Holy Virgin Mary Orthodox Convent at Bluffton v Oustinow Estate, 2023 ABKB 462

Date: 20230808
Docket: 1103 02907
Registry: Edmonton

Between:

Protection of the Holy Virgin Mary Orthodox Convent at Bluffton

Applicant

- and -

Estate of Vitaly Oustinow, Deceased, by His Litigation Representative Marily Singleton

Respondent

Reasons for Decision
of the
Honourable Justice June M. Ross

I. Introduction

[1] This litigation is about who is entitled to certain convent lands (the "Lands") in Bluffton, Alberta.

[2] The Plaintiff is a Convent. The Plaintiff alleges that the owner of the Lands, the now deceased Metropolitan Oustinow, promised the current Abbess of the Plaintiff, Abbess Martens, that he would leave the Lands to the Plaintiff, in return for the Plaintiff restoring monastic life in

Bluffton. On the strength of that promise, the Plaintiff maintained and made numerous improvements to the Lands.

[3] Metropolitan Oustinow died in 2006. In his will, he left the Lands to a convent in the United States.

[4] The Plaintiff started this action on February 11, 2011. The claim alleges losses for repairs, construction, maintenance and landscaping made in reliance on the promise from the Metropolitan. The Plaintiff seeks a constructive trust on the lands, or, alternatively, damages.

[5] The Defendant filed a Statement of Defence on March 30, 2012.

[6] Since 2012 the parties have exchanged Affidavits of Records and Supplemental Affidavits of Records, attended a mediation, and made settlement offers.

[7] On December 9, 2020, the Plaintiff filed an application to amend the Statement of Claim. On February 9, 2021, the Plaintiff filed a summary judgment application.

[8] On April 14, 2021, the Parties agreed to a Consent Order granting the Plaintiff leave to file an Amended Statement of Claim, granting the Defendant leave to file an Amended Statement of Defence in response, and setting out a litigation schedule in relation to the summary judgment application.

[9] The Defendant filed it's Amended Statement of Defence on May 7, 2021. On May 17, 2021, the Plaintiff filed an application to strike the Amended Statement of Defence arguing that several paragraphs do not respond to the Plaintiff's Amended Statement of Claim.

[10] On June 11, 2021, the Defendant filed a cross-application to strike the action for delay. In the alternative, the Defendant sought leave to file an Amended Statement of Defence.

[11] The Plaintiff now concedes to all amendments in the Amended Statement of Defence, except for one paragraph that pleads that the action is statute barred. The Plaintiff argues that this amendment will cause serious prejudice not compensable in costs because the limitation period for suing its former legal counsel has passed.

[12] The issues I must determine are:

1. Should the action be dismissed because of delay?
2. If the action is not dismissed, should I grant leave to the Defendant to include a limitations defence in the Amended Statement of Defence?

II. Procedural History

[13] The Statement of Defence was filed approximately one year after the Statement of Claim. Initial Affidavits of Records were promptly filed by the Plaintiff in March 2012 and the Defendant in June 2012.

[14] In October 2013, the Plaintiff indicated an intention to amend the Statement of Claim and file a supplementary Affidavit of Documents. The Plaintiff requested questioning dates from the Defendant. The Defendant responded that scheduling questioning was premature until pleadings and documents were addressed. In 2014 and 2015 Plaintiff's counsel made attempts to schedule questioning but was not able to due to a lack of response from Defendant's counsel.

[15] On January 26, 2015, the Plaintiff served a Supplemental Affidavit of Documents. On July 24, 2015, the Plaintiff filed an application to compel questioning. The application was resolved by a Consent Order granted on July 29, 2015, scheduling questioning in November 2015.

[16] The November 2015 questioning was adjourned at the request of the Defendant, so that a new litigation representative for the Defendant could be appointed.

[17] In August 2017, the Plaintiff sought an update on the status of the Defendant's efforts to appoint a new litigation representative and consent to a procedural order setting timelines for the litigation. In February 2018 the Defendant's counsel advised that a new representative had been selected. In March 2018 the Plaintiff brought an application to address the issue, and on April 18, 2018, a Consent Order was granted appointing a new litigation representative and setting procedural timelines. The timelines directed that questioning be completed by August 31, 2018.

[18] The Defendant concedes that it was responsible for delay in the progress of the action from July 29, 2015, to when the Consent Order was granted setting the matter for questioning and April 18, 2018 when the new litigation representative was appointed, a period of 2 years 9 months.

[19] On June 25, 2018, the Defendant served a Supplemental Affidavit of Records.

[20] The Defendant made a settlement offer on August 29, 2018. On August 31, 2018, the parties agreed to adjourn questioning for two months for the Plaintiff to consider the offer. On October 31, 2018, the parties agreed to further extend timelines for questioning as the Plaintiff was still considering the offer.

