

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *24 Hour Glass Ltd. v. Abtek Door Services Ltd.*,  
2025 BCSC 112

Date: 20250123  
Docket: S137078  
Registry: Vancouver

Between:

**24 Hour Glass Ltd.**

Plaintiff

And

**Abtek Door Services Ltd. and Hudson's Bay Company**

Defendants

Before: The Honourable Justice E. McDonald

## Oral Reasons for Judgment

|                                       |                                     |
|---------------------------------------|-------------------------------------|
| Counsel for the Plaintiff:            | J. Stephen                          |
| Counsel for Abtek Door Services Ltd.: | J.N. Harrigan                       |
| Counsel for Hudson's Bay Company:     | J. Ronsley                          |
| Place and Date of Trial/Hearing:      | Vancouver, B.C.<br>January 17, 2025 |
| Place and Date of Judgment:           | Vancouver, B.C.<br>January 23, 2025 |

**Table of Contents**

**INTRODUCTION ..... 3**

**BACKGROUND..... 3**

**LEGAL PRINCIPLES ..... 5**

**ANALYSIS..... 6**

    i. Is the plaintiff's delay in prosecuting the action inordinate?..... 6

    ii. Is the delay inexcusable? ..... 7

    iii. Is it in the interests of justice for the action to proceed?..... 8

        Factors relevant to interests of justice analysis..... 8

**DISPOSITION..... 12**

**Introduction**

[1] These reasons for judgment were delivered orally and they have since been edited for distribution to the parties and publication.

[2] The defendant, Abtek Door Services Ltd. (“Abtek”), applies pursuant to Rule 22-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] for an order dismissing the plaintiff’s claim and Abtek’s counterclaim. The ground for the application is want of prosecution.

[3] The defendant, Hudson’s Bay Company (“HBC”), filed a response and it submits that the application should be granted. The plaintiff opposes the application on a number of grounds and submits that even if inordinate and inexcusable delay is established, the court should decline to dismiss the Claim because it is not in the interests of justice to do so. The plaintiff refers to the fact that in 2024, it has filed a second notice of intention to proceed and served a second list of documents, all in anticipation of prosecuting its Claim.

**Background**

[4] The plaintiff commenced the claim over 11 years ago on September 24, 2013 (the “Claim”). The Claim concerns an alleged implied and/or oral contracts respecting labour, material and equipment supplied for skylight installation in 2010 and emergency glass repairs associated with the Stanley Cup riot in 2011. The Claim also alleges that the defendant, Abtek, was a contractor to the defendant, HBC, and that Abtek provided HBC’s retail outlet at 674 Granville Street, Vancouver, with building maintenance and related services. The Claim further alleges that the plaintiff and Abtek entered into written and/or verbal contracts and that the plaintiff and HBC entered into implied contracts. The plaintiff seeks an award of damages from each defendant for approximately \$108,316 for failure to pay the plaintiff for its services.

[5] On October 28, 2013, Abtek and HBC responded to the Claim. Also on October 28, 2013, Abtek counterclaimed against the plaintiff (the “Counterclaim”).

The Counterclaim alleges overbilling by the plaintiff for work done at two locations, including HBC's retail outlet, and it seeks damages for overbilling of approximately \$11,000. On November 19, 2013, the plaintiff responded to the Counterclaim.

[6] In 2014, the parties served their respective lists of documents. On January 23, 2015, Abtek served a further list of documents.

[7] On May 5, 2020, the plaintiff filed its first notice of intention to proceed (the "2020 Notice"). In mid-2020, counsel for the parties had emails and telephone conversations about document production and scheduling examinations for discovery.

[8] Between May to June, 2021, counsel for the parties once again engaged in emails about document production, namely, whether the plaintiff had met its disclosure obligations under Rule 7-1, scheduling examinations for discovery and trial. The last email message sent by the plaintiff's counsel was on June 15, 2021, indicating that the plaintiff would search for relevant documents and asking for confirmation of Abtek's September 2021 dates for examination for discovery. On June 15 and 17, 2021, counsel for the defendants responded by providing their available dates in September 2021. Counsel for HBC advised that he would confirm his client's availability but he did not do so. Counsel for the plaintiff neither followed up nor scheduled examination for discoveries on the dates that had already been provided.

