Court of King's Bench of Alberta

Citation: Secan Association Inc. v Cannan, 2025 ABKB 38

Date: 20250123
Docket: 1403 16088
Registry: Edmonton

Between:

Secan Association Inc. and FP Genetics Inc.

Appellants

- and -

Randy Cannan, Cannan Farms Ltd., His Majesty the King in Right of Canada, Represented by the Minister of Agriculture & Agrifood Canada and University of Saskatchewan

Respondents

Reasons for Decision
of the
Honourable Justice Peter Michalyshyn

Introduction

[1] This is an appeal from the decision of an Applications Judge on a Rule 4.33 issue. For reasons which follow the appeal is granted.

Background

[2] The Plaintiffs' action commenced November 4, 2014. On December 6, 2018 the Defendants' officer was questioned. He gave numerous undertakings. He purported to answer those undertakings by March 1, 2019. The Plaintiffs objected to what they called the Defendants' inadequate undertaking responses, in particular #28. A series of letters followed, ending on August 12, 2020 (Plaintiffs) and September 28, 2020 (Defendants).

[3] Nothing then happened in the action until an application to compel undertakings. It was filed just shy of three years later, on February 28, 2023. The application was first returnable on March 3, 2023. It was adjourned to March 23, 2023. The adjournment to March 23, 2023 was to accommodate counsel for the Defendants. It also enabled the Defendants' officer to further engage by filing an affidavit in response. That affidavit, filed March 17, 2023, rebutted the suggestion there were outstanding undertakings.

[4] On March 23, 2023 a further adjournment *sine die* was agreed to, not because their party could not proceed – by all accounts they were ready – but to allow counsel to explore resolution. Those efforts failed.

[5] In due course the application to compel was rescheduled to June 21, 2023, then ultimately August 3, 2023. In the meantime, on April 6, 2023 the Defendants proposed that if the application to compel was going to proceed, then the action be moved to the judicial centre of Wetaskiwin. That proposal was not accepted.

[6] In the same April 6, 2023 proposal, evidently for the first time, counsel for the Defendants raised the spectre of a delay application.

[7] The Defendants filed their Rule 4.31/4.33 applications on or about June 16, 2023. Both the application to compel and the delay applications were ultimately heard on the August 3, 2023 date.

[8] On August 3, 2023 the Applications Judge gave reasons from the Bench immediately following the oral submissions of counsel. The Applications Judge addressed two aspects of Rule 4.33, about which more to follow. He did not address the Defendants' application under Rule 4.31. The Defendants have not cross-appealed the Applications Judge decision failing to deal with Rule 4.31. Accordingly, I decline to deal with any Rule 4.31 matters otherwise raised in the materials before me.

[9] With regard to Rule 4.33, the Applications Judge found that:

- first, as to Rule 4.33(2) the last "uncontroverted significant advance in the action" was the December 6, 2018 questioning of the Defendant, three years after which was December 6, 2021; the various letters and positions taken between the parties between then and the date of the February, 2023 application to compel undertakings did not meet the test of a significant advance in the action; and
- second, as to Rule 4.33(2)(b) the Applications Judge held that the undertakings application filed on February 28, 2023 "...does not have the quality of acting as participation or acquiescence for the purposes of 4.33(2)(b)".

Analysis

[10] The standard of review of the Application Judge's decision on this appeal is well established. The appeal is de novo and the standard of review is correctness (***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 12).

[11] Rule 4.33 provides as follows:

> **Dismissal for long delay**
>
> 4.33(1) In this rule,
>
> (a) "applicant" means a party to an action who makes an application to dismiss the action for delay as set out in this rule;
>
> (b) "respondent" means a party who has filed a commencement document;
>
> (c) "suspension period" means, in subrules (5) to (9), a period that ends on
>
> (i) a specific date, or
>
> (ii) the happening of a specific event.
>
> (2) If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless
>
> (a) the action has been stayed or adjourned by order, an order has been made under subrule (9) or the delay is provided for in a litigation plan under this Part, or
>
> (b) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

Rule 4.33(2) - delay within 3 years

[12] The first question on appeal is whether the Applications Judge was correct to find no significant advance in the action within three years of the December 6, 2018 questioning. Or even within three years of the provision of undertaking responses, on March 1, 2019. Even on the March 1, 2019 timing, the action reached its third anniversary on March 1, 2022.

[13] The Defendants argue persuasively that the Applications Judge was correct to find correspondence between solicitors coming after March 1, 2019 did not significantly advance the action. This is so however "functionally" one looks at the application of the law to the facts. No authority was argued before the Applications Judge or in the appeal from his decision that persuades me otherwise.

