SUPREME COURT OF NOVA SCOTIA
Citation: Brogan v. RBC Dominion Securities Inc., 2009 NSSC 351

Date: 20091120
Docket: Syd. No. 28135
Registry: Halifax

Between:

Thomas Brogan, Romad Developments Ltd., Tom Brogan & Sons Construction Ltd., Derrick Kimball, Nash T. Brogan and Jocelyn Brogan

Plaintiffs

v.

RBC Dominion Securities Inc.

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	May 29, 2009, in Halifax, Nova Scotia
Final Written Submissions:	April 16, 2009
Counsel:	William P. Burchell, Esq. for the plaintiffs Alan V. Parish, Q.C. and Jason Cooke, Esq., for the defendant

By the Court:

[1] This is an application to dismiss a proceeding for want of prosecution pursuant to Rule 28.13 of the *Civil Procedure Rules (1972)*. The application will be determined in accordance with the 1972 Rules because it was filed before December 31, 2008.

Background

[2] The plaintiffs filed an Originating Notice and Statement of Claim on September 21, 2000, in which they claimed that the defendant RBC caused them to suffer losses on investments. Two of the plaintiffs, Derrick Kimball and Nash Brogan, are associated in the practice of law. Ms. Foshay Kimball is the spouse and law partner of Mr. Kimball. Each plaintiff had an investment account with RBC. They allege that RBC and its representative, Patrick O'Neill, counselled them to make investments in listed companies, particularly Golden Rule Resources Inc. and Hixon Gold Resources Inc, despite RBC's possession of information about the companies that was not communicated to the plaintiffs. According to the Statement of Claim, RBC "covered" the stock issues of the two companies. The plaintiffs allege that RBC guaranteed that the stock would appreciate.

[3] The plaintiffs say they dealt with Mr. O'Neill, who is no longer employed by RBC. They allege that he advised them, and in particular Mr. Brogan, to buy stock in the companies, and provided information about available gold was misleading. The plaintiffs say RBC is liable for any breach of duty by Mr. O'Neill.

[4] The plaintiffs also claim that, contrary to their instructions, RBC used their investment account balances to pay down loans and to meet other obligations. They also allege that some stock and security purchases were unauthorized. They say RBC failed to properly supervise Mr. O'Neill, and breached its duty of care and the applicable contracts. They claim damages for breach of fiduciary duty, breach of trust, breach of industry regulations and standards, breach of contract, negligence and professional malpractice.

[5] RBC denies responsibility for any loss or damage sustained by the plaintiffs. It denies any wrongdoing on its part or that of Mr. O'Neill. It denies the existence of a fiduciary relationship between itself (or Mr. O'Neill) and the plaintiffs. RBC also denies making promises or guarantees as to the future price of shares, and denies that the plaintiffs relied on such representations. It denies that Mr. O'Neill

engaged in unauthorized or discretionary trading in the plaintiffs' accounts, claiming that every purchase was approved or ratified, directly or indirectly, by Mr. Brogan. RBC denies that the purchases were inconsistent with the plaintiffs' investment objectives. It denies improper supervision of O'Neill. It had a compliance department, whose managers supervised him. RBC maintains that any decline in the value of the stock was directly attributable to the principals of the companies, who, it is alleged, withheld information, causing the price to fall.

[6] RBC counterclaims for contribution and indemnity from Mr. Brogan, alleging that, as representative of the plaintiffs, he authorized actions with respect to the accounts, and that RBC relied on his representations to that effect.

The course of the proceeding

[7] The Statement of Claim was issued on September 21, 2000. RBC served a Demand for Particulars pursuant to Rule 14.24 on October 10. The plaintiffs did not reply to the Demand for Particulars until December 2003. Mr. Parish, counsel for RBC, received the Reply in January 2004, some three years and three months

after the Demand was served. In the meantime, the plaintiffs filed Notices of Intention to Proceed on May 15, 2001 and September 8, 2003.