[9] On August 6, 2024, more than three years after the parties' last communication about scheduling examinations, the plaintiff filed a second notice of intention to proceed (the "2024 Notice").

[10] On September 5, 2024, Abtek filed the present application seeking dismissal of the Claim for want of prosecution. On September 6, 2024, the plaintiff served its amended list of documents dated September 5, 2024.

### Legal Principles

[11] Rule 22-7(7) provides that on application, if “it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed”.

[12] The leading case establishing the current test for dismissal for want of prosecution in British Columbia is *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*]. In *Giacomini*, at paras. 69-72, Justice Horsman sets out a revised test and analytical framework governing applications to dismiss an action for want of prosecution with defined questions applicable at each stage of the analysis as follows:

#### Initial Stage

- i. Has the defendant established that the plaintiff’s delay in prosecuting the action is inordinate?
- ii. Is the delay inexcusable?

If questions (i) and (ii) are answered affirmatively pursuant to the law developed in British Columbia under the previous test, then the court moves on to consider the third question at the final stage,

#### Final Stage

- iii. Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[13] To assess the interests of justice, the court considers the non-exhaustive list of factors set out in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45, along with the additional factor of the merits of the action: *Giacomini*, para. 71. In *Giacomini*, Justice Horsman also points out that while prejudice to the defendant’s ability to defend the action remains a relevant and important consideration under the new test, it is not a prerequisite to dismiss a claim

for want of prosecution and the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.

**Analysis**

**i. Is the plaintiff’s delay in prosecuting the action inordinate?**

[14] There is no hard and fast rule for identifying when delay is inordinate. The authorities recognize that inordinate delay is relative; it has been characterized as delay that is “immoderate, uncontrolled, excessive and out of proportion to the matters in question”: *Wiegert v. Rogers*, 2019 BCCA 334 at para 32.

[15] Delay is to be analysed in a holistic, and not piece-meal fashion and the extent to which delay may be excusable is highly fact-dependent: *Ibid*, citing *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38.

[16] The plaintiff submits that the delay should be calculated as either:

- a) Three years and three months from June 14, 2021 to September 2024, starting from when the plaintiff could have unilaterally set down examinations for discovery; or
- b) September 6, 2024 to the hearing date, starting from when the plaintiff served the applicant with a second list of documents.

[17] However, the plaintiff’s submissions about the calculation of the delay simply skips over the issue of whether there was any delay following the date in 2014 when it served its first list of documents. The plaintiff’s submissions also fail to grapple with the issue of whether it took a “step” within the meaning of the *Rules* at any time after serving its first list of documents in 2014 and prior to the present application being filed. The plaintiff has provided no authority for simply disregarding that lengthy period of the overall delay.

[18] Taking a holistic view of the delay, it is clear that no step was taken by the plaintiff after it served its list of documents in April 2014 and prior to the filing of the

present application in September 2024. The delay exceeds 10 years. In my view, notwithstanding the two notices of intention to proceed and the counsel communications that took place from time to time during the decade that has elapsed, the delay in prosecuting the Claim is plainly inordinate.

**ii. Is the delay inexcusable?**

[19] The plaintiff has provided evidence to explain the reasons for the delay.

[20] Mr. Dunne, who is one of the directors of the plaintiff, made an affidavit on September 19, 2024 to oppose the application. Mr. Dunne's affidavit indicates that the reasons for the delay include that the defendants' counsel failed to confirm the dates for examination for discovery; that he had an unexpected total hip replacement in 2021 that occupied "many months" that affected the plaintiff's ability to actively take steps to advance the Claim; that catastrophic floods in November-December 2021 caused "catastrophic loss to our residential property" causing Mr. Dunne and his spouse (who are both directors of the plaintiff) to spend "most if not all our time mitigating the flood damage"; and, that between 2020 to 2022, the plaintiff experienced significant business operation challenges due to the COVID-19 pandemic.