[21] The Plaintiff made a counteroffer on June 19, 2019. The Defendant made a further counteroffer on April 24, 2020.

[22] During the August 2018 to November 2020 period, the Defendant's counsel was away on medical and maternity leave for part of the time, and the Plaintiff retained new counsel.

[23] On November 17, 2020, the Plaintiff filed a second Supplemental Affidavit of Records.

[24] In December 2020 the Plaintiff applied to amend the Statement of Claim. In February 2021 the Plaintiff applied for summary judgment. In April 2021 the Consent Order granting the Plaintiff leave to file an Amended Statement of Claim and the Defendant to file an Amended Statement of Defence was entered. The Defendant's Amended Statement of Defence filed in May 2021 led to the Plaintiff's application to strike the amendments, an adjournment of the summary judgment application, and the Defendants cross-application to strike the action for delay in or, in the alternative, to file an Amended Statement of Defence.

[25] In the fall of 2021 until April 2022, the parties engaged in mediation.

[26] In May 2022, the parties entered into a Consent order scheduling filing deadlines for this Special Chambers application.

III. Should the Action be Dismissed for Delay?

Applicable Legal Principles

[27] The application is brought under r 4.31, which provides:

> 4.31 (1) If delay occurs in an action, on application the Court may
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> (a) dismiss all of any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
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> (b) make a procedural order or any other order provided for by these rules.
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> (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.

[28] The applicable legal principles were summarized by Campbell J in ***Cochrane (Town) v Austech Holdings Inc***, 2021 ABQB 666, aff'd 2022 ABCA 377. Part of her summary of the case law follows:

> 36 Rule 4.31 permits a court to dismiss all or part of a claim if it determines that delay in the action has resulted in significant prejudice to a party. Rule 4.31(2) provides that if the delay is "inordinate and inexcusable" it is presumed to have caused significant prejudice: ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2019 ABCA 276 at para 43. As an alternative to dismissing the action, the court may make a procedural or other order allowed by the *Rules*.
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> 37 Rule 4.31 is not a mandatory provision; the court retains discretion not to dismiss an action even if there is delay and significant prejudice.
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> 38 The applicant has the onus of showing that the delay is inordinate and inexcusable or that the delay has or will result in significant prejudice: ***Kuziw v Kucheran Estate***, 2000 ABCA 226 at para 31. If the applicant shows that the delay is inordinate and inexcusable, the burden then shifts to the responding party to rebut the presumption of significant prejudice.
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> 39 The key to success on this type of delay application is establishing that significant prejudice exists, whether actual or presumed, that is a direct result of the delay; this is the "ultimate consideration": ***Transamerica*** at para 21.
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> 40 Applications to deal with delay are considered in the context of the Foundational Rules at Part 1 of the *Rules*: ***Alston v Haywood Securities Inc***, 2020 ABQB 107 at para 37.
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> 41 The Foundational Rules impose obligations on all parties in conducting their litigation to advance the action. The key objectives of the Foundational Rules include: encouraging timely and cost-effective resolution of claims that is both fair and just (r 1.2(1)); open, honest and timely communication between parties (r 1.2(d)); identification of the real issues in dispute (r 1.2(2)(a)); and for all parties to manage the litigation, including responding "in a substantive way and within a reasonable time to any proposal for the conduct of an action" (rr 4.1 and 4.2(b)).
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> 42 Thus, the objective of rule 4.31 is to promote timely, cost-effective, fair and just resolution of claims by providing for a remedy when delay in prosecuting a claim has resulted in presumed or actual significant prejudice to a party.

[29] In ***Humphreys v Trebilcock***, 2017 ABCA 116, leave to appeal to SCC refused, 37626 (14 December 2017), the Court of Appeal set out six questions arising under a r 4.31 application:

> 151 First, has the nonmoving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the timeframe under review?
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> 152 Second, is the shortfall or differential of such a magnitude to qualify as inordinate?
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> 153 Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
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> 154 Fourth, if the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the moving party so as to justify overriding the nonmoving party's interest in having its action adjudged by the court? Has the moving party demonstrated significant prejudice?
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> 155 Fifth, if the moving party relies on the presumption of significant prejudice created by r. 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?
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> 156 Sixth, if the moving party has met the criteria for granting relief under r. 4.31(1), is there a compelling reason not to dismiss the nonmoving party's action? This question must be posed because of the verb "may" in r. 4.31(1).

[30] In ***Transamerica*** the Court of Appeal noted that, while the ***Humphreys*** approach may be helpful in some cases, it is not the only way to analyze delay (para 16). Some parts of the ***Humphreys*** test, notably the first step, may be difficult to apply due to "the wide variety in the detail of particular claims, and in the procedural journeys that particular litigation may follow" (para 19). "[T]here is no scientific method of determining what 'point on the litigation spectrum' that a litigant acting reasonably would have attained within the time frame under review" (para 20). "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... 'significant prejudice' remains the ultimate consideration." (para 21).

