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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DENIS FERLAND and MICHELLE FERLAND,	)	Abram Silver
	)	Avery A. E. Sharpe
	)	for the plaintiffs
plaintiffs,	)	
	)	
-and-	)	
	)	
GEORGES BOHEMIER and CENTURY 21 CARRIE REALTY LTD. carrying on business as CENTURY 21 CARRIE.COM,	)	Kelsey L. Schade, Andrew C. Derwin, Ryan Hall
	)	for the defendants
	)	
defendants.	)	Judgment Delivered:
	)	December 17, 2025

ASSOCIATE JUDGE GOLDENBERG

INTRODUCTION

[1] The plaintiffs brought an action against the defendants seeking compensation for breaches of contractual duties, fiduciary duties and the duty of care, and for negligent misrepresentation. The action relates to property that was owned by the plaintiffs and sold pursuant to a listing agreement with the defendants (the Property). The defendants have brought a motion to dismiss the action for long delay, or in the alternative, inordinate and inexcusable delay. For the reasons that follow, the motion is dismissed.

PROCEDURAL HISTORY

[2] The history of the steps taken and dates of significance in this action can be summarized as follows:

February 19, 2020	Plaintiffs filed their Statement of Claim
June 30, 2020	Plaintiffs filed an Amended Statement of Claim
August 7, 2020	Defendants filed a Statement of Defence
September 21, 2020	Plaintiffs served the defendants with their Affidavit of Documents and Schedule "A" productions
April 15, 2021	Defendants served the plaintiffs with their Affidavit of Documents and Schedule "A" productions
May 4, 2021	Plaintiffs served the defendants with a Supplemental Affidavit of Documents
May 5, 2021	Defendant Georges Bohemier was examined for discovery
June 10, 2021	Plaintiff Denis Ferland was examined for discovery
September 2, 2021	Examination for discovery of Denis Ferland was resumed and completed
August 30, 2024	Plaintiffs filed a Pre-trial Conference Brief and requested available dates for a pre-trial conference from the Trial Coordinator
September 2, 2024	Labour Day
September 3, 2024	The Trial Coordinator provided counsel for the plaintiffs with a list of available pre-trial dates, and counsel sent an e-mail to counsel for the defendants enclosing a copy of the Pre-trial Conference Brief and requesting the defendants' availability for a pre-trial conference
September 5, 2024	Defendants filed the within Notice of Motion

LONG DELAY

[3] The defendants bring their motion pursuant to Rule 24.02(1) of the *Court of King's Bench Rules, M.R. 553/88* (the Rules) on the basis that three or more years have passed without a significant advance in the action. Rule 24.02(1) provides as follows:

> **Dismissal for long delay**
> **24.02(1)** If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action unless
> (a) all parties have expressly agreed to the delay;
> (b) the action has been stayed or adjourned pursuant to an order;
> (c) an order has been made extending the time for a significant advance in the action to occur;
> (d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or
> (e) a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing.

[4] Of significance in this case is that discoveries concluded on September 2, 2021, and the Pre-Trial Conference Brief (the Brief) was filed on August 30, 2024, but not provided to the defendants' counsel until September 3, 2024. September 2, 2024, was Labour Day. It is agreed that there were no significant advances in the action between the conclusion of the discoveries and the filing of the Brief, and that none of the exceptions in Rule 24.02(1) apply.

[5] In ***Schneider et al v. Moffat***, 2024 MBKB 106, the court found that the filing of a pre-trial brief constituted a significant advance in the circumstances. In support of this decision, Bond J. found as follows at paragraphs 11 and 12:

> 11 In this case, the plaintiffs argued that when they filed their pre-trial brief and requested to schedule a pre-trial conference in December 2023, this constituted a significant advance in the action. There is support in the caselaw for the plaintiffs' position.

