IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ghag v. Ghag,* 2024 BCSC 400

Date: 20240308
Docket: S189435
Registry: New Westminster

Between:

Amrik Singh Ghag

Plaintiff

And

Sukhvinder Singh Ghag

Defendant

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

Counsel for the Plaintiff:	P. Roberts, K.C.
Counsel for the Defendant:	A. Dosanjh C. Gallant
Place and Date of Hearing:	Vancouver, B.C. January 19, 2024
Place and Date of Judgment:	New Westminster, B.C. March 8, 2024

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Introduction

[1] The defence brings this application for an order dismissing the plaintiff's action for want of prosecution.

[2] The plaintiff commenced this action against the defendant on March 31, 2017.

[3] The plaintiff and the defendant were brothers. The defendant passed away on September 20, 2017.

[4] The plaintiff's notice of civil claim makes the following allegations:

a) From 1989, the parties were partners and had agreed to carry on business in common with a view to share profits equally;

b) From 1989, the parties owned and operated various pharmacy businesses and acquired property as a partnership;

c) The partnership held assets in the personal names of the parties, the names of various family members, and in corporate entities of which the parties and their family members were shareholders;

d) In 2016 or 2017, the defendant ceased applying his talents and financial resources to support the partnership, entered into transactions without the plaintiff's consent, and started to deal with the partnership's assets as though they belonged to him alone; and

e) As a result of the defendant's breach of his contractual obligations and his fiduciary duties, the plaintiff claims:

   i. damages;

   ii. a constructive trust over the partnership's assets based on an allegation of unjust enrichment;

   iii. the appointment of a receiver;

iv. an accounting; and

v. certificates of pending litigation against real property.

Steps Taken in the Action

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[5] The defendant received a diagnosis of a terminal illness in July 2016. The defendant filed a response to civil claim on May 19, 2017.

[6] When delivering his response to the plaintiff, the defendant:

a) reminded the plaintiff that he had a survival prognosis of 14 to 16 months from the date of his diagnosis;

b) advised the plaintiff that he consented to being deposed; and

c) advised the plaintiff that he required document disclosure within the time limits set by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

[7] Defendant's counsel took the following steps to preserve the defendant's evidence before he passed:

a) proposed dates for a discovery of the defendant and booked a court reporter pending confirmation from the plaintiff;

b) secured two affidavits sworn by the defendant addressing the allegations in the notice of civil claim; and

c) delivered a list of documents and demanded the plaintiff's document list.

[8] Notwithstanding the steps taken by the defendant and the requests made by the defendant, the plaintiff took no steps until after the defendant passed away.

[9] The steps taken by the plaintiff in this action since the filing of the notice of civil claim are as follows:

a) May 29, 2017, the plaintiff filed a notice of trial which was later adjourned;

b) September 22, 2017, the plaintiff delivered a list of documents;

c) December 27, 2017, the plaintiff filed a second notice of trial for November 26, 2018, which the parties adjourned;

d) February 23, 2018, the plaintiff filed an application to add defendants and to amend his notice of civil claim, which the court eventually adjourned generally;

e) March 12, 2018, the plaintiff delivered a first amended list of documents;

f) March 20, 2018, the plaintiff attended to the defence application for document production;

g) May 22, 2018, the plaintiff delivered a second amended list of documents; and

h) June 13, 2018, the plaintiff attended a mediation.

[10] While the parties had unsuccessful discussions about settlement after the mediation, the plaintiff has taken no further steps to advance this action since attending the mediation on June 13, 2018.

The Test for Dismissal

[11] A five-member panel of the Court of Appeal for British Columbia in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*] significantly changed the test for deciding whether a dismissal for want of prosecution is an appropriate order. The Court in *Giacomini* shifted the focus in these applications from whether the delay in prosecution has prejudiced the defendant's ability to have a fair trial to a broader focus on the interests of justice, which is to consider:

a) the public confidence in the justice system; and

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b) the justice system's interest in promoting access to justice by having cases resolved in a timely manner.

[12] Prior to *Giacomini*, an application for dismissal for want of prosecution required the court to consider the following four questions:

a) Has there been inordinate delay?

b) If there is inordinate delay, is the delay inexcusable?

c) Has the delay caused, or is likely to cause, serious prejudice to the defendant? and

d) If the former factors have been established, does justice demand a dismissal of the action?