[31] In ***Austech Holdings*** Justice Campbell followed the framework in ***Humphreys***. The Court of Appeal in upholding her decision noted that she was permitted to do so. The parties on this application submit that the ***Humphreys*** framework is useful. I will follow the framework, keeping in mind the cautions in ***Transamerica***.

Has There Been Delay?

[32] The first question is whether the action has reached the point on the litigation spectrum that a litigant acting reasonably would have attained. If it has not, there has been delay.

[33] I must assess the action's progress between February 18, 2011, when the Statement of Claim was filed up to June 11, 2021, when the Defendant's dismissal application was filed: ***Arbeau v Schulz***, 2019 ABCA 204 at para 27.

[34] The Defendant argues that this action is procedurally simple. There is one Plaintiff, one Defendant, and one parcel of land. The Defendant submits that, while the action proceeded at a reasonable rate up until the filing of the Defendant's Affidavit of Records in June 2012, there has

been no appreciable progress since then. From the 9-year period since then until the delay application, the Defendant concedes that the 2-year, 9 month delay that it was responsible for, and a 75 day period excluded by the operation of Ministerial Order 27/2020, should not be counted against the Plaintiff. That leaves approximately 6 years, during which a litigant, acting reasonably, should have progressed the case beyond document production.

[35] I note that the Defendant's calculation of delay runs from the filing of its Affidavit of Records in June 2012, rather than the filing of the Statement of Claim in February 2011. That is likely because most of that time was taken up by a 1 year, 1 month period for the filing of the Statement of Defence, a delay attributable to the Defendant.

[36] The Plaintiff submits that in addition to the delay caused by the Defendant, there was a 2-year period of settlement negotiations, during which the Plaintiff obtained appraisals in order to pursue the discussions, and that this period should not be considered in calculating delay. This would leave a period of approximately 4 years, which, given extensive document production (6680 pages), and the effect of the COVID pandemic, should not give rise to a finding of delay.

[37] I do not agree with the approach taken by the Defendant, of deducting periods of delay conceded to have been caused by the Defendant and suggesting that all other periods of time should be "counted against the Plaintiff". This is like the appellant's argument in ***Transamerica***, which focused on "excuses" for delay and argued that inaction by a defendant did not "excuse" delay by the plaintiff. The Court of Appeal rejected that approach, noting that while "it is correct to say that the plaintiff has the primary obligation in moving the litigation forward...[i]t does not follow...that a defendant has no obligation with respect to the pace of litigation" (para 27). For example:

> 27 ...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:
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> > ...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.
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> ...
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> 28 Many Alberta authorities confirm that defence delay is relevant [citations omitted]. 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 cause by its own delay.
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> 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:
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> > 4.1 The parties are responsible for managing their dispute and for planning its resolution in a timely and cost effective way.
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> 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".
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> 30 The *Rules of Court* also impose a number of specific duties on a defendant in support of these general obligations. Some examples are:
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> > ...
> >
> > (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...
>
> ...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.

[38] I will return to the issues of defence delay and acquiescence in relation to other steps in the ***Humphreys*** analysis. While defence delay is also relevant in relation to a finding of delay, I conclude, nonetheless, that there has been delay in this case. This action has been ongoing for about 10 years. The parties are still at the stage where the pleadings are being resolved. A reasonably acting litigant should have progressed further on the litigation spectrum by the time the Defendant filed the application to dismiss.

Is the Delay Inordinate?

[39] The next question is whether this delay is inordinate.

[40] Inordinate delay 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: ***Transamerica*** at para 18, citing ***Kuziw*** at para 31. "As a rule, until a credible excuse is made out, the natural inference would be that (inordinate delay) is inexcusable": ***Transamerica*** at para 18, citing ***Arbeau*** at para 36.

[41] On the other hand, inordinate delay was defined in ***Humphreys*** at para 168 as any delay that is "not trivial or minor". In my view, the ***Humphreys*** definition is overly strict, having regard to the implication that inordinate delay is inexcusable. ***Transamerica*** also suggests that ***Humphreys*** sets a standard that may be too strict, and that detracts from the "ultimate consideration" which is "significant prejudice":

> 21 ... 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 actions if significant prejudice has resulted. “Significant prejudice” remains the ultimate consideration.

[42] Circumstances that are relevant in determining whether the delay is inordinate include: “the complexity of the matter; the number of parties; the possible advanced age or deteriorating health of critical witnesses; the proceedings that have been taken along the way, whether there have been long periods of inactivity; and whether the delay has substantially been caused by a defendant who has obstructed the progress”: ***M L Bruce Holdings Inc v Ceco Developments Ltd***, 2015 ABQB 604 at para 41. Also relevant is whether the case is a "documents" case or a "memories" case: ***Transamerica*** at para 46.

