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(Brandon Centre)
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2025 MBKB 7 (CanLII)

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

JANET ANN MAY PALAMAR	)	Furyal Sadiq
petitioner,	)	for the petitioner
	)	
- and-	)	
	)	
ROBERT JOHN PALAMAR	)	Premmal Patel-David
respondent.	)	for the respondent
	)	
	)	
	)	Judgment delivered:
	)	January 15, 2025

LEVEN J.

SUMMARY

[1] This case is yet another dispute about applying the "Drop-Dead Rule" (Rule 24.04 of the ***Court of King's Bench Rules,*** Man Reg 553/88 [the ***"Rules"***]), which requires courts to dismiss actions after a three-year period elapses with no significant advances in the litigation. Among other things, this case raises questions about the application of Rule 24.06 in the context of family litigation.

[2] The Petitioner will be referred to as the Wife, and the respondent will be referred to as the Husband.

[3] For reasons explained below, there was a three-year delay with no significant advances, and most aspects of the litigation must come to an end, but the parties are still allowed to apply for a divorce (a remedy that they both want), and both parties are free to litigate issues relating to a jointly-owned commercial building which currently has a lien registered against the Husband's interest. Also, potential child support arrears engage the best interest of the parties' children, so the parties may still litigate the matter of those potential arrears.

FACTS

[4] This is not intended to be a comprehensive recitation of all evidence and argument; it is a concise summary of certain important matters.

[5] The Wife filed her Petition on November 9, 2018. The Wife filed a notice of motion for substitutional service on March 5, 2019. On March 27, 2019, the Master issued an Order for substitutional service.

[6] The Husband filed his Answer on November 18, 2019. The parties had been living separate and apart for over a year, and both wanted a divorce. One of the issues in dispute was child support arrears.

[7] The Wife served the Husband with her affidavit of documents on January 13, 2022. She served him with Interrogatories on the same date. On April 4, 2022, he provided a without-prejudice draft of his Answers to

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Interrogatories. He made a without-prejudice settlement proposal on August 4, 2022 ("the August 4, 2022 Letter").

[8] On March 6, 2024, she filed a notice of motion to dismiss his Answer for delay under Rule 24.01 and/or Rule 24.02 (the Delay Motion). He filed an affidavit on March 19, 2024. She filed an affidavit on June 29, 2024. There was no cross-examination on affidavits.

[9] The parties' children are now adults, but the issue of potential child support arrears is still in dispute. Also, the parties are joint owners of a commercial property. A bank has a lien on the Husband's interest in the property. The Wife runs her business out of the property and wants to keep doing so. They both want to resolve this issue in some manner (i.e. neither wants them to remain joint owners forever).

The Associate Judge's hearing

[10] A hearing was held before the learned Associate Judge (AJ). The Wife argued that there had been no significant advances in the litigation between November 18, 2019 (the filing of the Answer) and March 6, 2024 (the Delay Motion). This was well over three years, so she argued that the court must dismiss the Answer under Rule 24.02 (the Drop-Dead Rule). In the alternative, she argued that the court should dismiss the Answer for inordinate and inexcusable delay under Rule 24.01 (the Ordinary Delay Rule). She also argued that the dismissal of the Answer for delay should serve as a defence to any subsequent action of the Husband.

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[11] The Husband argued that the August 4, 2022 Letter was a significant advance in the litigation (resetting the three-year clock). The Husband did not argue (even in the alternative) that the filing of the Wife's affidavit of documents on January 13, 2022 reset the three-year clock. The Husband did not argue (even in the alternative) that, if the court were to strike the Answer, it should also strike the Petition.

[12] Neither party addressed the reality that they both wanted a divorce and did not want any court order that would preclude them from getting a divorce. Nor did they address the reality that they were the joint owners of the commercial building and did not want to remain so for the rest of their lives. Recall that there was a bank lien against the Husband's interest in the building.

[13] As the Husband did not make an alternative argument that the AJ should dismiss both the Petition and the Answer, the Wife did not see the need to make any alternative arguments about what aspects of the litigation (e.g. potential child support arrears, divorce, the commercial building) should be allowed to continue.

[14] On September 18, 2024, the learned AJ issued his judgment, reported at 2024 MBKB 140. At paragraph 72, the learned AJ concluded "that the Wife has satisfactorily established, on a balance of probabilities, that the August 2022 Letter of the Husband does not represent a significant advance in these proceedings."