[8] After receiving the Reply to the Demand for Particulars, Mr. Parish indicated to Ms. Kimball on January 15, 2004, that he had believed that the claim was abandoned, in view of the time that had elapsed. He asked for time to review the file and determine whether the Reply was sufficient, and to file a Statement of Defence. On January 16 Ms. Kimball informed him that RBC could have 30 days to file a Defence. The plaintiffs filed a list of documents the same day. RBC filed a Defence, as well as a Counterclaim against Mr. Brogan, on February 17, 2004, which was forwarded to Ms. Kimball on March 3. A Defence to the Counterclaim was provided on March 17 and filed on March 22). In August 2004, she confirmed to Mr. Parish that the plaintiffs were proceeding with the claim.

[9] In a letter dated October 21, 2004, Mr. Parish questioned whether Ms. Kimball could represent the plaintiffs, in view of the relationships between the various plaintiffs and, in particular, the possibility that she might be required to undergo examination for discovery, and might have to testify at trial. Mr. Parish referred to paras. 14.5 and 14.17 of the *Legal Ethics and Professional Conduct*

handbook. He informed Ms. Kimball that if she did not withdraw, RBC would apply to have her removed as solicitor of record. Ms. Kimball agreed to seek alternate counsel, by letter of the same date. She repeated the request for the defendant to file a List of Documents.

[10] On August 29, 2005, Derrick Kimball notified Mr. Parish that the plaintiffs were retaining alternate counsel. He also requested a List of Documents, and asked for immediate notice if one could not be provided by the third week of September. Mr. Parish did not reply. On November 4, 2005, Mr. Kimball wrote again, indicating that the plaintiffs were considering an application to compel production of a List of Documents. In a letter dated November 7, Mr. Parish inquired whether Mr. Kimball would be acting for the plaintiffs, or whether there would be new counsel. He also stated that he was unavailable in the last week of November, but was otherwise available in December for the application.

[11] On February 28, 2006, Mr. Brogan, on behalf of the plaintiffs, filed an Application for production of RBC's List of Documents. On March 9, Mr. Parish wrote to Mr. Kimball, noting that Ms. Kimball remained solicitor of record and that Mr. Brogan was one of the plaintiffs. He said he intended to file a List of

Documents shortly, and that the application was not necessary. He also indicated that he was unwilling to accept documents signed by a lawyer who was a party. On March 10, Mr. Kimball indicated that the plaintiffs would retain an outside lawyer upon receipt of the List of Documents. On May 18 Mr. Kimball agreed that Mr. Parish would be allowed until June 2 to file the List of Documents. Mr. Parish filed the List of Documents on May 31. It was served on Mr. Kimball. Thereafter, it appears, the matter did not advance for over 20 months.

[12] On February 20, 2008, Mr. Kimball informed Mr. Parish that the plaintiffs had retained William P. Burchell, and that a Notice of Change of Solicitor would be filed, as well as a Notice of Intention to Proceed. He indicated that the plaintiffs wanted to move to the discovery stage. Mr. Burchell, on behalf of the plaintiffs, filed a Notice of Change of Solicitor and a Notice of Intention to Proceed on August 14, 2008. RBC made a without prejudice offer to settle on March 20, 2008. Mr. Parish says the offer was for a nominal amount.

[13] There is additional evidence respecting the plaintiffs' dealings with outside counsel. They say they retained Howard Crosby, Q.C., in 1988. There was an exchange of correspondence between Mr. Crosby and RBC, directed at locating

Mr. O'Neill and outlining the nature of the losses alleged. Mr. Crosby did not initiate legal proceedings, but remained involved on behalf of the plaintiffs until his death on December 12, 2003. The plaintiffs indicate that they subsequently retained counsel in Ontario in November 2004, but, because of the logistical difficulties in dealing with out-of-province counsel, they ultimately retained Mr. Burchell instead. While Mr. Parish was advised in October 2004 and August 2005 that the plaintiffs intended to retain new counsel, RBC's position is that it was not until February 2008 that the plaintiffs gave notice of the change of solicitor.

Issue

[14] RBC maintains that the Statement of Claim should be dismissed for want of prosecution, asserting that it has suffered significant prejudice due to delay, which will make it impossible to properly defend the claim should it proceed to trial.

