COURT OF APPEAL FOR ONTARIO

CITATION: Arapakota v. Imex Systems Inc., 2025 ONCA 367
DATE: 20250514
DOCKET: COA-24-CV-0405

Trotter, Thorburn and Wilson JJ.A.

BETWEEN

Damodar Arapakota and the Arapakota 2006 Family Trust

Applicants (Appellants)

and

Imex Systems Inc., Krishnasamy Parthiban, Andrew Lindzon, Issa Nakhleh and Robert Saltsman

Respondents (Respondents)

Damodar Arapakota, acting in person for the appellants

Luke Sabourin and Scott Kugler, for the respondents Krishnasamy Parthiban, Andrew Lindzon and Issa Nakhleh

Alexander Evangelista, for the respondent Robert Saltsman

Heard: May 7, 2025

On appeal from the order of Justice Peter J. Cavanagh of the Superior Court of Justice, dated March 6, 2024.

REASONS FOR DECISION

A. OVERVIEW

[1] The appellants, Damodar Arapakota and the Arapakota 2006 Family Trust, appeal from the decision of the motion judge to dismiss their application for delay relying on the Superior Court's inherent jurisdiction. The appellants also seek to admit fresh evidence.

[2] A deferential standard of review applies when this court considers a motion judge's dismissal of an action for delay.

[3] For the reasons set out below, we would not interfere with the motion judge's decision to dismiss the appellants' application for delay. Even if we agreed to admit the fresh evidence, it does not satisfy the appellants' onus to rebut the presumption of prejudice resulting from the inordinate and inexcusable delay.

B. BACKGROUND

[4] Mr. Arapakota is the founder of Imex Systems Inc. ("Imex") and was the Chief Executive Officer until he resigned on or about February 17, 2018.

[5] The respondents, Krishnasamy Parthiban, Andrew Lindzon, Issa Nakhleh and Robert Saltsman (the "director respondents"), were directors and/or shareholders of Imex.

[6] The appellants brought an application on July 13, 2018, claiming that the director respondents committed oppressive acts that caused Mr. Arapakota and

his family substantial personal and financial losses (the “Application”). In particular, the Notice of Application alleges that the director respondents:

a. Improperly pressured Mr. Arapakota to resign from his positions as Chief Executive Officer and director of Imex;

b. Caused Imex to default on its receivables and indebtedness owed to creditors for whom Mr. Arapakota provided a personal guarantee and encouraged those creditors to pursue him;

c. Repudiated a *bona fide* third party offer from a strategic investor to finance Imex and provide management expertise lacking at Imex to continue and expand its business;

d. Developed an inadequate and excessively diluted financing strategy for the express purpose of diluting the appellants’ interest and materially affecting control of Imex;

e. Raised capital from the public, based on the false representation that the current board and management had the intent and ability to pursue Imex’s publicly disclosed business;

f. Organized private placements to avoid the requirement to obtain shareholder approval or a share issuance designed to materially affect control of Imex; and

g. Took these actions for the purpose of entrenching the current board and management.

[7] Thereafter, Mr. Arapakota became involved in other civil and criminal proceedings not directly related to the Application.

[8] No steps were taken to further the Application until April 27, 2023, when the applicants served motion materials for a motion to transfer it to the Superior Court of Justice in Hamilton. On June 2, 2023, Mr. Arapakota requested an appointment before a judge of the Commercial List to schedule a hearing for the Application and set a timetable.

[9] On August 21, 2023, the director respondents brought a motion to dismiss the Application for delay.[1]

C. THE ISSUES

[10] There are two issues on this appeal: (i) whether the motion judge erred in granting the director respondents' motion to dismiss the Application for delay; and (ii) whether the appellants' fresh evidence should be admitted.

[1] Although the respondents Parthiban, Lindzon and Nakhleh and the respondent Saltsman filed separate motions to dismiss for delay, the motion judge heard and decided them together. For simplicity, we refer to these motions in the singular.