[15] At paragraph 74(e), the learned AJ adopted a "functional approach" and concluded that "the August 2022 Letter did not cause this litigation to move forward in a "meaningful" manner."

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[16] At paragraph 74(j), the learned AJ pointed that "no motion has been filed on behalf of the Husband to request that the Court consider if there was a significant advance of the Petition for Divorce filed by the Wife."

[17] At paragraph 75, the learned AJ ruled that "the Answer of the Husband shall be dismissed for delay in accordance with Rule 24.02(1). This pleading shall be immediately struck from the Court's file, and the Wife may proceed accordingly."

[18] In the alternative, at paragraphs 76 to 79, the learned AJ ruled that the Husband's delay was inordinate and inexcusable. Therefore, the Answer of the husband should also be dismissed for delay pursuant to Rule 24.01. That conclusion is repeated at paragraph 85.

[19] The learned AJ went on to consider Rule 24.06 (whether the dismissal of the Answer should be a defence to subsequent actions by the Husband). At paragraph 93, the learned AJ pointed out that "pursuant to its *parens patriae* authority, the Court always has jurisdiction to address the best interests of the children, including issues in connection with arrears in child support."

[20] Therefore, at paragraph 96, the learned AJ ruled that the "dismissal of the Answer for delay shall also serve as a defence to a subsequent action of the Husband, subject only to the Court's *parens patriae* authority to address any unresolved issues in relation to the parties' two children (such as child support)."

The appeal

[21] On October 3, 2024, the Husband appealed. The appeal hearing was held on October 31, 2024, continuing on December 4, 2024. The Husband raised a

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new legal issue in his Notice of Appeal. He argued that, if the Answer should be dismissed, the Petition should also be dismissed.

[22] The Husband's appeal brief did not address Rule 24.06. In particular, it did not comment on the fact that the Husband and the Wife both wanted a divorce. They obviously don't want any sort of ruling that would preclude them from getting a divorce. Similarly, the Husband's appeal brief did not address the commercial building. The parties are joint owners, and they do not wish to remain joint owners forever.

[23] I asked both counsel to make further submissions about Rule 24.06. For the Husband, it would be an alternative submission. I specially asked counsel to direct their minds to that fact that both parties want a divorce. I also asked counsel to direct their minds to the fact that the Wife is seeking child support arrears (dating back to the period where one child was under 18). For the Husband, these would be alternative submissions (his primary submission being that there are no child support arrears at all). Counsel made additional submissions in response to my requests.

[24] The Wife argued that the Husband should not be allowed to raise a new legal argument at the appeal stage. Both parties agreed that, no matter what Orders I might make, the parties should be allowed to get the divorce that they both want.

[25] Counsel for the Husband relied on the court's decision in ***Esler v Busch***, 2022 MBQB 171 ("***Esler***").

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[26] Counsel both made submissions about which party was most responsible for the three-year delay. The Wife felt that the Husband did not provide adequate financial disclosure. The Wife did not make a motion to compel further disclosure because of her limited means. The Husband felt that his disclosure was adequate under the circumstances. The Husband was self-represented on the date the Delay Motion was filed.

[27] The Husband argued that there are no child support arrears. Also, the children are now over 18, so there should be no further litigation about hypothetical child support arrears. The Husband also shared his opinions about the merits of the litigation, including his feelings about imputing income to the Wife and about the spousal support dispute.

[28] The parties submitted that decisions of Associate Judges may be appealed for errors of law and for palpable and overriding errors of fact.

[29] The Wife requested $1,500 costs in respect of the appeal. The Husband requested costs.

KING'S BENCH RULES

[30] Relevant Rules include:

> DEFINITIONS
>
> **1.03** In these rules, unless the context requires otherwise,
>
> …
>
> "**action**" means a civil proceeding, other than an application, that is commenced in the court by,
>
> (a) a statement of claim,

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(b) a counterclaim,

(c) a crossclaim,

(d) a third or subsequent party claim, or

(e) a petition

…

General principle

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

…

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.

…

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.

[underlining added]

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.

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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.

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.

Excluded time

24.02(2) A period of time, not exceeding one year, between service of a statement of claim and service of a statement of defence is not to be included when calculating time under subrule (1).