> 12 In ***Rempel v. Gentek***, 2022 MBQB 128, it was held that the filing of a pre-trial brief constituted a significant advance in the action. In her decision, McCarthy J. stated that in her view the preparation and filing of a pre-trial brief would almost always be a significant step in the litigation process. As she points out, in Manitoba, a date for a trial or summary judgment motion can only be set at a pre-trial conference. As she states, generally at a pre-trial conference, direction is given regarding the completion of various steps required to have the matter ready for trial (***Rempel***, at para. 23).

[6] The defendants in this case acknowledge that if the Brief had been filed and served within three years of the last step in the action, that it would have constituted a significant advance in the action. However, their position is that the Brief was not served within the three-year timeline and, in fact, to date has not been properly served as it was only provided by e-mail to counsel on September 3, 2024, which does not amount to proper service under the Rules.

[7] The issue of filing but not serving a pre-trial conference brief was addressed in ***Blaze et al v. Rooke et al***, 2024 MBKB 119. In that case, Leven J. expressly considered the issue of whether filing, but not serving, a pre-trial conference brief, constituted a significant advance in an action. In that case, the plaintiffs had attempted to rely on the above-noted principles cited in the ***Schneider*** decision. However, Leven J. found that the failure to serve the brief distinguished it from the ***Rempel*** decision cited in ***Schneider***. He found that the filing of the pre-trial conference brief alone, and without service, did not constitute a significant advance in the action. He stated as follows at paragraphs 43 to 49:

> *Was the filing (but not serving) the pre-trial brief a "significant advance in the action"?*
> 43 The plaintiffs relied on ***Rempel.*** At paragraph 23, the court commented that, "the preparation and filing of a pre-trial brief would almost always be a significant step in the litigation process". In ***Rempel***, the brief was filed and served on the same day.

> 44 The court in ***Rempel*** made no comment about a hypothetical scenario in which a pre-trial brief might be filed within a three-year window but not served within the three-year window.
> 45 The court in ***Rempel*** certainly made no comment about a hypothetical scenario in which a brief might be filed within the window, but not served until three and half months later.
> 46 I am forced to conclude that the court in ***Rempel*** meant "filing and serving a pre-trial brief". Filing a brief without serving it does nothing to advance the litigation. If the defendants are unaware of the plaintiffs' brief, the plaintiffs' brief serves no useful purpose. The mere filing of the brief without service does not hasten the setting of a trial date. The mere filing of the brief without service does nothing to hasten potential settlement discussions.
> 47 There might be cases where a brief is officially filed but only an unofficial copy is served. There might be an argument that giving the other party an opportunity to read one's brief does advance the litigation. But that hypothetical scenario will have to wait for another day.
> 48 As a practical matter, the pre-trial brief is not even provided to the person who will become the pre-trial judge until a pre-trial conference date is set (which did not happen until November 27, 2023 or later).
> 49 The filing (but not serving) of the pre-trial brief was not a "significant advance in the action".

[8] The decision in ***Blaze*** was recently overturned by the Court of Appeal in ***Blaze v. Rooke***, 2025 MBCA 90. However, it was overturned not in relation to the motion judge's determination on the issue of whether there was a significant advance, but rather on the determination of whether there had been an express agreement to the delay.

[9] In ***Blaze***, the facts were that the pre-trial brief was filed within the three-year window, but not served until three and a half months later. That is not what happened in the present case. On the contrary, on the day the Brief was filed, counsel also requested dates for the pre-trial conference. Then, on the next business day, they received the dates from court and provided the Brief and dates to counsel that day, that is, on September 3, 2024. Thus, within one business day of filing the Brief, the

defendants had the Brief, and the parties were in a position to schedule the pre-trial conference.

[10] The plaintiffs say that the time for a significant advance to occur in this case was by Tuesday, September 3, 2024. They rely on the computation provisions set out in Rule 3.01 as well as on ***The Interpretation Act***, C.C.S.M. c. I80 (the Manitoba ***Interpretation Act***).