Rule 4.33(2)(b) – participation in the proceeding

[14] The second question in the appeal raises rule 4.33(2)(b).

[15] The Plaintiffs argue amongst other authorities Justice Lema's recent helpful decision in ***Western Industrial Services Ltd v Brennan***, 2024 ABKB 50.

[16] In ***Western Industrial*** Justice Lema canvasses the law around an "applicant's participation" that might trigger the rule and might then save the action. None of the canvassed

cases are quite like the case on appeal. They include cases, as noted by Justice Lema, "where defendants have actively participated in an action to an extent and degree that could lead a plaintiff to fairly assume that the defendant has waived the delay": ***Flock v Flock Estate***, 2017 ABCA 67, citing ***Krieter v Alberta***, 2014 ABQB 349 at para 50. In ***Krieter***, Master Hanebury (as she then was) articulated at para 63 a test that requires the court to take into account such factors as whether the parties' participation was minimal; did it do anything to advance the action; and, by its nature was it likely to make the plaintiff believe that the defendant was ignoring or acquiescing to the ticking clock?

[17] In ***Western Industrial*** Justice Lema made the additional important point that unlike the 'delay within three years' question raised by rule 4.33(2), "It is not necessary [under rule 43.33(2)(b)] that such participation represent a 'significant advance', only that the requirements of R. 4.33(2)(b) are met", citing ***CWC Well Services Corp v Option Industries Inc***, 2019 ABCA 331 which holds that participation by a defendant engaging rule 4.33(2)(b) must be such that it is "fair" for the plaintiff to assume waiver of the accumulated delay. In ***CWC*** the delay application was dismissed where out of court the delay applicant consented to a litigation plan that envisaged questioning which, despite multiple attendances of counsel, for various reasons did not actually proceed until the delay application was made.

[18] The undertakings application was "a proceeding". This is a circumstance distinct from those cases in which parties are exploring steps toward a JDR, case management or the like. Other things which have been called proceedings include an application for permission to appeal, ands a Notice to Admit.

> In the case now on appeal, an application was filed and appeared in court, twice, each time with the Defendants' counsel present and silent with regard to any delay concerns - concern for delay having been raised only after the March 23, 2023 adjournment, on April 6, 2023. Before then the Defendants' officer had engaged by swearing and having filed an affidavit relevant to the compelling undertakings litigation.

[19] In ***Western Industrial*** Justice Lema asks whether the delay applicants' conduct was equivocal – could its participation be reasonably read otherwise than to assume waiver of the accumulated delay?

[20] Whether that is so will often be determined by inference based on all of the circumstances. That is so in the case on appeal where there is no evidence of waiver being sought by the Plaintiffs. Here there is also no evidence of non-waiver being sought by the Defendants. To yet again paraphrase from ***Western Industrial***, at para 61:

> …would [it] be fair to conclude that, instead of using the accumulated delay as ammunition for a dismissal application, the defendant had effectively elected to engage or re-engage in the action when it had an opportunity to stop the action [?]

[21] Finally, Justice Lema refers to Justice Poelman's decision in ***Vasiljevic v Kotur***, 2023 ABKB 292, at para 70, in which filing amended pleadings "on compulsion by the plaintiff... could not have signalled a willingness to continue to participate in the action", and not did correspondence about arranging dates for questioning, with no dates agreed on.

[22] With these authorities now in mind, I note no further authorities being argued on behalf of the Defendants on the rule 4.33(2)(b) specifically. Still, it is the Defendants' position as stated

in their brief that the Defendants did not participate in the application for the purpose and to the extent that warrants the action continuing:

> "...the [Defendants'] only action was to seek to adjourn the hearing for availability of counsel, the filing of a replying affidavit, which demonstrates that no further answers can be provided, and filing the Application to dismiss after negotiations to end the action failed".

[23] Through counsel the Defendants argue that none of those actions warranted the action continuing.

[24] I am not persuaded by the Defendants' position, for the following reasons.

[25] But for the March 23, 2023 *sine die* adjournment which the Defendants through counsel agreed to, the application to compel would otherwise have proceeded. It would almost certainly have been decided against the Defendants. That conclusion flows from the affidavit then filed in support in which the Plaintiffs proved non-compliance with at least one undertaking coming out of the December 6, 2018 questioning. That was undertaking #28, in which the Defendants straightforwardly agreed to "contact AFSC and request copies of all records on the account, including those provided to crop insurance for 2012, 2013, and 2014". The answer, given on March 1, 2019, was that "These documents have previously been provided under undertaking #11 from the prior questioning". The Plaintiffs quite reasonably objected to the inadequacy of that response in that it failed to address whether the Defendant contacted AFSC as he undertook to do. Simply on that basis, without more the Plaintiffs' application in court on March 23, 2023 would likely have succeeded.