D. THE LEGAL TEST ON A MOTION TO DISMISS FOR DELAY

[11] There is an inherent right of the court to dismiss a proceeding for delay. In *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited*, 2007 ONCA 695, 87 O.R. (3d) 660, at para. 24, Sharpe J.A. for the court held that:

> A court has inherent jurisdiction to control its own process, which "includes the discretionary power to dismiss an action for delay." … "The power of a superior court to strike a matter for want of prosecution does not hinge on the niceties of the wording of the rules, but rather flows from the inherent power of the court to prevent an abuse of its own process." In at least two cases, this court has characterized lengthy, unexplained delays as "an abuse of the court's process". [Citations omitted.]

See also *Susin v. Baker and Baker*, 2004 CanLII 12392 (Ont. C.A.), at para. 7, leave to appeal refused, [2004] S.C.C.A. No. 164; and *Convay v. Marsulex Inc.*, 2002 CanLII 8446 (Ont. C.A.).

[12] This is true whether the proceeding is commenced as an action or an application. Otherwise, there would be no mechanism to dismiss an application for delay: see *Gilmour v. Estate of Charles Wayne West*, 2018 ONSC 2130, at paras. 46-48.

[13] An order dismissing a proceeding for delay will be justified where the delay is inordinate, inexcusable, and prejudicial to the respondents in that it gives rise to a substantial risk that a fair determination of the issues will not be possible: *Langenecker v. Sauvé*, 2011 ONCA 803, 286 O.A.C. 268, at paras. 4-7.

[14] "The inordinance of the delay is measured simply by reference to the length of time from the commencement of the proceeding to the motion to dismiss … Memories fade and fail, witnesses become unavailable, and documents and other potential exhibits are lost. The longer the delay, the stronger the inference of prejudice to the defence case flowing from that delay": *Langenecker*, at paras. 8-11. Accordingly, inordinate delay generates a presumption of prejudice: *Langenecker*, at para. 23.

[15] The motion judge's order to dismiss an Application for delay is a discretionary order that is entitled to deference. The order will not be interfered with unless the motion judge exercised his or her discretion unreasonably or acted on a wrong principle: *Ali v. Fruci*, 2014 ONCA 596, 122 O.R. (3d) 517, at para. 10.

E. THE MOTION JUDGE'S DECISION

[16] The motion judge noted the inherent right of the court to dismiss a proceeding for delay. He then considered the context of the proceedings and dismissed the Application for delay on the basis that there was (i) inordinate delay, as it had been almost five years since the Application was commenced; (ii) the delay was inexcusable, as "Mr. Arapakota made a decision not to take steps to move the application forward between October 15, 2018 … and June 2023 when he requested a date for a case conference to schedule a new hearing" and "chose to prioritize other legal proceedings over this application"; and (iii) given the lengthy

inexcusable delay, there was a presumption of prejudice that the appellants had not rebutted. The motion judge held that:

> Although Mr. Arapakota baldly asserts that the hard drive to which Mr. Parthiban refers in his affidavit contains all Imex emails and documents until 2019, he provides no evidence to show that this is true. Mr. Arapakota baldly asserts, without evidentiary support, that the Respondents intentionally destroyed relevant documents. Mr. Arapakota has not tendered evidence that shows that the issues in this application do not depend on the recollections of witnesses or that all relevant documents have been maintained and are available to the moving parties.

[17] The motion judge therefore concluded that there was a substantial risk that a fair hearing would no longer be possible if the matter proceeded, and he ordered that the Application be dismissed for delay. He did so while noting that, for some period, the appellants were unrepresented.

F. THE POSITIONS OF THE PARTIES

[18] The appellants challenge the order to dismiss for delay. They also bring a motion for fresh evidence to address the issue of prejudice and the need to ensure a fair hearing.