[21] The plaintiff points out that in various communications between counsel in 2021 about scheduling examinations for discovery, while dates were requested and supplied, the defendants' counsel never provided final confirmation of dates. In my view, had the plaintiff wished to proceed with prosecuting its Claim in 2021, the plaintiff could have, but failed to, set down the examinations for discovery on the dates that had been supplied. Further, the plaintiff could, but did not, follow up on the proposed dates, especially in circumstances when opposing counsel had been responsive to the plaintiff's requests. This is not a situation where the plaintiff was being stonewalled by the opposing counsel.

[22] The plaintiff's evidence is that Mr. Dunne understood Abtek would not agree to examinations for discovery proceeding unless the plaintiff provided additional documents. I do not read the communications from Abtek's counsel as taking such

a position. However, even if Abtek had taken that position, the plaintiff had the option of setting the examination for discovery in accordance with the *Rules*, but it did not do so.

[23] The plaintiff submits that it experienced difficulties prosecuting the Claim, for example, in locating and listing documents, due to events outside of its control. As mentioned, Mr. Dunne refers to several events in 2021 that prevented the plaintiff from advancing the Claim, such as his surgery and flooding at their residential property. Such issues may provide valid excuses for delay. However, the evidence is not particularly clear or compelling as to the precise time that health issues prevented the plaintiff's directors from turning their attention to prosecuting the Claim. Likewise, the evidence is not clear or compelling as to how a flood at the directors' residence actually affected the plaintiff's ability to prosecute the Claim.

[24] Taking the plaintiff's evidence at its highest and best, there appears to be excuses for some periods of delay in 2021 and 2022 for health and flood concerns as well as the impacts of the COVID-19 pandemic. However, there is no excuse for the otherwise nearly eight years of delay.

[25] In short, while there are some valid excuses offered for a limited period, they do not apply to the entire period of delay. A significant number of years of the delay have no excuse applicable.

[26] Having concluded that the two questions at the first stage of the analysis are answered in the affirmative, I must now consider the third and final question.

**iii. Is it in the interests of justice for the action to proceed?**

**a) *Factors relevant to interests of justice analysis***

[27] The defendant, HBC, has provided evidence about its efforts to locate witnesses to the events mentioned in the Claim, which date back to 2010 and 2011 and involve an alleged implied contract between the plaintiff and HBC. In my view, that evidence establishes that HBC is likely to suffer prejudice due to the fact that HBC's General Counsel tried, but was unable to locate a single employee who was

employed at the relevant time at the Granville Street retail outlet who remains an employee. The plaintiff submits that this evidence does not establish prejudice since HBC did not try to locate former employees.

[28] However, I note that the Claim contains no details, such as the names or titles of the HBC representatives that the plaintiff alleges entered into the implied verbal and/or written contract with the plaintiff. In my view, it is obviously prejudicial for HBC to now be in a position of potentially having to locate and contact an indeterminate number of former employees, from a period dating back more than a decade ago, to ask whether any of them were involved with the plaintiff or Abtek's work at the retail location. It seems obvious the cost and time required to undertake such efforts will only increase with the passage of time.

[29] Respecting Abtek's potential to suffer prejudice, the long lapse of time and the natural fading of memories, especially when an oral and/or written contract is alleged, is a factor to consider. In my view, the prejudice to the defendants, while not strictly required, does weigh in favour of granting the relief sought. Clearly the costs to the defendants will be increased by the need to look for witnesses.

[30] Respecting the factor of the length of the delay, this factor also weighs in favour of granting the dismissal of the Claim. The object of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits. A delay of ten, or even eight years, in prosecuting an action undermines each of those objectives. In my view, a delay of this length runs a real risk of bringing the administration of justice into disrepute. This factor militates in favour of granting the relief sought.