Rule 28.13

[15] Rule 28.13 of the *Civil Procedure Rules (1972)* provides:

> Where a plaintiff does not set a proceeding down for trial, the defendant may set it down for trial, or apply to the court to dismiss the proceeding for want of prosecution and the court may order the proceeding to be dismissed or make such order as is just.

[16] The Nova Scotia Court of Appeal has repeatedly addressed the test on an application to dismiss a proceeding for want of prosecution, following the analysis set out in *Allen v. Sir Alfred McAlpine & Sons*, [1968] 1 All E.R. 543 (Eng. C.A.). In that case, Salmon L.J. said, at p. 561:

> A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
>
> > (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
> >
> > (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
> >
> > (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

[17] Salmon, L.J. added that if these three factors were established, “the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance.” If the plaintiff “is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault.” On the other hand, “[i]f the delay is entirely due to the negligence of the plaintiff's solicitor and the plaintiff himself is blameless, it might be unjust to deprive him of the chance of recovering the damages to which he could otherwise be entitled” (p. 561).

[18] Among the appeal decisions in this jurisdiction that have followed this general analysis are *Martell v. Robert McAlpine Ltd.* (1978), 25 N.S.R. (2d) 540, *Moir v. Landry* (1991), 104 N.S.R. (2d) 281, *Savoie v. Fagan* (1998), 165 N.S.R. (2d) 276, *Hurley v. Co-op General Insurance Co.* (1998), 169 N.S.R. (2d) 22 (C.A.) and *Clarke v. Sherman* (2002), 205 N.S.R. (2d) 112, 2002 NSCA 64, 2002 CarswellNS 219. Saunders, J.A., for the court, summarized the analysis as follows in *Clarke v. Sherman*, *supra*, at para. 8:

> Thus, to summarize, in order to succeed the onus is upon a defendant to show: first, that the plaintiff is to blame for inordinate delay; second, that the inordinate delay is inexcusable; and third, that the defendant is likely to be seriously prejudiced on account of the plaintiff's inordinate and inexcusable delay. If the defendant is successful in satisfying these three requirements, the court, before granting the application must, in exercising its discretion, go on to take into

> consideration the plaintiff's own position and strike a balance — in other words, do justice — between the parties.

[19] In *Moir, supra*, Hallett, J.A. referred (at para. 5) to *Heichert v. A.M. Kelly and Son Limited et al.* (1963), 37 D.L.R. (2d) 55 (Man. C.A.), where Guy, J.A., stated, at p. 60:

> A party who launches a *motion to dismiss an action completely so that it will never be heard on its merits*, must file an affidavit in support of his application. In my opinion, that affidavit should set out some specific facts which support the contention of the applicant, that unless the action is dismissed immediately the applicant will be prejudiced. It is not enough, I think, to rely upon the fact that all parties are prejudiced to some extent by the failure of memories of witnesses due to the effluxion of time. The applicant should prove his particular prejudice in a more positive way, if he is to justify an application for final judgment in his favour without hearing any of the evidence as to the merits of his case. [Emphasis by Guy J.A.]

[20] The onus is on the defendant/applicant, RBC to prove that the delay was inordinate and inexcusable, and caused it serious prejudice. If the plaintiffs do not raise some excuse or reasons for the delay, it will not be difficult to show that the delay was inexcusable. The more contentious point in this case is whether the delay attributable to the plaintiffs is sufficiently extreme to justify a presumption of prejudice accruing to RBC.