[19] The appellants submit the fresh evidence should be admitted as it satisfies the test for admissibility in *Palmer v. The Queen*, [1980] 1 S.C.R. 759: (i) it was not available at the time the motion was heard and could not, by the exercise of due diligence have been available; (ii) it bears on a decisive issue; (iii) it is credible as

it is reasonably capable of belief; and (iv) if believed, this evidence could affect the outcome of the proceedings.

[20] The appellants claim that, if admitted, the fresh evidence will establish that the evidence necessary to conduct a fair trial is available despite the delay.

[21] The director respondents argue the fresh evidence should not be admitted, as it could have been obtained before the hearing of the motion to dismiss. Moreover, they claim that the fresh evidence would not have affected the outcome of the case in any event, as there is still no evidence proffered by the appellants as to the witnesses available to testify should the Application proceed to a hearing, nor have the appellants provided confirmation that the evidence required to address all issues raised on the Application has been produced.

G. ANALYSIS AND CONCLUSION

[22] We are satisfied that the motion judge made no error in deciding that there was inordinate delay as:

a. The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provide for the administrative dismissal of actions that have not been set down for trial after five years, and these proceedings were brought by way of application, which "is expected to be a more expeditious avenue than an action" and procedures are more streamlined;

b. This matter was brought on the Commercial List, the very purpose of which is to "expedite the hearing and determination of matters involving issues of commercial law": *Deutsche Postbank AG v. Kosmayer*, 2019 ONSC 6997, at para. 21 (quoting from the Commercial List Practice Direction), aff'd 2020 ONCA 410;

c. The appellants themselves argued before the motion judge that the matter "will not take a long time to resolve" and is not unduly complicated, such that it should and could have been resolved early; and

d. The motion judge noted that the Application "was first scheduled to be heard on October 25, 2018, just a few months after it commenced. A new hearing date could have been readily obtained after the adjournment of this hearing date. This was not done. Instead, [almost five years] passed without any activity."

[23] We are also satisfied that the motion judge made no error in concluding that the delay is inexcusable as:

a. Mr. Arapakota maintains he periodically informed the respondents that he intended to proceed with the Application, but took no steps to advance the litigation;

b. Mr. Arapakota admitted that the delay in moving the Application forward was mainly caused by Mr. Arapakota focussing on other litigation;

c. Though Mr. Arapakota claims the appellants have been self represented since 2019, he filed no notice of intention to act in person until June 27, 2022; and

d. Contrary to Mr. Arapakota's submission, COVID-19 was not really a factor in the context of this nearly-five-year delay in moving the matter forward, as the Commercial List was shut down for only a very short time.

[24] Having drawn the conclusion that there was inordinate delay and that the delay was inexcusable, the motion judge properly noted that there was a presumption of prejudice that a fair hearing would no longer be possible if the matter proceeded: see *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1, at paras. 28, 32.

[25] The motion judge then considered the claims raised in the appellants' notice of application, and found that these "raise issues that will likely require evidence from the parties, as well as, possibly, non-parties, and will depend [on] the recollection of witnesses and the availability of documents." Since the appellants had not shown that these issues could be resolved on the basis of documentary evidence, or that the necessary documents were available, he found that the presumption of prejudice was not rebutted. This finding is entitled to significant appellate deference: *Beshay v. Labib*, 2024 ONCA 186, at para. 27.

[26] We are satisfied that the motion judge made no error in concluding that the appellants were unable to rebut the presumption of prejudice resulting from the inordinate and inexcusable delay on the evidence before him as:

a. Imex ceased operating in 2019 and therefore, as noted by the motion judge, "locating former employees will be difficult as will obtaining information from them about the events at issue in the application";

b. No witness list was provided;

c. The respondents indicated that while they had made efforts, they were unable to locate the Imex server (although they did locate some documents from Imex's former counsel and a hard drive that appeared to contain a backup of some Imex files);

d. There were no current directors of Imex such that it was not known what electronic documents had been preserved by Imex; and

e. The issues raised in the Application are serious allegations of misconduct including improper dealings involving a third-party investor.