[43] The Defendant argues that this case is comparable to ***Austech Holdings***. In ***Austech Holdings*** Justice Campbell found that a delay of 7.5 years was inordinate where there was virtually no activity on most of the essential steps necessary to move the litigation forward and the case was far from being ready for trial.

[44] The Plaintiff argues that during the 10-year period between the filing of the Statement of Claim and the filing of the Defendant’s dismissal application, 35% of the time is defence delay because the Defendant lacked a litigation representative. A further 20% is due to the parties’ focus on settlement. I should not consider reasonable periods of delay for settlement negotiations, rather than expending resources on litigation, against the Plaintiff. The only other period of relative inactivity, was the period after the Defendant’s Affidavit of Records in June 2012 until the July 2015 Order directing questioning dates. While the Plaintiff acknowledges that further activity could have occurred during this time, the Plaintiff notes that the Plaintiff had requested questioning dates from the Defendant and the Defendant had refused or failed to provide them until the Plaintiff brought an application to set questioning in 2015.

[45] I disagree with the Defendant that a comparative exercise with ***Austech Holdings*** is appropriate. As the Court of Appeal notes in ***Transamerica***, at para 48, “delay cases are decided largely on their facts, and it is seldom possible to compare the outcome of one case with another.”

[46] In my view, there are several significant differences between this case and ***Austech Holdings.*** One significant difference is that in ***Austech Holdings*** Justice Campbell found no evidence of defence delay. In this case, the Defendants concede defence delay of 2 years and 9 months between July 29, 2015 and April 18, 2018 when the Defendant did not have a replacement litigation representative. In addition to the Defendant’s concession, I find a further one year and one month Defence delay in filing the Statement of Defence when the Statement of Defence could not be filed until authority for the Defendant Estate was resolved. This amounts to almost 4 years of Defence delay.

[47] In addition, while the Plaintiff could have taken further steps to set questioning dates between June 2012 until the July 2015, the Defendant’s initial refusal to provide dates and subsequent failure to respond to the Plaintiff contributed to that period of delay.

[48] Another significant difference is that the Plaintiffs in ***Austech Holdings*** took virtually no litigation steps because they were solely interested in pursuing ADR. The Plaintiffs argued that the Defendants agreed to hold the litigation in abeyance to pursue ADR. Justice Campbell found that the Defendants did not agree to pause the litigation; it was the Plaintiffs alone who decided

to pursue only ADR. Further, despite a court direction to pursue the litigation and despite a mediator's conclusion that mediation was premature, there was still no progress in the action. Instead, the Plaintiff waited for an expert report to pursue ADR. At the time of the dismissal application, the parties were far from ready to proceed to trial.

[49] In this case the parties agreed to adjourn questioning to pursue settlement discussions and later jointly engaged a mediator. Settlement offers and counteroffers came from the Defendant in August 2018, the Plaintiff in June 2019, and the Defendant in April 2020. The Defendant was not merely silent in the face of the Plaintiff's actions, but agreed to pause questioning to pursue settlement discussions, and then participated in an exchange of offers at a pace that was desultory on the part of both parties.

[50] Further, the Plaintiff did not hold the litigation in abeyance. Since the filing of the Statement of Claim, the Plaintiff has taken litigation steps to move the litigation forward. Affidavits of Records and Supplemental Affidavits of Records have been filed. A litigation plan was entered into on April 18, 2018. The issues for trial are now clarified with the amended pleadings. If the Plaintiff elects to proceed with the summary judgment application, the Order of Applications Judge Birkett April 14, 2021 indicates the procedural steps should take no more than one year. The Litigation Plan approved by Justice Burns in April 2018 indicates that questioning and undertakings should take less than a year. From this a reasonable inference is that whether the parties proceed to a summary judgment application or to trial, the parties are not far from ready to proceed to resolve this action.

[51] As to the complexity of the matter and other considerations, this case is not as simple as the Defendant suggests. It is based not only on an alleged oral agreement, but on actions taken by the Plaintiff over many years in reliance on that agreement. While there is only one Plaintiff and one Defendant, the fact that the Defendant is an estate has made conduct of the action slower and more difficult. This is not solely a memories case. Document production is substantial. Witnesses are no doubt aging, but this will likely pose more of a challenge for the Plaintiff than the Defendant.

[52] Having considered the nature of the issues in the case, the Defendant's contribution to the delay, the progress to date and the time required to move this action to resolution, I am not persuaded on a balance of probabilities that the delay is inordinate.

Is the Delay Excusable?

[53] If I am wrong in concluding that there is no inordinate delay, I will consider whether the delay is excusable.

[54] "Inordinate delay is a temporal measure of what is reasonable or unreasonable but inordinate delay may still be excusable": ***John Barlot Architect Ltd v Atrium Square Investments Ltd***, 2017 ABQB 749 at para 32. The responding party has the burden of establishing that delay is excusable: ***Altex International Heat Exchanger Ltd v Foster Wheeler Limited***, 2018 ABQB 620 at para 64; ***Kuziw*** at para 27.