[13] The Court in *Giacomini* held that the previous test for dismissal over-emphasized the requirement that the defendant establish a delay which has prejudiced its ability to have a fair trial. As a result, Justice Horsman, in *Giacomini*, restated the test for dismissing an action for want of prosecution, at paras. 69–70, as follows:

> ***The revised test***
>
> [69] For clarity, I will summarize the revised framework of analysis that, in my view, should govern applications to dismiss actions for want of prosecution in British Columbia. The first two questions are:
>
> (1) Has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?
>
> (2) Is the delay inexcusable?
>
> [70] These two questions are to be answered in accordance with the law that has developed in British Columbia under the existing test. If both questions are answered in the affirmative, the court should move to the third and final question:
>
> (3) Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

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[14] In assessing whether it is in the interests of justice for the action to proceed, the Court in *Giacomini* directs us to a "non-exhaustive" list of factors, set out in para. 45 of *International Capital Corporation v. Schafer*, 2010 SKCA 48 [*International Capital Corp.*]. The factors outlined in *International Capital Corp.* are as follows:

a) What prejudice will the defendant suffer in mounting its case if the matter goes to trial? Relevant considerations on the question of prejudice may include failing memories on the part of witnesses, the disappearance or death of witnesses over the course of time, and the loss or destruction of physical evidence;

b) How long is the delay? The longer the unjustifiable delay, the more likely it is that letting the matter go to trial will not be appropriate;

c) To what stage has the litigation progressed? In general terms, a court should be less inclined to strike an action which is well-advanced than one which is in its early stages. The interests of justice will normally weigh in favour of getting a case to trial if it has somehow stalled just short of that mark;

d) What impact has the delay had on the defendant? The court should be sensitive to the impact of claims which put in question the professional, business, or personal reputation of the defendant, which put the livelihood of the defendant at risk, or which involve significant or ongoing negative publicity for the defendant;

e) In what context has the delay occurred? There is no obligation on the defendant to take any steps to move the plaintiff's case forward. However, the defendant's inaction in the face of lengthy delay by the plaintiff may weigh against dismissal of the action: *Giacomini* at para. 76. On the other hand, delay in the shadow of repeated requests by the defendant to move the action forward may be more serious than a delay where the defendant has not pressed the plaintiff;

f) What are the reasons for the delay? When considering the justice of allowing a claim to move forward to trial, a court may revisit the reasons offered by the

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plaintiff for the delay. An explanation for the delay which falls short of establishing an "excuse" may inform the interests of justice analysis;

g) What was the role of counsel in causing the delay? There are circumstances where it might be unjust to deprive a plaintiff of a remedy where the plaintiff is blameless in relation to the delay and his or her counsel is responsible for it. However, the Court in *International Capital Corp.* cautions that this consideration should not be given undue weight because plaintiffs select and instruct their counsel. If a litigant engages a lawyer and the lawyer then fails to move matters forward expeditiously, the litigant should bear the burden of his or her choice of counsel. Care must be taken to ensure that plaintiffs' counsel are not allowed to defeat applications to strike for want of prosecution by simply assuming the blame for not moving the action forward; and

h) Is there a public interest in allowing the action to be decided on the merits? There is a narrow category of actions in which the public interest is served by allowing the action to proceed to trial. This category of actions includes cases of genuine public importance or cases that have significant implications reaching beyond the specific interests of the litigants themselves.

[15] The Court of Appeal in *Giacomini* adds the merits of the action as an additional factor to consider. While a "searching examination of the merits" is not appropriate, the Court notes that if the action is bound to fail, then the interests of justice favour dismissal: at para. 71.

Is the Delay Inordinate?

[16] The first step in the revised test is to determine whether the delay in the prosecution of the action is inordinate.

[17] The plaintiff has taken no steps to advance this action for over five years since attending a mediation on June 13, 2018. It has been over six years since the plaintiff commenced this action on March 31, 2017.

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[18] The plaintiff concedes that this length of delay is inordinate. I agree. Therefore, I find that the plaintiff's delay in prosecuting this action is inordinate.

Is the Delay Inexcusable?

[19] The second step in the revised test is to determine whether the delay in the prosecution of the action is inexcusable.

[20] In *Giacomini*, at para. 40, Justice Horsman states, "[a]s a rule, unless a credible excuse is offered, the natural inference is that inordinate delay is inexcusable". In my view, this statement by Horsman, J.A., places the evidentiary burden on the plaintiff to present a credible excuse for the delay once the defendant establishes that the delay is inordinate.