[11] Rule 3.01 provides as follows:

> **Computation**
> **3.01** In the computation of time under these rules or an order, except where a contrary intention appears,
> (a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words "at least" are used;
> (b) where a period of less than seven days is prescribed, holidays shall not be counted;
> **(c) where the time for doing an act under these rules expires on a holiday, the act may be done on the next day that is not a holiday; and**
> (d) service of a document, other than an originating process, after 5 p.m., or at any time on a holiday, shall be deemed to have happened on the next day that is not a holiday**.**
> (Emphasis added)

[12] Sections 22(4) and 24(1) of the Manitoba ***Interpretation Act***, provide as follows:

> **Within a time**
> **22(4)** When anything is to be done within a time after, from or before a specified day, the time does not include that day.
>
> **Time limits are extended for holidays**
> **24(1)** A time limit that would otherwise expire on a holiday is extended to include the next day that is not a holiday.

[13] The plaintiffs say that Rule 3.01 and section 24(1) of the Manitoba ***Interpretation Act*** both operated to extend the deadline to Tuesday, September 3, 2024, because September 2, 2024, was Labour Day, a holiday under that ***Act*** and the Rules. They also say that by virtue of section 22(4) of Manitoba ***Interpretation Act***, September 2, 2021, was not to be included in the time calculation; rather, the three years started on September 3, 2021.

DID RULE 3.01(C) EXTEND THE DEADLINE TO SEPTEMBER 3, 2024?

[14] Rule 3.01 expressly sets out provisions for computing time in certain circumstances, including when the time for doing an act expires on a holiday.

[15] The defendants say that Rule 3.01(c) does not apply because "the time for doing an act" did not expire. In support of their position, they point out that Rule 24.02 does not state that a plaintiff must significantly advance an action within three years of the last significant advance. Instead, the Rule states that "If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action." They say that the last day of the three years being a holiday does not change the fact that the three years did, in fact, pass.

[16] The defendants say that the plaintiffs had three years before Monday, September 2, 2024, to do anything to advance the action, or seek an agreement to the delay. The plaintiffs failed to do either and should not be entitled to rely on the fact that the three-year window expired on a holiday as justification for continuing an action that the plaintiff left stagnant for an unreasonable amount of time. They say that this would be contrary to the principles of delay.

[17] In support of their position, the defendants rely on the decision of ***Droog v. Hamilton***, 2024 ABKB 243, which dealt with the expiry of a three-year deadline for a significant advance to occur falling on Saturday, May 22, 2021. The plaintiff in that case served its affidavit of documents by e-mail on Tuesday, May 25, 2021, which was the next day that was neither a weekend nor a holiday. The defendant filed a motion to dismiss for long delay.

[18] The decision considers the application of section 22 of Alberta's ***Interpretation Act***, RSA 2000, c I-8, (the Alberta ***Interpretation Act***) which provides as follows:

> **Computation of time**
> **22(1)** If in an enactment the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.
> **(2)** If in an enactment the time limited for registration or filing of an instrument, or for the doing of anything, expires or falls on a day on which the office or place in which the instrument or thing is required to be registered, filed or done is not open during its regular hours of business, the instrument or thing may be registered, filed or done on the day next following on which the office or place is open.

[19] In ***Droog***, the court analyzed section 22(2) of the Alberta ***Interpretation Act***, not section 22(1). In that case, the deadline in question fell on a Saturday, and the court considered the applicability of section 22(2). Under the Alberta ***Interpretation Act***, the definition of holiday does not include a Saturday (see section 28(1)(x)). Therefore, section 22(1) did not apply to the expiry of the three years which occurred on a Saturday, as Saturday was not a holiday.

[20] Along the lines of the reasoning in ***Droog***, the defendants say there is no reason why the plaintiffs could not have served their Brief on Friday, August 30, 2024. I disagree with that being dispositive of the issue, as Friday, August 30, 2024, was not

the last date for a significant advance to occur. The question is whether, by operation of Rule 3.01, the time limit for a significant advance to occur was extended to Tuesday, September 3, 2025.

[21] ***Droog*** counters the defendants' argument that the deadline for a significant advance to occur is not an act under the Rules with a timeline that expires. The long delay rule in Alberta provides that an action must be dismissed "if 3 or more years have passed without a significant advance in an action." (See Alberta Rule 4.33(2)). The court considered whether the three-year deadline was extended by virtue of section 22(2) of the Alberta ***Interpretation Act***. While the court found that section 22(2) did not apply in the circumstances, there was no suggestion that the three-year deadline was not a time limit for doing something under the Rules.