[55] The Plaintiff argues that the periods of delay during the action can be grouped into the following categories and explained as follows:

a. February 2011 – March 2012 – Plaintiff awaited the Statement of Defence that was delayed due to a lack of a litigation representative for the Defendant.

b. June 2012 – July 2015 – while the Plaintiff requested questioning dates, the Defendant refused to provide dates.

c. July 2015 – April 2018 – Defendant concedes is defence delay due to a lack of litigation representative for the Defendant.

d. October 2018 – November 2020 – the parties engaged in settlement discussions.

e. November 2020 – June 2021 – the litigation has been active with numerous applications.

[56] The Defendant disagrees: (1) that the Defendant's refusal to provide questioning dates excuses the delay; (2) that settlement discussions justify any delay; and (3) that the recent applications move the action forward.

[57] I have already found that the period February 2011 – March 2012 and July 2015 – April 2018 are Defence delay, these periods are excusable.

June 2012 – July 2015

[58] The Defendant does not dispute that in early October 2013 Plaintiff's counsel requested questioning dates from the Defendant's counsel and that Defendant's counsel refused to provide dates. However, the Defendant argues this does not excuse the delay because it is clear from the response of Defendant's counsel on October 8, 2013, that Defendant's counsel took a reasonable position that questioning was premature until the Plaintiff determined whether it would be amending the Statement of Claim and filing a supplementary Affidavit of Records and at that time neither party had exchanged documents. The Plaintiff did not serve the Supplementary Affidavit of Records until 2015. In these circumstances, the Defendants argue the delay is not excusable.

[59] It was reasonable for the Defendant to request that before scheduling questioning, the Plaintiff should decide if the Plaintiff needed to amend the pleadings or file a further Affidavit of Records. However, the Plaintiff did not agree with this request. The Plaintiff continued to try to schedule questioning in the summer of 2014 and in 2015 and the Defendant did not respond. On April 16, 2015, Plaintiff's counsel wrote to Defendant's counsel enclosing the previously filed Supplemental Affidavit of Records and requesting dates for questioning. Defendant's counsel again did not respond. On July 24, 2015, the Plaintiff was forced to bring an application to compel questioning which was resolved by a Consent Order scheduling questioning for November 2015.

[60] I am satisfied from the above that the Defendant did not respond in a substantive way and within a reasonable time to the Plaintiff's requests for questioning dates.

[61] I conclude that both parties are responsible for delay between 2013 and 2015. The Plaintiff should have produced its Supplementary Affidavit of Records sooner and should have brought an application to compel questioning sooner. The Defendant should have responded to the Plaintiff's requests for questioning dates by providing dates. The Plaintiff is entitled to advance the joint conduct of the parties as a partial excuse for this portion of the delay: ***Transamerica*** at para 37.

October 2018 – November 2020 – Parties Engage in Settlement Discussions

[62] The Defendant does not dispute that from August 2018 to mid–2020 the parties engaged in settlement negotiations. However, the Defendant argues that engaging in settlement discussions does not justify any delay during negotiations. The Defendant relies on the Court of Appeal's endorsement of Justice Campbell's statement in ***Austech Holdings*** that counsel must pursue both ADR and litigation tracks in tandem: ***Austech Holdings*** CA at para 36.

[63] I do not interpret Justice Campbell's statement or the Court of Appeal's endorsement of her statement as meaning that it is never appropriate for counsel to adjourn or not take certain steps for a reasonable period if the parties are involved in good faith settlement discussions. Such an interpretation runs contrary to the *Rules of Court* that require parties to resolve matters as efficiently as possible. ***Kuziw*** at paras 43-46 held that "consideration of settlement negotiations constituting a credible excuse for delay is fact-sensitive, and that the detailed history and specific facts of the settlement efforts and circumstances of the case must be considered."

[64] As discussed in the context of assessing whether delay was inordinate, this case is different from ***Austech Holdings***, where the Plaintiffs decided to pursue only ADR, and the Defendants did not agree to this. In this case the Plaintiff was pursuing litigation steps up until the end of August 2018. On April 18, 2018, there was a procedural Order requiring the parties to complete initial questioning by August 31, 2018. On August 29, 2018, the Defendant made a settlement offer to the Plaintiff. On August 31, 2018, Plaintiff's counsel requested an adjournment of the questioning to October 2018 to consider the proposal. The Defendant agreed. In October the Plaintiff was still considering the offer and the parties agreed to further extend the timelines for questioning. In my view it was appropriate for both parties to agree to adjourn the questioning for a reasonable period of time where the parties were considering settlement offers and it appeared that a settlement might be possible. This conduct is consistent with the foundational rules requiring resolution at the earliest opportunity and the least expense.