[21] Factors such as:

a) whether the delay was intentional or tactical;

b) whether the delay was a result of dilatoriness, negligence, impecuniosity, illness or some other relevant cause; or

c) whether the delay was as a result of a lack of diligence on the part of the plaintiff's counsel

will inform the decision as to whether the delay is inexcusable: *Giacomini* at para. 40.

[22] In this case, the plaintiff submits that as a result of a combination of various factors, the delay is excusable.

Dealings with Counsel

[23] The plaintiff deposes that the first counsel he retained to represent him in this action advised him that there was no time limit on how long this case would take and that the plaintiff did not need to rush ahead with the claim if he did not wish to do so. The plaintiff also deposes that he trusted his legal counsel to move this case along

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in an appropriate and timely manner. The plaintiff claims that he has no legal training and, although he has been involved in navigating the legal system on more than one occasion, he did not feel comfortable making legal decisions on his own. As a result, the plaintiff deposes that he relied upon his legal counsel to give him appropriate legal advice and to tell him what the next steps are in his case.

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[24] Based on the evidence before me, I am not prepared to attribute any blame for the delay to the plaintiff's counsel. In my view, it is not sufficient for the plaintiff to sit on his hands and do nothing to move this action forward, or to press counsel to do so, when it was obvious that no steps were being taken to move the action forward. As suggested in *International Capital Corp.*, at para. 45(g), the plaintiff selected and retained his counsel and he, not the defendant, must bear the burden of his choice.

[25] However, the information he received from his counsel may have left the plaintiff with the impression that time was not of the essence in bringing this case to trial.

Related Litigation

[26] The plaintiff claims that the delay in this action was due to his involvement in other litigation involving family members and corporate entities controlled by family members. The plaintiff has listed 16 separate legal actions commenced between February 2017 and March 2021 (the "Other Actions"). The Other Actions involve:

a) debt claims against the plaintiff or his companies made by corporate entities controlled by the defendant's estate;

b) a dispute with respect to a family trust established by the defendant in which the beneficiaries of the trust challenged the trustee (the "Family Trust Action"); and

c) actions involving property in which the plaintiff claims an interest in this action.

[27] While there is no direct connection between the issues in the Other Actions and this action, the Other Actions involve assets which are related to the claims made in this action. The property which is the subject of the Other Actions is property over which the plaintiff in this action claims an interest. Accordingly, there is some connection between the Other Actions and the claims made in this action.

[28] Further, there is a more direct connection between this action and the Family Trust Action. The beneficiaries of the family trust commenced the Family Trust Action seeking to remove the trustee of the family trust and to appoint an alternate trustee. The trust property included property in which the plaintiff in this action claims an interest. The trustee of the family trust claimed that not only was he the trustee but that he was also the sole beneficial owner of the defendant's assets after the defendant's death.

[29] While the connections between the various actions is not so significant that the plaintiff could not have proceeded expeditiously with the action herein while the Other Actions continued to be outstanding, it is understandable that there was uncertainty.

Health Reasons

[30] The plaintiff deposes that he experienced a number of health issues that have contributed to the delay in this action. He claims that he had a decline in his mental health since the commencement of this action for which his physician prescribed anti-depressants. In February 2019, the plaintiff's doctor also diagnosed him with severe sleep apnea.

[31] The plaintiff also received care and continues to receive care for a heart condition.

[32] However, the evidence does not persuade me that a decline in the plaintiff's health contributed to the delay in prosecuting this action. The plaintiff could have and should have instructed his counsel to push this action forward. In fact, during the

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period between 2018 and 2022, the plaintiff was instructing counsel in many of the Other Actions.

COVID-19

[33] The plaintiff claims that the impact of COVID-19 on his pharmacy business was a further cause for delay. The plaintiff deposes that from March 2020 to the end of 2022, his pharmacy business was extremely busy as a result of the COVID-19 crisis. Therefore, his business required that he expend significant time working in this business and serving the public.

[34] I am not convinced that an increase in the plaintiff's business activities contributed to the delay. The plaintiff had counsel whom he could have instructed to move this action forward during this time.

Financial Circumstances

[35] Another reason cited by the plaintiff for the delay was that the financial circumstance in which he found himself and his family prevented him from absorbing the cost of litigation required to proceed with this action.