…

Procedural order if action not dismissed

24.04 If the court refuses to dismiss an action for delay under rule 24.01 or 24.02, it may still make any procedural order it considers appropriate in the circumstances.

Effect on crossclaim or third party claim

24.05 When an action against a defendant who has made a crossclaim or third party claim is dismissed for delay,

(a) the crossclaim or third party claim is deemed to be dismissed with costs; and

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(b) the defendant may recover those costs and the defendant's costs of the crossclaim or third party claim from the plaintiff.

Not a defence

24.06(1) The dismissal of an action for delay is not a defence to a subsequent action unless the order dismissing the action provides otherwise.

…

Application

24.07 Rules 24.01 to 24.06 apply, with necessary changes, to counterclaims, crossclaims and third party claim.

…

Purpose of family proceedings rules

70.02.1(1) The purpose of this Rule is to

(a) help parties resolve the legal issues in a family proceeding fairly and in a way that will

(i) take into account the impact that the conduct of the proceeding may have on a child, and

(ii) minimize conflict and promote cooperation between the parties; and

(b) secure the just, most expeditious and least expensive determination of every family proceeding on its merits.

[underlining added]

CASE LAW

[31] ***Esler*** was an appeal from a Master's decision. The parties had a "common law" relationship, so divorce was never an issue. There was a child support dispute. Both the Petition and the Answer mentioned that family property was in dispute (although both parties wanted an equal division of family property). The Answer said that spousal support was in dispute. Nothing happened for over three

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years. The Petitioner made a motion to dismiss the Answer. The Respondent made a motion to dismiss the Petitioner's Motion. The Master ruled that the Drop-Dead Rule and/or the Ordinary Delay Rule applied, and that the litigation could only continue in respect of the best interests of the child (under *parens patriae*) and family property. The Petitioner appealed. The Petitioner argued that the Answer should be dismissed or, in the alternative, both the Petition and the Answer should be dismissed. The court dismissed both the Petition and the Answer. Only litigation in respect of the best interests of the child (e.g. child support) could continue.

[32] ***The Workers Compensation Board v. Ali,*** 2020 MBCA 122 ("***Ali***"), dealt with the Ordinary Delay Rule. At paragraph 87, the court pointed out that the "time has come to stop paying lip service to the phrase 'justice delayed is justice denied'. Unreasonable delays in civil matters can no longer be tolerated for numerous reasons, but chiefly because they undermine access to justice."

[33] A leading Manitoba case was ***Buhr v. Buhr,*** 2021 MBCA 63 ("***Buhr***"). The unique issue in ***Buhr*** arose because, after a three-year gap in the litigation, the plaintiff took a significant step forward. Instead of immediately filing and serving a motion under the Drop-Dead Rule, the defendant's lawyer wrote to the plaintiff's lawyer, expressing surprise about the plaintiff's movement after a long delay, indicating his availability for a pre-trial conference in a specific month, and reserving his right to make any interlocutory motions that might be required. Three months later, the defendants filed their motion under the Drop-Dead Rule.

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The appeal court ruled that the motion should succeed. In short, plaintiffs cannot beat the Rule by taking a fresh step forward after the three-year gap but before defendants make their Drop-Dead Rule motion. Relying on Alberta case law, at paragraph 72, the court endorsed a "functional test" for this Rule. At paragraph 78, the court observed that "the functional test is a broad-based inquiry into whether an advance in an action 'moves the litigation forward in a meaningful way considering the nature, value, importance and quality of the action'." The court mentioned that "the rationale of the rule is to weed out inactive cases…"

[34] ***WRE Development Ltd. v. Lafarge Canada Inc***., 2022 MBCA 11 ("***WRE***"), was another leading Manitoba case about the Drop-Dead Rule. The court endorsed the "functional approach" mentioned in ***Buhr***. At paragraph 10, the court referred to the anti-delay philosophy in the new Rules as a "culture shift". At paragraph 18, the court observed that a "step by either party will be taken into account in deciding whether a thing has been done in three years to significantly advance the action…"

[35] In ***Ruchotzke v Ruchotzke***, 2022 MBQB 153 ("***Ruchotzke***"), the Respondent moved to dismiss the Petition, and then the Petitioner moved to dismiss both the Petition and the Answer. The court noted that it was bound by ***Buhr*** and ***WRE***. It dismissed both Petition and Answer. No submissions were made about Rule 24.06, so the court made no further rulings. At paragraphs 32 to 35, the court noted that the Drop-Dead Rule might have unfortunate consequences in some family litigation, for example, when the parties need a

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divorce, where the parties are joint owners of property, and/or where the parties are both shareholders in certain corporations.