[65] Unfortunately, in this case, the questioning was adjourned for more than a reasonable period. This was due to the joint conduct of the parties. For different reasons both parties delayed in responding to offers of settlement. The Plaintiff did not respond to the Defendant's offer until June 20, 2019. Some of this time was taken up by the Plaintiff obtaining appraisals, which it subsequently relied on in support of its summary judgment application. From August 2019 to March 2020 Defendant's counsel was away on leave. In April 2020 the Defendant responded to the Plaintiff's settlement proposal with a counteroffer. The Plaintiff then changed counsel. New counsel filed a second Supplemental Affidavit of Records in November 2020 and an application to amend the Statement of Claim in early December 2020. At the end of December 2020 Plaintiff served a formal offer.

[66] In summary I conclude that it was appropriate to defer questioning for a few months to allow the parties to exchange settlement offers. This is excusable. Both parties are responsible for delay in responding to each other's offers from 2019 – 2020. The joint conduct of the parties is a partial excuse for this portion of the delay: ***Transamerica***, at para 37.

November 2020 – June 2021

[67] The Plaintiff argues that the action has been active and moving along since November 2020. The Plaintiff filed an application to amend the Statement of Claim in December 2020 and an application for summary judgment in February 2021.

[68] The Defendant argues that an unheard summary judgment application does not constitute a significant advance in the action. Until the application is heard, it does not serve to narrow the issues or clarify the parties' positions.

[69] I agree that the Plaintiff has been trying to move this matter along since the end of 2020. It has taken longer than usual for the summary judgment application to be heard. This was because both parties needed to amend their pleadings. The amended pleadings led to the Plaintiff's application to strike the Defendant's amendments and the Defendant's application for dismissal of the action. Both parties should have amended their pleadings long ago. While the Plaintiff now opposes only the Defendant's amendment that raises a limitation period, I find that most of the amendments are not in response to the Plaintiff's amendments. I conclude that the delay in hearing the summary judgment application is due to the joint conduct of the parties in failing to identify and clarify the issues for trial in a timely manner.

[70] The parties have joint responsibility for delay in scheduling questioning from October 2013 to July 2015, for delay occasioned by settlement negotiations from August 2018 to April 2020, and for delay in hearing the summary judgment application.

[71] In summary, of the approximately 6 years of delay after deducting delay caused by the Defendant, there is joint responsibility for approximately 4 years, primarily in relation to delays in scheduling questioning and a prolonged exchange of settlement offers. This joint responsibility provides a partial excuse for those periods. The remaining 2 years encompassed various periods of time for document production and procedural orders, as well as periods of delay associated with changes in counsel or the effects of the pandemic. Overall, I conclude that the delay is excusable, and does not lead to an inference of prejudice.

Is there Significant Prejudice?

[72] Having found that the delay is not inordinate and is excusable, the presumption of prejudice does not apply. The onus is on the Defendant to prove significant prejudice arising from the delay. Prejudice is the most important factor in the analysis: ***Transamerica***, at para 42.

[73] The Defendant alleges prejudice in four different ways.

Reputational Prejudice

[74] The Defendant relies on reputational prejudice arising from the Plaintiff's assertions that implicate the conduct of the Metropolitan.

[75] It is difficult for a Defendant to provide specific examples of reputational prejudice. However, I agree with the Plaintiff that if the reputational prejudice was significant, the Defendant would have been more proactive in moving the action to trial: ***Transamerica***, para 45. Given the significant periods of defence delay, an inference of significant prejudice is not appropriate.

Inability of the Defendant to Distribute the Estate

[76] The Defendant argues prejudice from the fact that the Defendant has not been able to distribute the assets of the Estate in Alberta. In addition, as the beneficiary of the Land in the will is now deceased, the beneficiary's estate cannot be finalized.

[77] I appreciate that until the action concludes there are two estates that cannot be completely finalized. However, the Defendant provides no evidence of any significant prejudice arising from

the inability to finalize the two estates. There is no evidence that other assets cannot be distributed, there is no evidence that the Lands are not properly cared for or losing value, there is no evidence that any beneficiary of either estate requires the assets immediately for any reason or any other evidence of significant prejudice. Accordingly, I do not find that the delay in finalizing the two estates gives rise to significant prejudice.

Loss of Evidence

[78] The Defendant concedes there are no missing documents because of any delay.

[79] The Defendant relies on the loss of a witness, Abbess Eugenia, as raising significant prejudice. However, Abbess Eugenia died on February 25, 2012, before the Statement of Defence was filed. As the loss of this witness occurred during defence delay in filing a Statement of Defence, the loss of this witness does not support significant prejudice arising from the delay.

[80] The Defendant's Litigation Representative provided evidence about the difficulty for the Defendant to locate individuals and witnesses with personal knowledge of the facts and background to the events because of the amount of time that has lapsed.