[31] The Claim remains at the early pretrial stage since no examinations for discovery have taken place. As this is not a situation where many pre-trial steps have been completed and, for example, the evidence has been fixed before the inordinate delay took place, I find this factor also militates in favour of granting the relief.

[32] Regarding the impact of the delay on the defendants' interests, the defendants concede that this factor is not engaged and it does not assist them.

[33] Regarding the context of the delay occurring, I do not find that the defendants, by providing dates for examination for discovery in 2021, induced the plaintiff to believe that the defendants had, or would excuse or accept the plaintiff's delays in prosecuting the Claim. Such would need to be clearly and unequivocally communicated and I find no such communication in the evidence of the parties' emails or telephone calls.

[34] The plaintiff submits that the fact there is a Counterclaim by Abtek that has not been advanced is additional context that militates against granting the relief sought. I agree that the Counterclaim ought to be considered in the analysis.

[35] In *Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd.*, 2012 BCCA 251 [*Murrin*], the court considered the impact of a counterclaim on an application seeking to dismiss a claim for want of prosecution. In that case, the claim for damages for breach of an oral construction contract was commenced in 2006, followed by a counterclaim by the defendant seeking set-off in 2007. In 2011, the defendant offered to settle and said it would seek dismissal for want of prosecution if the settlement was refused. The plaintiff made a counteroffer and filed a notice of intention to proceed.

[36] After the defendant in *Murrin* filed its application to dismiss for want of prosecution it advised the court that if successful it did not intend to proceed with the counterclaim. The application judge concluded that there was inordinate and unexplained delay but the interests of justice lay with permitting the action to proceed because the defendant had not prosecuted the counterclaim diligently.

[37] In my view, the facts in the present case are distinguishable from *Murrin*. HBC has no counterclaim, so the issue is irrelevant to the analysis as it relates to HBC. For Abtek, this is not a situation where Abtek proposed to proceed with the

Counterclaim or it was proposing to discontinue the Counterclaim as a “last minute makeweight to tip the balance” in its favour at the hearing.

[38] Here, Abtek’s notice of application actually seeks an order dismissing the Counterclaim if it is successful on the application. Justice Smith, writing for the majority, at para. 9, found that the application judge was not in error in giving dispositive weight to the defendant’s conditional abandonment of the counterclaim, especially when there was nothing in the record to commit the defendant to following through with its informal assurance.

[39] Obviously, given the application filed by Abtek in the present case, no such concern exists. Further, there has been no exchange of settlement offers carrying with them the possibility of implicit admissions recognized in *Murrin* that there was at least some merit to the Claim and Counterclaim. In my view, the existence of the Counterclaim and Abtek’s delay in prosecuting the Counterclaim in all of the circumstances does not militate in favour of dismissing Abtek’s application.

[40] The plaintiff has provided reasons for some of the period of delay. Even accepting those reasons, I find they fall well short of explaining the causes for the length of the delay when viewed holistically.

[41] No party alleges that counsel played a role in causing the delay. I do not find that counsel played a role in the delay and this factor does not militate for or against the relief sought.

[42] The Claim concerns a contractual claim between commercial entities who have been represented by counsel throughout. In my view, there is no issue of genuine public importance or public interest in having the Claim heard on its merits. This factor does not militate against granting the application.

[43] There is no suggestion that the Claim lacks merit or that it is bound to fail. This factor militates against granting the application.

[44] When I assess the interests of justice and take into account all relevant factors, including those described in *Giacomini*, and taking the plaintiff's evidence explaining the reasons for the delay at its highest and best, I find that the interests of justice weigh strongly in favour of dismissing the plaintiff's Claim.

**Disposition**

[43] The relief sought in Part 1 of the notice of application is granted. The plaintiff shall pay costs of the action to Abtek and HBC forthwith after assessment, unless the parties otherwise agree to costs.

"E. McDonald J."