[27] Finally, we note that the motion judge arrived at his conclusion recognizing the challenges faced by self-represented litigants as well as the importance of promoting access to justice and equal justice. It is clear from his reasons that he factored this into his analysis:

> Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent unfair disadvantage to self-represented persons. However, judges must exercise diligence in ensuring that the law is applied in an even-handed way to all, regardless of representation.
>
> When a litigant commences a legal proceeding, that litigant assumes responsibility for moving the litigation forward in a timely way. This is only fair to the opposing parties. This applies to a litigant who is represented by legal counsel as well as a litigant who is self-represented, who is expected to familiarize himself or herself with the relevant legal practices and procedures pertaining to the case. The consequence of inordinate and unjustified delay of a legal proceeding to a defendant or respondent does not depend on whether the proceeding is brought by a party who is represented by legal counsel.
>
> Mr. Arapakota's reason for the delay of this application is, fundamentally, that he chose to prioritize other legal proceedings over this application. The fact that other legal proceedings competed for Mr. Arapakota's attention and that he chose to focus on this other litigation, leaving this application to languish, is not a sensible and persuasive explanation to justify the lengthy and inordinate delay in bringing this application to a hearing. This reason does not provide a reasonable and cogent explanation for the delay.

H. THE APPELLANTS' FRESH EVIDENCE MOTION

[28] The final question to be addressed is whether to admit the fresh evidence and if so, whether it serves to rebut the presumption of prejudice such that the appeal should be allowed.

[29] After filing this appeal, the appellants brought a motion to admit fresh evidence to prove that the respondents have access to all the documents and emails that would be necessary to dispose of the Application.

[30] In our view, the evidence the appellants sought to admit does not put into question the motion judge's conclusion that there has been an inordinate, inexcusable delay, which gives rise to a substantial risk that a fair hearing would not be possible if the Application were to proceed.

[31] The fresh evidence includes 1331 documents and emails provided in January 2025, by the respondent Issa Nakhleh as part of his settlement of a third-party claim against the director respondents. It also includes the Imex Minute Book that was in Imex's then-counsel's possession as corporate and securities counsel.

[32] We agree with the director respondents that this evidence could, by the exercise of due diligence, have been available for the motion to dismiss. These documents were not produced earlier because:

a. The appellants did not elect to cross-examine any of the respondents on their affidavits to determine what documents they did or could locate.

b. Before us, the appellants did not explain why they did not do so, except to assert that they knew the director respondents would not have provided the documents anyway;

c. The appellants did not explain why these documents could not have been adduced through the discovery process in the third-party claim before the hearing for the motion to dismiss (especially since most of the documents sought to be admitted on this fresh evidence motion were later obtained as part of a partial settlement of that third party claim); and

d. There is no evidence that the appellants could not have brought a motion to obtain the Imex Minute Book earlier.

[33] For these reasons, it is not clear that the appellants have satisfied the first requirement of the test for the admission of fresh evidence by establishing that these documents could not have been produced earlier by the exercise of due diligence.

[34] However, even if the appellants had shown they could not have obtained these documents in time for the hearing of the motion to dismiss, we are not persuaded that the documents could affect the outcome of the motion. This evidence does not rebut the presumption of prejudice as it is not clear what issues the new documents pertain to, or that they represent all the documents that pertain to each of the issues raised, as there has been no cross-referencing of the documents and the issues. Moreover, the appellants did not refute the respondents' contention that witness evidence would be necessary, nor did they provide a list of possible witnesses.

I. OTHER ISSUES

[35] In their factum on this appeal, the appellants also claim that the respondents' counsel was negligent, and that the cost order made by the motion judge was excessive. These issues were not raised by the appellants in oral argument, and in any event, on the basis of the written materials, we see no merit in these claims.

J. CONCLUSION

[36] For these reasons, the appeal is dismissed.

[37] On the consent of all parties, each of the two sets of respondent counsel are entitled to their partial indemnity costs of $20,000, all inclusive.

"Gary Trotter J.A."
"Thorburn J.A."
"D.A. Wilson J.A."