[81] The difficulty I have with this argument is that there is no evidence from the Defendant on what attempts or efforts they made to locate and find witnesses and when. There is no evidence of any witnesses that might have relevant and material evidence and no evidence of any attempts to determine what witnesses there might be. In order to demonstrate significant prejudice, the Defendant must provide evidence that there are witnesses with potential relevant and material evidence that are no longer available or remember the events or that because of delay it is not possible to locate witnesses. The Defendants have done neither. Without evidence of whether and when the Defendant searched for witnesses, it is not possible to conclude that any difficulty they have locating witnesses is due to delay.

[82] Lastly the Defendant argues that this is not a documents case. It will depend heavily on individuals' testimony.

[83] The Plaintiff argues that witness memories are not an issue because the only two witnesses with direct knowledge of the promise made are Abbess Martens and the Metropolitan. The Abbess is alive and has sworn an affidavit in support of summary judgment. The only other potential key witness is Abbess Eugenia of the California convent, who died in February 2012. The remaining evidentiary issues will be addressed through documentation.

[84] I agree with the Plaintiff that the only witnesses the Defendant points to are the Plaintiff's witnesses. To the extent that the delay impacts the memory of the Plaintiff's witnesses, this memory prejudice will be borne by the Plaintiff and does not justify dismissal.

Adverse Possession Action

[85] During the hearing of the application, I was advised that the Plaintiff commenced a separate adverse possession action in July 2021. The Defendant alleges that the commencement of this action is another form of prejudice, that has arisen from the Plaintiff's continued occupation of the Lands during the currency of the action.

[86] There is no evidence before me regarding the Plaintiff's continued occupation of the Lands or the terms upon which this has occurred. In any event, I do not accept that this alleged prejudice, if it exists, arises from delay in pursuing the within action. It arises from the occupation of the Lands.

[87] In summary, the evidence does not satisfy me that the Defendant has suffered any significant prejudice arising from the delay. While the estates cannot be finalized until completion of the litigation, there is no evidence that any party is impacted in any significant way from the delay in finalizing the estates. There is no evidence that because of the delay the Defendant has lost documents or witnesses. If there were significant reputational prejudice, a reasonable inference is that the Defendant would have taken the appropriate steps to move this action along.

Is There a Compelling Reason Not to Dismiss the Action

[88] The final step in the ***Humphreys*** analysis is to ask whether there is a compelling reason not to dismiss the action. I have concluded that the Defendant has not demonstrated delay causing prejudice, and there is therefore no basis to dismiss the action, without considering this step of the analysis. However, for completeness I will do so.

[89] The Plaintiff raises two reasons not to dismiss the action. The first is Defence delay. The second is acquiescence or waiver.

[90] I dealt with Defence delay in determining that the delay is not inordinate and is excusable. I will not consider it again under this step.

[91] The Plaintiff argues that Alberta decisions recognize that a defendant's participation in the action may constitute acquiescence to delay and bar dismissal of an action ***422252 Alberta Ltd v Messenger***, 2019 ABQB 251 at para 16. Where a "party has participated in the action or otherwise acquiesced in the delay when dismissal might otherwise have been available under the rule, the court may find a 'compelling reason' not to dismiss the action": ***Messenger*** at para 24. Examples of "dismissal-barring participation" include "consenting to the delaying party taking the next step" and "filing a pleading": ***Messenger*** at para 24; see also ***Maurice v Matchett***, 2016 ABQB 704, at paras 53-54.

[92] The Plaintiff notes that throughout the action, the Defendant has consented to the Plaintiff's steps, and has consented to various timelines for the litigation. This includes the July 29, 2015 Consent Order scheduling questioning, the April 18, 2018 Consent Order setting timelines, and the April 14, 2021 Consent Order granting the Plaintiff leave to file an Amended Statement of Claim, granting the Defendant leave to file an Amended Statement of Defence, and setting out a litigation schedule in relation to the summary judgment application. None of these consent orders were made without prejudice to a delay application. The Defendant also filed its Amended Statement of Defence just prior to the delay application.

[93] I agree with the Plaintiff. If the Defendant was significantly prejudiced by the delay, the latest time to raise it was in February 2021 when the Plaintiff had an outstanding application to amend the Statement of Claim and the Plaintiff filed an application for summary judgment. Instead, the Defendant consented to adjourn the application to amend and consented to the April 14, 2021 Order allowing the Plaintiff to amend the Statement of Claim and the Defendant to amend the Statement of Defence. The Defendant then filed an Amended Statement of Defence. Two months later the Defendant applied to dismiss the action for delay. There is no evidence of any prejudice or change of circumstances in those two months.

IV. Limitation Amendment to the Statement of Defence

[94] The April 14, 2021 Consent Order granted the Plaintiff leave to amend the Statement of Claim and the Defendant leave to file an Amended Statement of Defence in response.