[36] ***Papasotiriou-Lanteigne v. Tsitsos***, 2023 MBCA 66 ("***Papasotiriou-Lanteigne"***) was a recent decision by the Manitoba Court of Appeal about the Drop-Dead Rule and Rule 24.06(1) (dismissal under the Drop-Dead Rule is a not defence to future actions unless the court specifies otherwise). At paragraph 41, the court observed that the "era of civil claims being allowed to drone on interminably by the courts in sorry fashion is over." At paragraph 43, the court commented that "the values of timeliness and proportionality must be considered in the exercise of discretion under r 24.06(1)." At paragraph 45, the court pointed out that "fairness is about more than a plaintiff's interests no matter how serious the claim. A defendant is entitled to closure and should not be twice vexed by the same matter without a good reason….In most cases it will be contrary to the public interest for the same matter to be repeatedly litigated, even where the limitation period has not expired." At paragraph 70, the court ruled that the dismissal for delay in that case would be a defence to future actions.

[37] ***Duncan v. Magnusson***, 2023 MBKB 33 ("***Duncan"***) was a recent application of the Drop-Dead Rule in a family context. In ***Duncan***, the issue of divorce had been previously severed, and divorce had been granted. There was some family property in play (although the judgment did not spell out the details of the property issue). At paragraph 61, the court quoted from ***Papasotiriou-Lanteigne*** with approval. The Petitioner moved to dismiss the Answer under the

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Drop-Dead Rule. The court concluded that three years had gone by with no significant advances in the litigation, so it dismissed the Answer. However, concerned about the family property issue, the court ruled that the dismissal would be a defence to subsequent actions by the Respondent, except for a claim to an equal division of family property.

[38] In ***Broda v. Busby***, 2024 MBKB 39, the only live issue was spousal support. The Petitioner moved to dismiss the Answer under the Drop-Dead Rule. The Respondent did not argue (even in the alternative) that, if the Answer is dismissed, the Petition should also be dismissed. As the argument was never raised, the court did not mention it. The court dismissed the Answer and ruled that the dismissal would be a defence to subsequent actions. (No issues in respect of divorce or children were mentioned.) The litigation was later reopened (see 2024 MBKB 144) to allow the Public Guardian and Trustee to participate in the litigation.

[39] In ***Wozney v. Struth***, 2023 MBKB 167 ("***Wozney***"), the Respondent moved to dismiss the Petition for delay under the Drop-Dead Rule. The Petitioner did not move, even in the alternative, that if the Petition is dismissed, the Answer should also be dismissed. The court found that there had had been a three-year delay, so it ordered the Petition dismissed. At paragraph 25, the court added that the dismissal would be a defence to subsequent action except for the matter of a claim to an equal division of family property. Under the circumstances of ***Wozney***, there was a reason of substance to allow the family property matter to survive.

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[40] ***Blaze et al. v. Rooke et al.***, 2024 MBKB 119 ("***Blaze***") was a civil case involving the Drop-Dead Rule and the Ordinary Delay Rule. There were some unique, factual twists and turns, including a pretrial brief filed but not served, an assurance by counsel not to note default, and the premature filing (and subsequent adjournment) of the motion to dismiss for delay. The court dismissed both the Claim and the Counterclaim because of the two delay rules. The dismissal was a bar to further litigation. The court noted in *obiter* that there might be unique issues in family litigation, including the need to protect the best interests of children. The decision is currently under appeal.

[41] In ***Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.***, 2002 SCC 19 ("***Sylvan Lake***"), there was dispute about a contract. Some arguments about rectification of the contract were raised for the first time on appeal. At paragraph 33, the Supreme Court of Canada observed: "The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice." The court allowed the new arguments about rectification.

[42] In ***Guindon v. Canada***, 2015 SCC 41 ("***Guindon***"), a party wished to raise a constitutional argument on appeal. They had not served notices of constitutional question in the courts below. At paragraph 21, the Supreme Court of Canada pointed out: "The Court has many times affirmed that it may, in appropriate circumstances, allow parties to raise on appeal an argument, even a new constitutional argument, that was not raised, or was not properly raised in the

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courts below…The Court has even done so of its own motion…" At paragraph 22, the court cited ***Sylvan Lake*** with approval.