[22] In ***Taylor v. Richardson Foods***, 2012 Carswell Ont. 7637, the Ontario Superior Court of Justice considered a claim in which the limitation period expired on a Sunday, which was a holiday. The plaintiff filed the statement of claim on the next business day. The court interpreted legislation which computed times for holidays by stating that, "time limits that would otherwise expire on a holiday are extended to include the next day that is not a holiday", and therefore held that the time limit for filing the claim was extended to include the next day that was not a holiday. The plaintiff was, therefore, allowed to proceed with the claim (see paragraphs 14 to 15).

[23] Similarly, in ***Hamel v. Leduc***, 29 S.C.R. 178, the Supreme Court of Canada held that when the time limit for presenting a petition expired on a holiday, the petition could be filed on the next non-holiday day. The Supreme Court interpreted language

functionally the same as section 24(1) of the Manitoba ***Interpretation Act*** and Rule 3.01(c). They considered section 7(27) of the ***Interpretation Act*** (revised Statutes of Canada), which provided as follows:

> If the time limited by any Act for any proceeding or the doing of anything under its provisions, expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the day next following which is not a holiday.

[24] The petition in question had to be filed within 40 days after the holding of a poll. In that case, the 40-day time limit fell on a Sunday, which was included in the definition of holiday under the Federal ***Interpretation Act***.

[25] The Supreme Court found that if the expiration of a time limit landed on a holiday, and the deadline was not extended to the following day, that such an interpretation would "render this clause of the "Interpretation Act" useless and inapplicable in every case in which an Act of Parliament required some Act to be done within a prescribed number of days, and we should thus reduce this useful rule of statutory interpretation to a nullity." (see paragraph 11)

[26] I disagree with the defendants' position that Rule 3.01(c) does not apply because Rule 24.02 does not say that a significant advance must occur. It is clear from this Rule and the considerable case law on it that it is a mandatory time limit. If there is no significant advance in a period of three or more years, the court must, on motion, dismiss the action.

[27] This deadline is more consequential than most, if not all, other deadlines under the Rules. For example, Rule 18.01 provides that a statement of defence shall be filed and served within 20 days of service of the statement of claim. Yet, Rule 19.01(5)

provides an exception that a defendant may file a statement of defence at any time before default is noted. And, even if default is noted, the court still has discretion to set aside default and allow the defence to be filed. There is no discretion under Rule 24.02. If a period of three or more years have passed without a significant advance, and if none of the exceptions apply, the action must be dismissed.

[28] In ***Buhr v. Buhr***, 2020 MBQB 107, upheld by the Court of Appeal in 2021 MBCA 63, Bock J. framed the issue for determination as follows:

> 14 Examinations for discovery commenced on September 27, 2016 and were adjourned on September 30, 2016. The parties agree that the discoveries represented a "significant advance" of the action. The three year period in Rule 24.02(1) began to toll on September 30, 2016. **At issue is whether the plaintiff took steps to advance the action toward trial in a meaningful way before the expiry of the three year limit on September 30, 2019.** (emphasis added)

[29] Rule 3.01(c) is worded broadly. It refers to "the time for doing an act under these rules". I find that a significant advance in an action is an "act under these rules", and that the time limit for an advance expires three years after the last significant advance. Where the time for doing an act under the Rules expires on a holiday, Rule 3.01(c) allows the act to be done on the next day that is not a holiday. I find that Rule 3.01(c) extended the time for a significant advance to occur in this case to September 3, 2025.

[30] The Rules have their own computation provision for when the time for doing something under the Rules falls on a holiday. Regardless, for the same reasons, I would also find that the three-year deadline to make a significant advance in an action is also a time limit within the Mantioba ***Interpretation Act***, such that section 24(1) of that ***Act*** also operated to extend the time limit to the day after Labour Day.