[36] Even though the plaintiff's business was extremely busy during the COVID-19 pandemic, he claims financial hardship. The plaintiff deposes that in the summer of 2022, he risked the foreclosure of his personal residence on a second mortgage taken to finance legal expenses. As a result, the plaintiff deposes that he secured alternate financing to satisfy the demand.

[37] In my view, the evidence presented by the plaintiff on his financial circumstances is not sufficient to conclude that he did not have the financial ability to finance this litigation. It appears that he had the ability to refinance and secure funding to pay out the mortgage. There is not sufficient evidence to establish that he was unable to finance the litigation costs.

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Death of his Father-in-Law

[38] The plaintiff deposes that before his father-in-law passed away in 2021, he spent a considerable amount of time assisting with his father-in-law's care. However, the evidence does not disclose for how long before his passing the plaintiff assisted in his care, nor does it disclose what time commitment this assistance required.

[39] Accordingly, I am not satisfied that the plaintiff's activities in caring for his father-in-law contributed to the delay in this case.

Conclusion on Inexcusable Delay

[40] The plaintiff submits that while the individual reasons relied upon may not, on their own, be a reasonable excuse for the delay, the court should excuse the delay based on all of the circumstances with which the plaintiff was dealing in this timeframe.

[41] The only explanation for the delay that I find persuasive is the uncertainty about how to proceed in the face of the Other Actions. In particular, the outcome in the Family Trust Action could reasonably have affected the process and the outcome of this action. In my view, it is reasonable to conclude that the Other Actions had a significant effect on how the plaintiff prosecuted this action.

[42] Accordingly, I find that while the significant delay in this case was inordinate, the delay is excusable based on the uncertainty caused by the Other Actions.

<u>The Interests of Justice</u>

[43] Given my conclusion that the inordinate delay is excusable in this case, it is not necessary to decide whether it is in the interests of justice for the action to proceed. However, even if the delay was inexcusable, I would have found that it is in the interests of justice for this action to proceed.

[44] Both the Court of Appeal for Saskatchewan in *International Capital Corp.* and our Court of Appeal in *Giacomini* reinforce that the prejudice to the defendant's ability to defend the action caused by the delay remains an important factor.

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However, Horsman J.A., in *Giacomini*, states that prejudice to the defendant is not a pre-requisite to an order dismissing a claim for want of prosecution. Rather than prioritizing the impact of the delay on trial fairness, the court must now consider the question of prejudice alongside all the relevant factors in the interests of justice analysis: *Giacomini* at para 72.

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[45] In my view, the prejudice suffered by the defence in this case is the death of the defendant. While memories of the other witnesses may fade over time, the main witness for the defence, with the most reliable knowledge of the arrangements and relationship between the parties, was the defendant. However, the death of the defendant and the loss of his evidence would have occurred even if the plaintiff had prosecuted this action in a timely way. The defendant's death occurred only months after the plaintiff commenced the action. Therefore, in my view, the loss of the defendant's *viva voce* testimony was inevitable.

[46] Counsel for the defence had the foresight to preserve the defendant's evidence in affidavit form before his passing. Those affidavits are available and have been relied upon by the parties in this application. I have no doubt that the defence will seek to rely upon those affidavits at a trial of this action if a trial should occur. Therefore, the prejudice to the defence may not be as significant as it might have been.

[47] The significant length of the delay and the stage of the litigation process both favour a dismissal of the action in the interests of justice. It has been six years since the plaintiff commenced this action, but while the parties have disclosed their documents, no examinations for discovery have occurred.

[48] On the other hand, there is nothing in the evidence or in the allegations against the defendant that directly disparage the defendant's reputation, that generate negative publicity for the defendant, or that put the defendant's livelihood at risk. There is no evidence that the defence pressed the plaintiff to proceed with the action after the failed settlement negotiations in 2018. The defence concedes that

the court cannot conclude that the plaintiff's claim is bound to fail and there are no issues of public importance in the action.

[49] While the plaintiff's counsel should bear no responsibility for the length of the delay, the advice the plaintiff received from counsel left the plaintiff with the impression that there were no time limits imposed on concluding this action. As a consequence of having to deal with the Other Actions and the impression that there was no urgency in concluding this action, it was not unreasonable that the plaintiff delayed proceeding with this action.