[43] Cases involving the Drop-Dead Rule in a family context are a small subset of similar cases in a civil context. Under the new family case flow model, there should never be delays of three years or more. This case and past cases like ***Esler***, are transitional cases begun before the new model came into effect. In the long run, these cases will end up having little precedential value.

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DECISION

New argument on appeal

[44] There is no polite way to say this, but the Husband's counsel should have argued at the AJ level (in the alternative) that, if there really was a three-year delay, both the Petition and the Answer should be dismissed because of the delay. She never made this alternative argument, so the learned AJ never dealt with it, and the Wife's counsel obviously did not make any submissions at the AJ level about what aspects of the litigation should be allowed to continue (e.g. divorce).

[45] The Husband has now raised this (alternative) argument on appeal. The case law (including ***Sylvan Lake*** and ***Guindon***) suggests that there are some situations in which parties can properly raise new legal arguments on appeal. (This is separate and distinct from the issue of asking leave to introduce new or fresh evidence on appeal).

[46] In this situation, it would be fair, reasonable and proportionate to allow the Husband to raise this new legal argument on appeal. Among other Rules, Rules 1.04(1), 2.01(1) and 70.02.1(1) point in this direction.

[47] Moreover, the new legal argument (essentially that, if an Answer is dismissed for violating the Drop-Dead Rule, the Petition should also be dismissed for violating the Drop-Dead Rule) is consistent with the philosophy underlying the Drop-Dead Rule. In ***WRE***, our Court of Appeal explained that the introduction of the Drop-Dead Rule represented a "culture shift". In ***Papasotiriou-Lanteigne***, the court observed that the "era of civil claims being allowed to drone on interminably by the courts in sorry fashion is over."

[48] Therefore, even though the Husband's alternative argument was not before the AJ, it is now properly before this court.

No significant advances

[49] The learned AJ was absolutely correct in his conclusion that there had been no significant advances in the litigation between November 18, 2019 (the filing of the Answer) and March 6, 2024 (the Delay Motion). There might be situations in which meaningful settlement negotiations do significantly advance ligation, thereby resetting the three-year clock. This was not one of those situations. The Husband made a settlement offer and the Wife never replied to it. There was no advance, let alone a significant advance.

[50] Although the parties never raised the issue, I have turned my mind to the question of whether the Wife's service of the affidavit of documents upon the

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Husband (on January 13, 2022) was a significant advance in the litigation. The answer is that I don't know. The affidavit of documents is not in evidence. I don't know if it listed one document or a thousand documents. I don't know if it included any documents that the Husband did not already possess. In the absence of any evidence, I cannot determine that the service of the affidavit of documents reset the three-year clock.

[51] In light of the above, the court has no discretion. It "must" dismiss the "action" under the Drop-Dead Rule.

[52] What is the "action"? Rule 1.03 says:

> "**action**" means a civil proceeding, other than an application, that is commenced in the court by,
>
> (a) a statement of claim,
>
> (b) a counterclaim,
>
> (c) a crossclaim,
>
> (d) a third or subsequent party claim, or
>
> (e) a petition…

[53] In ***Esler***, the court analyzed the nature of an Answer in family litigation. It is a bit like a statement of defence and a bit like a counterclaim. This might vary from case to case.

[54] In any event, the Drop-Dead Rule says that, after a three-year delay, the court must dismiss the "action". It does not say that a court must dismiss a statement of claim. It does not say that a court must dismiss a counterclaim. It

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does not say that a court must dismiss a Petition. It does not say that a court must dismiss an Answer. It says that a court must dismiss the "action".

[55] An "action" is not a statement of claim, or a counterclaim, or a Petition. It is a "proceeding commenced" by a statement of claim, a counterclaim, a Petition, etc.

[56] I note that, when the Rules want to refer to the striking of a "pleading", as opposed to an "action", they say so explicitly [e.g. Rule 20A(30)(b); Rule 25.11 Rule 50.09(1)(f)].

[57] In our case, there has been a three-year delay. The action must be dismissed. The action is the "proceeding commenced" by the Petition. It is a shame the Husband's counsel did not make this argument at the AJ level. She is making it now. It is the only argument consistent with the actual wording of the Drop-Dead Rule.