(1) inordinate delay

[21] Whether there has been inordinate delay must be examined on the facts of the case. In *Hurley, supra*, Flinn, J.A. held that the Chambers judge's finding that a delay of three years was inordinate was incorrect. He said, at para. 31:

> The appellant's action against the insurer was commenced in November 1994. Therefore, at the time the Chambers judge dismissed the action, for want of prosecution, three years had passed. Unless a proceeding is lying dormant, a period of three years, on its face, is not, in my view, an inordinate period of time in which to bring a matter to trial. The cases which the insurer's counsel has referred to the court - where a proceeding has been dismissed for want of prosecution because of inordinate delay - were all cases where the period of delay was considerably in excess of three years. In *Savoie v. Fagan, supra,* the circumstances of that case and the resulting ten (10) year delay, was found to have been inordinate. In *Martell v. Robert McAlpine Ltd., supra,* there was found to be inordinate delay because, in the words of Justice Cooper, "the action was allowed to sleep for seven years and no explanation for this delay was forthcoming except that it was lost sight of". In *Allen v. Sir Alfred McAlpine & Sons, supra,* the court reviewed and decided three separate appeals simultaneously. The first appeal involved an action where there had been a delay in excess of six years. The second appeal involved a claim which was precipitated by an injury suffered in the course of the plaintiff's employment. Nine years passed and little was done to advance the action. The third appeal involved delays amounting to three and a half years with little done to forward the claims and fourteen years passing since the time the cause of action arose. The first and third appeals were dismissed upholding the lower court's decision to dismiss the claims. The second appeal was allowed even in light of the delays because the court did not accept that the defendants had been prejudiced by the delays.

[22] On the other hand, in *Moir, supra*, a delay of three years was held to be inordinate and inexcusable although not sufficiently so to give rise to a presumption of prejudice (para. 10). The amount of time that passes between accrual of the cause of action and the commencement of the action will also have

an impact on whether the delay is classified as inordinate: *Anil Canada v. Industrial Estates Ltd.* (1986), 75 N.S.R. (2d) 181 (S.C.T.D.), at para. 4.

[23] RBC says the delay attributable to the plaintiffs is not only inordinate but constitutes "extreme delay," analogous to the delay in cases where a presumption of prejudice was applied against the plaintiffs. The Plaintiffs claim that given the chronology of events and actions by both sides, the delay is not inordinate. They cite *Buxton v. Sable Offshore Energy Inc.*, 2007 NSSC 105, for the principle that the behaviour of the defendant is relevant in determining whether the delay is inordinate. The original authority for that principle is *Canada (Attorney General) v. Foundation Co. of Canada* (1990), 99 N.S.R. (2d) 327 (S.C.A.D,), where there had been eight years without activity. In that case, Chipman, J.A. said, for the court, at para. 48:

> A plaintiff's conduct of the proceeding can and should also be judged to some degree in the context of that of the defendants. Acquiescence or waiver on the part of the defence are proper matters to be taken into account in determining the excusability of plaintiff's conduct.... There is no duty on a defendant to actually take positive steps to move the matter forward or to send out warnings and exhortations to the plaintiff to proceed. However, the presence or absence of these actions may be relevant in determining whether the defence acquiesced in the slow tempo of litigation.

[24] The plaintiffs submit that RBC waited until their counsel had been changed to bring this application, not having attempted to advance the matter prior to that.

RBC submits that *Buxton* is distinguishable on the facts and on the basis that the scope of the maximum possible limitation period has passed; in *Buxton*, where the delay was approximately eight years, the question was raised as to whether a plaintiff on such an application "should be in a worse position than an individual who had not commenced an action and who succeeded in extending the period of time in which a lawsuit could be pursued" (para. 27).

[25] The Plaintiffs claim that the delay is not inordinate because of the delay caused by the Defendants in not filing their list of documents and their acquiescence to the slow pace of litigation. In *Foundation Co. of Canada*, *supra*, acquiescence or waiver was considered under the heading of excusability, not inordinacy (para. 48). The actions of a defendant will also be important at the balancing stage of the test: *Clarke v. Sherman*, *supra*, at para. 36. I will consider the actions of the Defendant under the headings of inexcusable delay and balancing the positions of the parties.