APPLICATION OF SECTION 22(4) OF THE MANITOBA *INTERPRETATION ACT*

[31] The plaintiffs also argued that the time limit for the significant advance to occur was September 3, 2024, rather than September 2, 2024, by virtue of section 22(4) of the Manitoba ***Interpretation Act***. They say that when a thing is to be done within a time after, from or before a specified day, the time does not include that day as part of the calculation of the deadline. Specifically, they say that, in this case, when counting forward from the last significant advance on September 2, 2021, the time does not include that day.

[32] The defendants disagree with that analysis, saying that the Manitoba decisions dealing with the long delay rule have calculated the three-year period for long delay as beginning on the day of the last significant advance, not the day after. They referred to several Manitoba decisions where this has been done, including the ***Buhr*** decision both by the motion's judge and the Court of Appeal.

[33] I agree with the defendants that there does not appear to be a Manitoba decision that calculates a three-year period under Rule 24.02(1) as beginning the day after the last significant advance. However, nor does it appear that any of these decisions contemplated whether section 22(4) of the Manitoba ***Interpretation Act*** operates to exclude the day of the last significant advance from the calculation, despite or in addition to, the computation provisions set out at Rule 3.01. Nor does it appear that one day made any material difference in those cases.

[34] Rule 3.01(a) has a specific provision for computing time when there is a reference to a number of days between events. In that case, the days are counted by

excluding the day on which the first event happens. There is no specific provision in the Rules for the computation of time involving multiple years.

[35] Regardless, based on my findings that Rule 3.01(c) operated in this case to extend the deadline by one day, it is not necessary for me to determine whether section 22(1) of the Manitoba ***Interpretation Act*** has the same effect for a different reason.

[36] Having determined that the time for a significant advance to have occurred in this case was September 3, 2024, I will now consider whether there was a significant advance in the action by that date.

WAS THERE A SIGNIFICANT ADVANCE IN THE ACTION?

[37] In the present case, the Brief was filed on Friday, August 30, 2024. On Tuesday, September 3, 2024, counsel for the plaintiff sent an e-mail to counsel for the defendants that provided as follows:

> Enclosed for service upon you please find a filed copy of the Plaintiffs' Pre-Trial Conference Brief.
> We have been advised that the following dates are available for a Pre-Trial Conference:
> - November 18, 20, 21, 25, 27; and
> - December 2, 5, 9-13, 16-18 all at 9:00 a.m.
>
> Please let us know if any of these dates work for you.

[38] While it is true that the defendants were not aware until September 3, 2024, that the Brief had been filed, by filing the Brief, the plaintiffs nevertheless satisfied a pre-requisite for scheduling the first pre-trial conference in the action (see ***Schneider*** at para. 16). And, as already noted, the preparation and filing of a pre-trial brief will almost always be a significant step in the litigation process (see ***Rempel*** at para. 23).

[39] Rule 16.05(1) sets out requirements for service and provides as follows:

> **Forms of service**
> **16.05(1)** Service of a document on the lawyer of record of a party may be made by,
> (a) mailing a copy to the lawyer's office;
> (b) leaving a copy with a lawyer or employee in the lawyer's office;
> (c) faxing a copy in accordance with subrules (2), (3) and (4) but, where service is made under this clause between 5 p.m. and midnight, it shall be deemed to have been made on the following day;
> (d) by sending a copy to the lawyer's office by courier; or
> **(e) attaching a copy of the document to an e-mail message sent to the lawyer's e-mail address in accordance with subrule (6), but service under this clause is effective only if the lawyer being served provides by e-mail to the sender an acceptance of service and the date of the acceptance, and where e-mail acceptance is received between 5 p.m. and midnight, it shall be deemed to have been made on the following day.**
> (emphasis added)

[40] The defendants say that the Brief was not served on September 3, 2024. They say that the rules on service are clear. Specifically, Rule 16.05(1) states that e-mail service on the lawyer of record is effective only if the lawyer being served provides an e-mail accepting service. In this case, the Brief was sent by e-mail to counsel for the defendants on September 3, 2024, at 3:11 p.m. Counsel to the defendants did not provide an e-mail accepting service, the Brief was not faxed, and no hard copy was personally served. The first response by counsel to the defendants to the September 3, 2024, e-mail was the filing of the within delay motion on September 5, 2024.

