In the Court of Appeal of Alberta

Citation: 26th Avenue River Holding Limited Partnership v Winspia Co Ltd, 2025 ABCA 384

Date: 20251119
Docket: 2501-0136AC
Registry: Calgary

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Between:

26th Avenue River Holdings Limited Partnership,
26th Avenue River Investments Inc., and Ledcor Construction Limited

Respondents

- and -

Winspia Co. Ltd.

Appellant

- and -

Winspia Windows (Canada) Inc. and Han Min International Chemical Inc.

Not Parties to this Appeal

The Court:

The Honourable Justice Jolaine Antonio
The Honourable Justice Anne Kirker
The Honourable Justice Karan Shaner

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice C.L. Arcand-Kootenay
Dated the 17th day of April, 2025
Filed on the 28th day of April, 2025
(2025 ABKB 243, Docket: 2001 - 12080)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellant Winspia Co. Ltd., a South Korean corporation, seeks to appeal a decision refusing to set aside two orders extending the time for service of the respondents' statement of claim. The Court asked the parties for submissions on whether permission to appeal is required under Rule 14.5(1)(b) of the *Alberta Rules of Court*, Alta Reg 124/2010, and if so whether permission should be granted.

II. Background

[2] On October 8, 2020, the respondents filed a statement of claim alleging the appellant, its Canadian affiliate, and another South Korean defendant were liable in relation to certain deficiencies detected in window components installed as part of a condominium construction project. On September 27, 2021, shortly before the one-year time limit for service, the respondents served the statement of claim on the appellant's Canadian affiliate.

[3] Shortly thereafter, the respondents applied *ex parte* under Rule 3.26 of the *Alberta Rules of Court* for an extension of the time limit to serve the remaining defendants in South Korea. According to affidavit evidence accompanying the application, the respondents had originally filed the statement of claim "to preserve a limitation date while remedial work was ongoing", the remedial work had "only recently concluded", and serving the remaining defendants in South Korea according to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 15 November 1965, 658 UNTS 163 [*Hague Convention*] before expiry of the one year time limit was expected to be difficult. An applications judge granted the application, extending the time to serve the statement of claim to January 8, 2022.

[4] On January 4, 2022, the respondents applied *ex parte* under Rule 3.27(1)(c) for a further extension of the time limit for service. According to affidavit evidence accompanying that application, the respondents had taken steps to effect service, including translating documents into Korean and shipping them to South Korea in October 2021, but the Korean Central Authority responsible for executing foreign service requests had not yet confirmed service. An applications judge granted the application, extending the time to serve the statement of claim by a further six months to July 8, 2022. On January 24, 2022, shortly after the further extension was granted, the Korean Central Authority effected service on the appellant.

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[5] On May 5, 2022, the appellant applied to set aside the two extension orders, arguing the respondents had failed to provide sufficient justification for the extensions. An applications judge denied that application. The appellant appealed that decision to the chambers judge.

[6] The chambers judge considered the matter *de novo* and dismissed the appeal: *26th Avenue River Holding Limited Partnership v Winspia Windows (Canada) Inc,* 2025 ABKB 243 [*Chambers Decision*]. With respect to the first extension, the chambers judge accepted that the explanation provided by the respondents for not attempting service sooner was reasonable, there was no intention to delay, and there was no prejudice: *Chambers Decision* at paras 34-50. With respect to the second extension, the chambers judge held that an "individualized fact driven" analysis led her to conclude the respondents were not procrastinating or delaying and extraordinary circumstances existed, in part because of the involvement of the Korean Central Authority: *Chambers Decision* at paras 77-83. The appellant seeks to appeal to this Court.

III. Was permission required?

[7] Some appeals are allowed to the Court of Appeal only on obtaining permission. Among them are appeals from "any pre-trial decision respecting adjournments, time periods or <u>time limits</u>": *Alberta Rules of Court,* Rule 14.5(1)(b). This appeal is from pre-trial decisions to extend, and to uphold the extension of, the time limit for serving a statement of claim. Both rules at issue on the extension applications – Rules 3.26 and 3.27 – appear in a subdivision of the *Alberta Rules of Court* titled "<u>Time Limit</u> for Service of Statement of Claim" and Rule 3.26(1) expressly refers to the "one-year <u>time limit</u>" for service. On its face, the proposed appeal falls within Rule 14.5(1)(b).

[8] The appellant asserts it should not, for a number of reasons. Among other arguments, it submits no permission should be required where the grant or denial of an extension has the potential to bring the litigation to an end; where there is a legal test governing the extension, as opposed to pure discretion; and where an appeal is a proportionate response to the challenged order.