[50] In my view, the minimal prejudice to the defence as a result of the delay in this case tilts the balance toward allowing the action to proceed. In the circumstances of this case, after balancing the relevant factors, I find that the justice system's interest in having cases resolved in a timely manner is outweighed by the public's interest in having cases adjudicated on their merits.

[51] Therefore, I find that it would be in the interests of justice for this action to proceed.

Removal of the Certificates of Pending Litigation

[52] In this action, the plaintiff has claimed and has filed certificates of pending litigation ("CPLs") against various properties in which the defendant held an interest. The defence seeks to cancel those CPLs pursuant to ss. 252 and 256 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*].

[53] Section 252 of the *LTA* provides as follows:

> **Cancellation of certificate of pending litigation**
>
> **252** (1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.

[54] In *GMC Properties Inc. v. Rampart Estates Ltd.*, 2023 BCCA 172, the Court of Appeal held that even where no step had been taken in the proceeding for one year,

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the court retains a discretion to refuse the cancellation if to do so would be unjust. In exercising the court's discretion, the Court of Appeal endorsed the consideration of the following factors from *Wiest v. Middlekamp*, 2005 BCSC 1626, at para. 46:

> a) Whether the respondent has given an acceptable explanation for the delay in prosecuting the claim;
>
> b) Whether, despite the presumed prejudice, no actual prejudice would be incurred by the applicant if the order was not granted; and
>
> c) Whether the respondent's claim for an interest in the land has at least a reasonable prospect of succeeding.

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[55] In my view, the cancellation of the CPLs would not be just in this case for the following reasons:

a) As outlined earlier in these reasons, the plaintiff has provided an acceptable explanation for the delay in prosecuting the claim;

b) The plaintiff's claims in this case are not bound to fail, although it is premature to assess whether they have a reasonable prospect of succeeding; and

c) Cancellation of the CPLs may deprive the plaintiff of his remedy should the defence dispose of the assets.

[56] In these circumstances, I have concluded that the foregoing factors outweigh any presumed prejudice suffered by the defence as a result of the CPLs. Therefore, I find that it would be unjust to cancel the CPLs.

[57] Accordingly, the defendant's application to cancel the CPLs pursuant to s. 252 of the *LTA* is dismissed.

[58] Section 256 of the *LTA* provides as follows:

> **Cancellation of certificate of pending litigation on other grounds**
>
> **256** (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

> (a) particulars of the registration of the certificate of pending litigation,
>
> (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
>
> (c) the grounds for those statements,
>
> apply for an order that the registration of the certificate be cancelled.
>
> (2) An owner whose indefeasible title or charge is registered subject to a certificate of pending litigation under section 217 (2) (a) or (c) (ii) may, on setting out in an affidavit
>
> (a) that the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate contains no allegation that the owner is not a purchaser in good faith and for valuable consideration,
>
> (b) that the owner applied to register the owner's indefeasible title or charge before the certificate was received by the registrar, and
>
> (c) particulars of dates and times of receipt, application and registration of the owner's application and the certificate,
>
> apply for an order that the registration of the certificate be cancelled.
>
> (3) An application under this section must be made to the court in which the proceeding was commenced and must be brought
>
> (a) as an application in that proceeding, if the applicant is a party to the proceeding, or
>
> (b) by petition, if the applicant is not a party.

[59] In my view, the defendant's evidence of hardship and inconvenience is not sufficient to justify the cancellation of the CPLs. The defendant submits that the increasing expense for the properties is causing the defendant's estate hardship and inconvenience because the estate must make up the shortfall. However, there is no evidence upon which it can be inferred that the defendant's estate is incapable of making up the shortfall, or that by doing so it will experience hardship or inconvenience.

[60] The defendant submits further that the CPLs should be set aside because while the defendant's assets are tied up, the plaintiff has access to the equity in the properties in his name. In my view, the application of s. 256 of the *LTA* does not turn upon the relative positions of the parties. The only relevant consideration is whether

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the registrations have caused, or are likely to cause, hardship and inconvenience to the defendant's estate.

[61] For these reasons, I decline to set aside the CPLs pursuant to s. 256 of the *LTA*.

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Conclusion

[62] Based on all of the foregoing, the defendant's applications are dismissed.

[63] The parties have leave to speak to the issue of costs if they cannot agree. If they wish to speak to the issue of costs, they will be required to schedule a costs hearing within 30 days.

"D.K. Hori J."

HORI J.