[26] Even discounting the two years of delay between the filing of the Defence to the Counterclaim and the filing of the Defendant's List of Documents, at least five years of delay lie at the feet of the plaintiffs. This five-year period of dormancy,

combined with the overall 12-to-13-year delay since the accrual of the cause of action, is sufficient to establish inordinate delay. There has been inordinate delay. The activities forming the basis of the Statement of Claim are alleged to have occurred in 1996 and 1997. Between 1996 and 2003 the plaintiffs did not move the matter forward, with the exception of Mr. Crosby's inquiries as to Mr. O'Neill's whereabouts, and commencing the proceeding. At the end of 2003, they replied to the Demand for Particulars. This delay covers about seven years. There was further delay between the filing of RBC's List of Documents and correspondence from Mr. Kimball in 2008 indicating that Mr. Burchell would be representing the Plaintiffs. This period covers some 18 months.

[27] There was, of course, additional time where nothing happened on the file due to delay by RBC, a period of about two-and-a-half years. This accounts for the 11 years between the time the alleged activities occurred and this application. Even allowing for two-and-a-half years of delay attributable to RBC, this means the delay of attributable to the Plaintiffs was of some eight-and-a-half years, which I am satisfied is inordinate.

(ii) inexcusable delay

[28] RBC cites *Clarke*, *supra*, and submits that the court should infer that the delay is inexcusable unless the plaintiffs can demonstrate otherwise. *Savoie v. Fagan*, *supra*, suggests that consideration should be given to whether the parties are sophisticated (para. 27). The delay in *Clarke*, *supra,* was largely attributable to the plaintiff's solicitor and not to the plaintiff himself. As a result, the Court refused to dismiss the proceedings. In *Savoie*, *supra*, Bateman, J.A. held that the evidence did not adequately explain the delay. She said, at para. 21:

> ... In his affidavit filed on the application Mr. Savoie (who is a lawyer) recited several factors to which the Court was to infer that the delay was attributable: Mr. Garson chose not to continue with this claim while another lawyer, acting for Mr. Savoie, pursued an action resulting from a boating accident in which he was injured. That accident occurred in September of 1988 and was settled in June of 1991. In August and October of 1992 he was hospitalized for cardiac investigations. He does not say for how long. In addition, his brother had passed away (he does not say when) and he was having difficulty dealing with his death. After retaining Mr. Wagner and while sorting through the medical records of Dr. Stalker, Mr. Savoie was "faced with a lot of personal emotions arising from the notes concerning his past" He suffered further unspecified injuries in an accident in January of 1996 and underwent extensive medical treatment, requiring him to wear a shoulder harness for six weeks and attend physiotherapy. In December 1996, he fell down and injured his hand which required a cast. In January 1997, he fell on ice and re-injured his hand. That same month he required oral surgery to remove an infected tooth. There was a misunderstanding between him and Mr. Wagner about a draft settlement proposal prepared in March of 1997, as a result of which it was not forwarded to Mr. Miller. In March of 1997, he applied for employment with Mr. Miller's firm. Absent is any specific evidence detailing how the intervening injuries and other events impeded Mr. Savoie's progress with this file. Nowhere in his lengthy affidavit does he say that he was unable to instruct his solicitor to the extent necessary. At least part of the delay is attributable to a conscious decision not to pursue this action while working on settlement in relation to a subsequent accident. It is telling that when Mr. Miller, in his letter of August 29, 1994, asked for an explanation of the delay, Mr. Wagner responded only that it was due to the inaction of Mr. Savoie's previous solicitor. He did not attribute it to any inability on Mr. Savoie's part to advance this lawsuit.

[29] Two of the plaintiffs, Mr. Brogan and Mr. Kimball, are experienced members of the bar; as such, the RBC submits, the delay cannot be excused on account of lack of knowledge of court procedure or of the legal consequences of delay. RBC also points to para. 17 of the Statement of Claim, where the plaintiffs state that Mr. Brogan "acted as the contact person for all plaintiffs in dealing with Patrick O'Neill and RBC Dominion."