[41] I do not accept the defendants' position that the analysis ends with a finding that the Brief was not served in accordance with the Rules. The defendants acknowledge that they received the e-mail on September 3, 2025, which meets the threshold for validating service under Rule 16.08, which provides as follows:

> **16.08(1)** Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,
> (a) the document came to the notice of the person to be served; or
> (b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

[42] Furthermore, Rule 2.01 operates to prevent a nullity as follows:

> **Not a nullity**
> **2.01(1)** A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
> (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

[43] I find that there must be a functional analysis of whether the receipt of the Brief, even though not served in accordance with the Rules, along with the available dates for a pre-trial conference, amounted to a significant advance in the action.

[44] I find that the functional analysis of the provision of the Brief in both the ***Rempel*** and ***Schneider*** decisions to be strongly persuasive, even though the Brief in this case was not served in accordance with the Rules. The defendants in this case had the Brief which I agree is substantive, providing the plaintiffs' assessment of case law and legal principles as well as the expert report on which they intend to rely at trial.

[45] In ***Buhr***, Bock J. found that the partial provision of undertakings was not a significant advance. However, he pointed out that the next significant advance was when the plaintiff took steps to schedule a pre-trial conference. That step was described as:

> December 10, 2019, plaintiff's counsel sends defendants' counsel a pre-trial conference brief and requests availability to attend a pre-trial conference in March 2020. (see paras 3 and 15)

[46] In ***Buhr***, Bock J. considered this to be the next significant advance, albeit it occurred outside the three-year period under Rule 24.02(1). Bock J. also noted at para. 16 that the plaintiff had options to advance the action before the three-year period, including scheduling a pre-trial conference which Rule 50.02(1) allows to happen any time after the pleadings are closed.

[47] In this case, the defendants chose not to acknowledge receipt of the service by e-mail, but are in the same position as they would have been if the Brief had been served upon them that day by fax or courier. They were able to see the plaintiffs' legal positions and expert report, and were given the next available dates to schedule the pre-trial conference. I find that was a significant advance in the action.

INORDINATE AND INEXCUSABLE DELAY

[48] In the alternative, the defendants argue that the action should be dismissed for delay pursuant to Rule 24.01 which provides as follows:

> **Dismissal for delay**
> **24.01(1)** The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party.
> **Presumption of significant prejudice**
> **24.01(2)** If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.
> **What constitutes inordinate and inexcusable delay**
> **24.01(3)** For the purposes of this rule, a delay is inordinate and inexcusable if it is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case.

[49] The defendants rely on the presumption of significant prejudice that arises if the court finds the delay to be inordinate and inexcusable. They argue that the delay in this

action – 58 months from the date the statement of claim was filed to the date the delay motion was brought – has been inordinate and inexcusable.

[50] The defendants submit that, like in ***Buhr***, the within action does not involve a complicated matter. They submit that the action raises straightforward factual issues and that the claim is neither novel nor unusual. They say that the delay is unreasonably long in light of the straightforward legal issues.

[51] In ***Buhr***, a delay of 33 months in a personal injury action between the completion of discovery and the delivery by the plaintiff of some, but not all, of the answers to undertakings was found to be inordinate and inexcusable. The defendants point out that, in the present case, discovery was completed 36 months prior to the filing of the delay motion, and no undertakings have been exchanged.

[52] The defendants say further that there is no evidence by the plaintiffs that provides a sufficient or reasonable explanation for the delay. In particular, nothing unusual has happened procedurally that has led to the delay. There was no communication whatsoever between the conclusion of the discovery on September 2, 2021, and September 3, 2024, when the e-mail attaching the Brief was sent. They also say that taking 35 months to obtain an expert report was not reasonable under any circumstances.