[26] Of course, following service of the application to compel there was more. It took the form of the Defendants officer's affidavit filed March 17, 2023. This was the same officer, Mr. Cannan, who coincidentally on March 1, 2019 had provided the above, very arguably inadequate response to Undertaking #28. And the same Mr. Cannan who, when challenged as to the inadequacy of his March 1, 2019 reply, responded through counsel on June 13, 2019 that he was too ill and in no condition "to divert his attention to this litigation". On the strength of that assertion, correspondingly counsel for the Defendants stated in the same June 13, 2019 correspondence that he was "unable to advise further on [the Plaintiffs'] request for further and better answers to undertakings".

[27] (I pause to note that in the June 13, 2019 letter Defendants' counsel indicated that "...we will advise you further when our client's health improves or fails further". There is nothing in record before me that any such advice was ever given, or that anyone treated it as an implied standstill agreement.)

[28] Fast forward to Mr. Cannan's March 17, 2023 affidavit more than four years later. Now for the first time the Defendants' officer adds to his original March 1, 2019 response to undertaking #28. He says that:

> "...in or about 2019, the representative of AFSC I spoke with was not aware if they still had records from 2012, 2013, and 2014, due to the age of the documents and the representative could not provide me with anyone who could assist to provide the documents. I have therefore exhausted all options to obtain any further documents that may have existed."

[29] Also not surprisingly, this answer – given for the first time more than 50 months after it was first requested on December 6, 2018 – was viewed as unsatisfactory by the Plaintiffs, who requested the Defendants officer's authorization to inquire directly with the record-holder. The Defendants have refused to provide that authorization.

[30] In my view the March 17, 2023 affidavit leads to the following conclusions.

[31] First, it is at least implicitly an admission that the March 1, 2019 undertaking response was clearly inadequate.

[32] Second, it is also itself a much fuller undertaking response and as such I find it is a significant advance in the action. I say this mindful of the legal test that undertaking responses that are perfunctory, or on which nothing hinges, will arguably not be a significant advance: ***Kahlon v Khalon***, 2021 ABQB 683.

[33] What of this undertaking response? On its face it is not a true 'there are no records' response. Rather, it is ambiguous and raises more questions than answers. The Plaintiffs, and indeed a chambers judge, might well question for example whether the Defendants' officer corresponded with AFSC or made only verbal contact; whether the unidentified person from AFSC was a proper person to be answering on behalf of the organization; what was meant by "not aware if they still had records"; what efforts were made to find the records in question; and on what basis was it stated by the unidentified AFSC representative that they "could not provide me with anyone who could assist to provide the documents".

[34] Again, unsurprisingly on being provided with the March 17, 2023 response the Plaintiffs requested an authorization to inquire directly of AFSC. The Defendants refused to do so.

[35] In all of the circumstances it cannot be said with any confidence that the undertaking response of March 17, 2023 was merely perfunctory, or one on which nothing hinged. It can be said with greater confidence that it was an ambiguous undertaking response that needed to be clarified, here by way of further litigation.

Conclusion

[36] The Defendants engaged fully in the proceeding being the application to compel before they raised the spectre of a delay application. Their engagement began with a request to adjourn the original March 3, 2023 application date, but for which the application would likely have been granted. Their engagement continued with Mr. Cannan's March 17, 2023 affidavit, and their consent to adjourn the March 23, 2023 date *sine die*. Together with my findings above regarding the inadequate March 17, 2023 undertaking response, the circumstances support the conclusion, to paraphrase rule 4.33(2)(b), that the Defendants participated in a proceeding for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

[37] For the reasons given and on the standard of review of correctness, I agree with the Plaintiff/Appellant that the Applications Judge was in error in striking the action. The appeal is granted. If the parties are unable to resolve the question of costs, I will accept written submissions of not more than three pages in length, within 60 days of these reasons.

Heard on the 30th day of July, 2024; further submissions August 2, 2024.
Dated at Edmonton, Alberta this 23rd day of January, 2025.

Peter Michalyshyn
J.C.K.B.A.

Appearances:

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for the Appellant

Conrad van Staden
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for the Respondent