[30] The plaintiffs submit that their delay was caused in part by the death of Howard Crosby, who had originally advanced the claim, and the difficulty in locating competent counsel to advance the claim after his death. They retained counsel in Ontario between November 2004 and November 2007. It is submitted that one difficulty was the inability to provide counsel with RBC's list of documents, which was not produced until May 2006. After this, time was required for counsel to review the documents. RBC maintains that Mr. Crosby's death had no impact on the litigation, noting that as of September 2000, Ms. Kimball was the plaintiffs' solicitor of record. It also says there were Nova Scotia counsel who could have taken the case (see the affidavit of Jason Cooke, dated Jan 29, 2009). RBC also argues that given interprovincial mobility for lawyers, and the available

technology, the arguments with respect to the difficulty in working with Ontario counsel are unconvincing.

[31] RBC says the delay in filing its List of Documents – spanning August 2004 until May 2006 – is explicable for several reasons: difficulty in determining relevance; the quantity of documents to review; the need to review documents carefully to identify confidential information on non-party investors; and the time required to review some 20 communications for privilege.

[32] The plaintiffs submit that RBC could have compelled Mr. O'Neill to attend examination, while they could not, because they did not have his contact information. RBC sayss the plaintiffs never asked for those particulars.

[33] The Plaintiffs provide a number of reasons for finding the delay excusable. They submit that RBC, as defendant, was responsible for a considerable period of delay, and that RBC acquiesced to a slow tempo of litigation. In *Foundation Co.*, *supra*, Chipman, J.A., as noted above, held that "[t]here is no duty on a defendant to actually take positive steps to move the matter forward or to send out warnings and exhortations to the plaintiff to proceed. However, the presence or absence of

these actions may be relevant in determining whether the defence acquiesced in the slow tempo of litigation." *Foundation Co.* concerned a construction claim in which the extent of damages would not be known until five years' restoration work was complete. Chipman, J.A. found that there was an understanding that the matter would not proceed until that time. This understanding was held to be a form of acquiescence and the matter was allowed to proceed to trial.

[34] On the question of a plaintiff's reliance on a defendant's representations that a matter would proceed to trial, *Roebuck v. Mungovin*, [1994] 2 A.C. 224 (H.L.) provides some guidance. The cause of action related to a car accident in 1984. The writ and statement of claim were issued in 1986, followed by nearly four years of inordinate and inexcusable delay. In 1990, the defendant, upon receiving some particulars, pursued discovery examinations and a statement of damages, with numerous communications to the plaintiff's lawyers. The Court of Appeal held that the letters sent by the defendant's solicitors in 1990 amounted to a representation that the matter would proceed to trial. Lord Browne-Wilkinson said, at p. 236:

> Where a plaintiff has been guilty of inordinate and inexcusable delay which has prejudiced the defendant, subsequent conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order. Such

> conduct of the defendant is, of course, a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case. At one extreme, there will be cases like the present where the defendant's actions are minor (as compared with the inordinate delay by the plaintiff) and cannot have lulled the plaintiff into any major additional expenditure; in such a case a judge exercising his discretion will be likely to attach only slight weight to the defendant's actions. At the other extreme one can conceive of a case where, the plaintiff having been guilty of inordinate delay, the defendant has for years thereafter continued with the action thereby leading the plaintiff to incur substantial legal costs; in such a case the judge may attach considerable weight to the defendant's activities. But it is for the judge in each case in exercising his discretion to decide what weight to attach in all the circumstances of the case to the defendant's actions and I trust that in the future there will be few occasions on which the Court of Appeal will be invited to review his decision on the point.

[35] In the case at bar, there are a number of factors to note. First, RBC was in contact with Mr. O'Neill as early as October, 2000, and could have compelled him to attend discovery, but did not do so. Second, RBC delayed for slightly less than two years before filing a List of Documents. Third, RBC requested a change of counsel by the plaintiffs in 2004, and later took the position that documents would not be accepted until this was done. Fourth, on March 20, 2008, RBC made a without prejudice offer to settle. (RBC submits that the offer was for a nominal amount, thus distinguishing it from the without prejudice offers from *Clarke*, *supra*, where a "substantial offer" was made.)