[53] The plaintiffs argue that the time was used to prepare the Brief and obtain an expert report, which report was attached as an exhibit to the Brief, and is dated July 5, 2024. They say that the pace at which this litigation has proceeded is not uncommon and falls well short of what could be considered inordinate or inexcusably slow. They

point out that the subject matter of this litigation is a claim for damages for breach of contract, negligent misrepresentation, breach of fiduciary duties and breach of the duty of care by the defendants with respect to the sale of the Property. Examinations for discovery have been concluded, the plaintiffs have obtained their expert report, and but for this motion, a pre-trial conference could have occurred in late 2024.

[54] The Court of Appeal summarized the applicable law with respect to Rule 24.01 in ***Forsythe v. Johnson***, 2024 MBCA 104, as follows at paras 19-20:

> [19] In *Ali*, this Court outlined the approach to motions to dismiss for delay pursuant to r 24.01. The two issues for determination are whether there has been delay and whether the delay has resulted in significant prejudice (see *ibid* at para 39). *Ali* states: "When assessing the issue of delay, the court must decide whether it has been inordinate and inexcusable" (at para 40) (emphasis in original). It is the moving party's burden to establish both requirements (see *ibid*). Deciding whether delay is inordinate and inexcusable involves a determination of whether the delay is in excess of what is reasonable, having regard to the nature of the issues in the action and the particular circumstances (see *ibid* at para 41; the *KB Rules*, r 24.01(3)). This includes a consideration of the factors identified in *Law Society (Manitoba) v Eadie*, 1988 CanLII 206 (MBCA) [*Eadie*]; namely, **the subject matter of the litigation, the complexity of the issues between the parties, the length of the delay and the explanation for the delay, as well as any other relevant circumstances, including the current status of the litigation in comparison to a reasonable comparator and the role of each party in the overall delay** (see *Ali* at para 41).
>
> [20] Upon inordinate delay being established, the moving party's onus to establish inexcusable delay will essentially be met and the plaintiff will be called upon to justify the delay. The issue is then whether the nature and quality of the evidence provides the judge with a clear and meaningful explanation for the delay in the particular circumstances of the case (see *Ali* at para 42). If the delay is found to be inordinate and inexcusable, there is a rebuttable presumption of significant prejudice. Further, even if the delay is not inordinate and inexcusable, the court may dismiss the action if the delay has resulted in significant prejudice. Finally, in exceptional circumstances, where there is a clearly articulated, compelling reason, the court may refuse to dismiss the action even where it finds delay and significant prejudice (see *ibid* at paras 45-46).
> (emphasis added)

[55] Overall, I consider the litigation to be somewhat complex, likely more complex than in ***Buhr***. It may require expert testimony, including on the standard of care of the defendants, whether the change in a development plan affected the value of the Property, and whether a real estate agent who was aware of (or ought to have been aware of) a change in a development plan would have an obligation to advise his clients accordingly.

[56] While the length of delay is not insignificant in this case, when viewed in its totality and with the steps that have been taken, including the amendment and close of pleadings, production of documents, examinations for discovery and the preparation, filing and provision of the Brief and pre-trial conference dates, and considering that a pre-trial conference could have proceeded in late 2024, but for this motion, I am not prepared to find that the delay was inordinate.

[57] It is true that the plaintiffs have not provided a specific explanation for why any of the specific steps, including obtaining the expert report, took as long as they did. Nevertheless, I am not satisfied that the delay has been in excess of what is reasonable in all of the relevant circumstances, including the complexity of the issues and the current status of the litigation and in comparison to other cases such as ***Buhr***. Accordingly, there is no presumption of significant prejudice in this case. Nor have the defendants established or argued that the delay has resulted in actual prejudice. Accordingly, I am exercising my discretion under Rule 24.01 to not dismiss the action for delay on the basis of prejudice.

CONCLUSION

[58] I find that there was not a period of three or more years without a significant advance in the action, and that the delay in this case has not resulted in significant prejudice to the defendants. The motion is therefore dismissed. If the parties cannot agree on the issue of costs, they may arrange to speak to the matter.

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J. L. Goldenberg
Associate Judge