[95] On May 7, 2021, the Defendant served an Amended Statement of Defence. On May 17, 2021, the Plaintiff filed an application to strike the amendments on the grounds that the amendments did not respond to the Plaintiff's amendments. The Defendant then filed an application for leave to file an amended Statement of Defence

[96] At the hearing the Plaintiff conceded to all amendments to the Statement of Defence except paragraph 18.2 that pleads a *Limitations Act* defence.

[97] I am satisfied that paragraph 18.2 of the Amended Statement of Defence is not responsive to the Plaintiff's amendments. Accordingly, it is not permitted by the April 14, 2021 Consent Order. Accordingly, the issue for me to determine is whether to grant the Defendant's application for leave to amend the Statement of Defence to include a *Limitations Act* defence.

[98] The Defendant relies on the classic rule that the Court has broad discretion to allow amendments no matter how late or careless: ***Balm v 3512061 Canada Ltd.***, 2003 ABCA 98 at para 43.

[99] The classic rule is subject to four exceptions: ***Balm***, at paras 26 – 27.

[100] The Plaintiff concedes that the only exception that applies in this case is that the amendment will cause serious prejudice to the Plaintiff, not compensable in costs. The Plaintiff bears the onus of establishing prejudice not compensable in costs: ***John Barlot Architect Ltd v 973189 Alberta Ltd***, 2008 ABQB 458, at para 22; ***Precision Forest Industries Ltd v East Prairie Investments Corp***, 2018 ABQB 489, at para 42.

[101] The Plaintiff argues that because the Defendant delayed in raising the limitations defence, the Plaintiff is now precluded from advancing a claim against the Plaintiff's former legal counsel in relation to advice given. Because the amendment comes more than 10 years after the commencement of the litigation, the ultimate 10-year limitation period under the *Limitations Act*, RSA 2000, c L-12, s 3(1)(b) has passed. This type of prejudice has been recognized as a proper basis upon which to deny a late request to amend a statement of defence: ***Precision Forest*** at paras 43-45, 49.

[102] I accept that this type of prejudice, if proven, would constitute non-compensable prejudice as found in ***Precision Forest***. But the Plaintiff has the burden of demonstrating this. In ***Precision Forest*** the Court was able to determine, based on the pleadings and the record, that, if the defendants' allegations were true, it was "highly likely that Precision would have a claim against [certain] individuals for fraud, negligent misrepresentation or breach of the contractual duty of good faith". The lateness of the proposed amendment would preclude them from bringing that claim due to the expiry of the ultimate limitation period.

[103] In contrast, there is nothing in the pleadings or the record that demonstrates that the Plaintiff would have an arguable cause of action against their lawyer in relation to advice given. The Plaintiff has not submitted evidence about when it retained a lawyer, or what advice was given.

[104] In order to succeed in the limitation defence, the Defendant must prove that the action was commenced more that two years after the discoverability date; in other words, the date when

the Plaintiff knew or ought to have known that the injury had occurred, that it was attributable to conduct of Metropolitan Oustinow, and that it warranted bringing a proceeding: *Limitations Act,* d 3(1)(a). Metropolitan Oustinow died in 2006, but there is nothing on the record that indicates when the Plaintiff became aware or should have become aware of the contents of his will. There is also nothing in the record that indicates when the Plaintiff consulted a lawyer. If the Plaintiff did not consult a lawyer until after the expiry of the limitation period, there would be no possible action against any lawyer. If the Plaintiff did consult a lawyer before that time, they might have had an action against the lawyer for failure to properly advise, and the barring of that action by the ultimate 10-year limitation period might constitute prejudice. However, the Plaintiff has failed to meet its onus to demonstrate this form of prejudice.

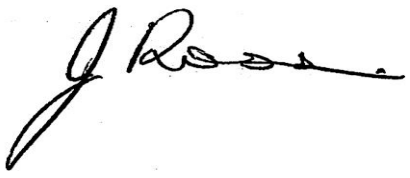
V. Conclusion

[105] The Defendant's application to dismiss the action for delay is denied. The Defendant's application to amend the Statement of Defence, including the addition of a limitations defence, is granted.

[106] At the hearing, the Plaintiff presented an application for an order directing that the within action and a separate adverse possession action (Action No. 1103-02907) be conducted and tried at the same time. The Defendant advised that, if it's application to dismiss the within action was unsuccessful, it would take no issue and present no evidence in relation to this application. The Plaintiff's application for trial together is granted.

[107] The parties may speak to me regarding costs if they are unable to agree.

Heard on the 8th day of February, 2023.
Dated at the City of Edmonton, Alberta this 8th day of August, 2023.



June M. Ross
J.C.K.B.A.

Appearances:

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Spencer Bierkos, McCarthy Tetrault LLP
for the Respondent