[9] None of these distinctions finds any basis in the wording of the rule. Unlike under the former *Court of Appeal Consolidated Practice Directions*, "the effect of the decision sought to be appealed no longer determines whether the permission requirement applies". Rule 14.5(1)(b) applies even when the decision may impact substantive rights: *Rath & Company Barristers & Solicitors v Sturgeon Lake Cree Nation*, 2022 ABCA 373 at paras 10-13; *Stubicar v Calgary (Subdivision and Development Appeal Board)*, 2023 ABCA 133 at paras 17-18; *Debut Developments Incorporated v Redcliff (Town)*, 2025 ABCA 223 at para 12. While the distinctions identified by the appellant may have scope to operate within the test for permission to appeal, they do not determine the applicability of Rule 14.5(1)(b).

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[10] The appellant further submits permission should not be required because of the way the grounds of appeal are framed. For example, it asserts this appeal is not about a time limit, in that it does not challenge the duration of the extensions that were granted; rather, the appeal is about whether service was properly effected. However, the underlying argument is that service was not properly effected because the time limit for service should not have been extended. We decline to hold that the framing of grounds of appeal in this way can determine whether an appeal arises from "any pre-trial decision respecting adjournments, time periods or time limits". Each case turns on its circumstances (see, e.g., *Osadchuk v Kidd*, 2025 ABCA 125 at paras 19-24), but in this case there is no question the decision at issue was a "pre-trial decision respecting... time limits".

[11] In short, we find this is an appeal to which Rule 14.5(1)(b) applies. Permission to appeal is required. As permission to appeal was not sought in time, an extension of time to seek permission to appeal under Rule 14.37(2)(c) is also required.

IV. Should an extension of time and permission to appeal be granted?

[12] To obtain permission to appeal under Rule 14.5(1)(b), an applicant must establish: (1) a serious question of general importance; (2) a reasonable chance of success on appeal; and (3) that the appeal will not unduly hinder the progress of the action or cause undue prejudice, without any proportionate benefit: *Esfahani v Samimi*, 2024 ABCA 16 at para 4; *Kenneth John Braithwaite Professional Corporation v 1006868 Alberta Ltd*, 2021 ABCA 425 at para 8. When considering an application to extend time, the Court will also consider whether there is a reasonable chance of success on appeal: *Cairns v Cairns*, [1931] 4 DLR 819 at 826-827, [1931] 3 WWR 335 (Alta SCAD); *Habib v Habib*, 2025 ABCA 59 at paras 12-15.

[13] The stated grounds of appeal point to alleged omissions in the chambers judge's reasons and to her application of legal tests to facts. Even if these grounds were charitably viewed as raising questions of law, they depend sensitively on the particulars of the case and could not be characterized as serious questions of general importance. It also appears the appeal may have delayed the progress of the underlying action. Importantly, there is no reasonable chance of success on appeal. Our comments on the merits of the appeal follow.

[14] Neither an extension of time nor permission to appeal is warranted.

V. Merits of the appeal

[15] If we had found it appropriate to grant an extension of time and permission to appeal, we would nonetheless have dismissed the appeal.

[16] The decision to grant an extension of time for service of a statement of claim is discretionary. Absent an error of law or principle, such decisions will only be varied on appeal where they are unreasonable: *Bristol-Myers Squibb Canada Co v Grande Prairie (City)*, 2023

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ABCA 294 at paras 14, 22; *Scott v Westwinds Communities*, 2021 ABCA 30 at paras 23, 43 [*Scott*]; *McGowan v Lang*, 2015 ABCA 217 at paras 21, 28, 29.

[17] The chambers judge stated the legal principles applicable to both applications correctly: *Chambers Decision* at paras 29, 57-58, 80-81. For the Rule 3.26 extension, the chambers judge cited this Court's decision in *Scott* at para 37, recognizing there is no "unilateral right to a three month extension", an applicant should provide evidence explaining the "reason or reasons for the lack of service within the 12 months", the "purpose of the renewal cannot be a stalling tactic", and "prejudice to the defendant, if any, is a factor to consider". For the Rule 3.27(1)(c) extension, the chambers judge recognized "special or extraordinary circumstances" need to exist "resulting solely from the defendant's conduct or from the conduct of a person who is not a party to the action". She correctly noted this is "an individualized fact driven exercise in every case": *Stremich v Pefanis*, 2017 ABCA 383 at para 16 [*Stremich*]. The appellant does not assert the chambers judge erred in describing these principles.