[58] It is not necessary for me to determine whether the Wife or the Husband was more morally to blame for the long delay. The fact is that the delay happened, and the court "must" dismiss the entire action. In short, the litigation ends. Except as noted below, the file is closed.

[59] I hasten to add that the learned AJ is not in any way to blame for the fact that the lawyers before him did not argue their cases as they probably should have. In the adversary system, decision-makers (whether they are administrative tribunals, associate judges or justices) rely on counsel to advance all appropriate arguments.

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[60] The fact remains that, through no fault of the learned AJ, an error of law has occurred. I now correct that error by dismissing the entire action.

[61] In the alternative, even if three years had not gone by with no significant advances, I would dismiss the action for inordinate and inexcusable delay under the Ordinary Delay Rule. In plain language, "inordinate and inexcusable" means "too long and for no good reason". The slow progress of the litigation took far too long and there was no good reason for the extremely slow pace. It was unreasonable.

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Defence to subsequent action

[62] Rule 24.06(1) says: "The dismissal of an action for delay is not a defence to a subsequent action unless the order dismissing the action provides otherwise." Our Court of Appeal has now explained (in ***Papasotiriou-Lanteigne***) that dismissal for delay will usually be a defence to subsequent actions. There might be a few exceptions.

[63] The court in ***Ruchotzke*** pointed out that the delay rules should not be used to force married couples to remain married forever. Obviously, couples who qualify for divorces (e.g. by living separate and apart for at least a year) should always have access to the mechanisms for obtaining divorces. If no other issues are in dispute, this can usually be achieved quickly through an "affidavit divorce".

[64] In several cases (e.g. ***Esler***), courts have commented that the best interests of children will be paramount to the philosophy underlying the delay

Rules. To be blunt, children should not be punished for the deficient litigation strategies of their parents.

[65] There is a potential dispute between the parties about child support arrears. I make no comment on the merits of that dispute.

[66] It is true that all children are now over 18. However, it is possible that some child support is still payable for periods before the youngest child turned 18. That potentially engages the best interests of children. If it were otherwise, parties might be encouraged to delay child support litigation until the youngest child turned 18, and then unfairly end the dispute with a delay motion.

[67] I encourage the parties to discuss the potential child support arrears, and try to settle their dispute. They might opt for private mediation-arbitration if they wish. In any event, the dismissal of the action for delay will not be defence to future litigation in respect of potential child support arrears.

[68] The court in ***Ruchotzke*** also pointed out that couples sometimes are joint owners of property. The delay rules should never force them to remain joint owners for the rest of their lives. The Wife and the Husband jointly own a commercial building. There is a bank lien against the Husband's interest. The Wife wants to keep running her business out of the building. Some resolution is obviously necessary. Ideally, it will be by agreement. If the parties cannot agree, they might opt for private mediation-arbitration. In any event, if all else fails, they should have access to the courts. The dismissal of the action for delay will not be defence to future litigation in respect of the commercial building.

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[69] The parties did not identify any other jointly owned property. The family home had once been jointly owned but, apparently, it no longer is.

[70] The parties did not make any submissions about any other issues that should be allowed to continue in the courts if the action is dismissed.

[71] It is not necessary to comment about any of the parties' submissions about the merits of their various disputes (e.g. imputation of income to the Wife).

Costs

[72] The Wife made a motion to dismiss the Answer for delay of more than three years under the Drop-Dead Rule and/or the ordinary Delay Rule. The Husband opposed the motion, arguing that three years had not elapsed. Both the learned AJ and I agree that more than three years elapsed. On that score, the Wife was successful.

[73] The Husband's belated argument that the Drop-Dead Rule serves to dismiss the "action" (not just the "Answer") was eventually successful. If he had made that argument (in the alternative) at the AJ level, perhaps an appeal hearing would not have been necessary.

[74] At the start of the appeal hearing, neither party had turned their minds to the question of precisely how Rule 24.06 should operate. This should have been an alternative submission by both parties. I had to direct both parties to think this through and to make submissions about it.

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[75] Examining the litigation as a whole, the conduct of the Husband has made the litigation longer and more complex. Among other things, I note that the Wife was successful in her 2019 motion for substitutional service.

[76] Considering all of the factors referred to in Rule 57.01(1), I award ordinary (tariff) costs of the entire litigation to date to the Wife.

[77] I thank counsel for their courtesy.

_____ J.

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