[18] Instead, the appellant argues the chambers judge erred by relying in part on excerpts of a cross-examination conducted after the *ex parte* orders were granted in assessing the explanation for why the respondents did not attempt service sooner. The appellant cites *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2017 ABCA 316 at para 176 for the proposition that "[a]ttempts by the original applicant to bootstrap the record by putting in additional evidence that was available at the time of the initial without notice application should be treated with caution". Allowing "bootstrap" evidence can undermine the obligation to make full and complete disclosure in the first instance: *Guillevin International Co v Barr*y, 2022 ABCA 144 at para 18. In this case, the evidence at issue was elicited by counsel for the appellant on cross-examination. It was not adduced by the respondents. Moreover, the answers given by the respondents' affiant on cross-examination were consistent with the initial affidavit evidence: the reason for the delay in service was because the statement of claim had been filed to preserve a limitation while remedial work was ongoing, and that remedial work had only recently concluded. In the circumstances, reference by the chambers judge to the cross-examination transcript did not risk undermining the obligation on *ex parte* applicants to make full and complete disclosure.

[19] The appellant also argues the chambers judge unreasonably accepted the respondents' explanation for not attempting service sooner. It submits waiting for the remediation work to complete, and being delayed on account of difficulties associated with service *ex juris*, are not valid excuses. While it may be, as the applications judge noted, that the respondents' "reasons for not serving earlier [were] not particularly strong", the chambers judge nevertheless determined that when considering this explanation, along with her findings that "the purpose of renewal was not to constitute a delay tactic and there was no prejudice to the Defendants", the Rule 3.26 extension should not be set aside. That was a reasonable exercise of discretion that is entitled to deference by this Court.

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[20] With respect to the second extension, the appellant submits it was “an obvious error” to conclude that involvement of the Korean Central Authority amounted to “special or extraordinary circumstances” for the purposes of Rule 3.27(1)(c). It says if that were the case, service on a foreign defendant under the *Hague Convention* would always be enough to obtain an extension of time.

[21] However, the chambers judge expressly stated she was “not making a blanket finding that all cases where there is service in a foreign jurisdiction will be exceptional circumstances”. Her assessment was based on more than just the fact of foreign service. She relied on a number of case-specific findings, including that the respondents “were diligent”, they “were not procrastinating or delaying”, they “had to rely on unrelated third parties... to translate the documents and... to properly effect service”, the “KCA was an uncontrollable party, and the only means” of service, the “timelines for service by KCA were not precisely known”, and no response was provided by the Korean Central Authority when counsel requested an update: *Chambers Decision* at paras 78-83. There is no basis for us to interfere with the chambers judge’s assessment that exceptional circumstances existed. That was an “individualized fact driven exercise” that is owed deference on appeal.

[22] Next, the appellant argues the chambers judge erred in finding extraordinary circumstances arose “solely” due to the “conduct of a person who is not a party to the action”, as required by Rule 3.27(1)(c), because she did not consider that the respondents could have attempted service *ex juris* sooner, prior to the first extension. The chambers judge carefully analyzed, and was well aware of, the fact that the respondents had purposefully delayed service to wait for the remediation work. This was not enough, on its own, to render Rule 3.27(1)(c) inapplicable. As noted by this Court in *Stremich* at para 16:

> Extensions are necessary, by definition, only where the plaintiff has missed the time to serve. Many, if not most, of these situations could have been avoided if service had been attempted earlier than it was. The issue remains whether special or extraordinary circumstances exist within the provisions of rule 3.27 that support the granting of an extension....

[23] Finally, the appellant submits the respondents did not comply with the requirement of Rule 3.29 that where a “statement of claim is served within an extension of time... the statement of claim must be accompanied with (a) a copy of the order granting the extension, or (b) written notice of the order”. Here, the respondents shipped the documents for service to the Korean Central Authority in October 2021, *before* the second extension was granted in January 2022, so the service package did not include the second extension order. Counsel for the respondents explains that once the materials were with the Korean Central Authority, there was no method to add additional documents for service, nor was there any communication from the Korean Central Authority. Counsel for the respondents provided counsel for the appellant a copy of the second extension

order well within the extended time for service. In the circumstances, we reject the submission that non-compliance with Rule 3.29 is a basis for setting aside service in this case.

VI. Conclusion

[24] For all the foregoing reasons, the applications for an extension of time and for permission to appeal are denied, and the appeal would have been dismissed.

Appeal heard on November 10, 2025

Memorandum filed at Calgary, Alberta
this 19th day of November, 2025

Antonio J.A.

Kirker J.A.

Authorized to sign for: Shaner J.A.

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Appearances:

T. Brookes
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for the Respondents

A.W. Wilkinson
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