[36] The backdrop to these events is that the plaintiffs delayed for three years in responding to the Demand for Particulars. It is RBC's position that it believed the matter would not be pursued, and that the delay in filing a List of Documents was the result of this assumption. The limitation period had not expired, however, and RBC did not take steps to ascertain the plaintiffs' position. Furthermore, the affidavit of Mr. Parish indicates that contact had been made with Mr. O'Neill, and that RBC did not disclose this information to the plaintiffs or actively take steps to compel examination of Mr. O'Neill.

[37] There is also the question of whether RBC was responsible for the period of delay before filing its List of Documents, between August 2004 and May 30, 2006. Mr. Parrish's affidavit indicates that RBC was hesitant to proceed while Ms. Kimball was solicitor of record for the plaintiffs. RBC also submits that the assembly of documents was extensive and was hampered by the plaintiffs' delay in responding to the Demand for Particulars. Accepting that there were many documents to be reviewed for relevance and privilege, it is not clear how the passage of time made their collection more difficult. The process of locating and collecting documents could have begun as early as 2000.

[38] The record suggests that RBC's concern about Ms. Kimball remaining solicitor of record after the death of Mr. Crosby was not unfounded, as there was a potential for a conflict of interest where she was a plaintiff herself. On the other hand, the request for a change of counsel may be taken as an indication by RBC of willingness to proceed once new counsel was retained.

[39] Even if the Court accepts that RBC's actions constitute waiver or estoppel, there is further delay attributable to the plaintiffs after RBC filed its List of Documents. Between May 30, 2006, and February 20, 2008, there was no action on the file. In February 2008 the plaintiffs informed RBC of the change of counsel and gave notice that they were prepared to proceed to discovery. On March 20, 2008, RBC made the without prejudice offer. It would be hard to characterize the offer to settle as a representation of the sort contemplated by *Roebuck*, *supra*. There is no evidence that the plaintiffs relied upon it or incurred any costs as a result of it. The request for a change of solicitor, however, may be characterized as a representation of willingness to proceed. If the delay between May 2006 and February 2008 is inordinate and inexcusable, then, *per Roebuck*, the question of prejudice to RBC must be considered.

[40] The plaintiffs say they retained counsel in Ontario, and that it was logistically difficult to move the matter forward from there. Their evidence does not disclose direct evidence of this retainer. Although Ontario counsel may have been retained between 2004 and 2007, all of the correspondence from the plaintiffs, including requests for a List of Documents, were sent from the Kimball Brogan law firm. Ms. Kimball was sending correspondence as early as May 15, 2001. This also suggests that Mr. Crosby was less actively involved in the file than the Plaintiffs suggest.

[41] If it is accepted that Mr. Crosby's death caused some difficulty in moving the matter forward, it should be remembered that most of the plaintiffs are lawyers, a factor militating in favour of the defendant (even in the case of hardship) in, for instance, *Savoie*, *supra*. While the death of Mr. Crosby certainly caused some difficulty, it does not furnish an excuse for the delay. As for the inability to find local counsel, the plaintiffs do not provide evidence of attempts to retain Nova Scotia counsel.

[42] I am satisfied that the parties shared responsibility for the delay. While the plaintiff's delay, viewed in isolation, can be described as inexcusable, RBC's own contribution to the reasons for delay was not irrelevant.

(iii) serious prejudice

[43] RBC submits that the delay in this case gives rise to a presumption of prejudice which the plaintiffs must rebut. Beyond the presumption of prejudice, RBC argues that the core of the case is oral communications between Patrick O'Neill and the Plaintiffs. Where no discoveries have taken place, Mr. O'Neill no longer works for RBC and more than twelve years have intervened between the events and the trial, RBC argues that witness recall will be impaired.

[44] The affidavit of Mr. Parish of October 27, 2008, addresses attempts to communicate with Mr. O'Neill (see paras. 6, 9, 11, 22-23). Mr. Parrish unsuccessfully requested interviews with Mr. O'Neill in October 2000 and in October 2004. The unavailability of this witness is one of the sources of prejudice asserted by RBC. RBC points to specific items from the Statement of Claim that will allegedly hinge on recollections of oral communications.

[45] The plaintiffs submit that there is no prejudice to RBC. They say the documents are intact and have not been destroyed or lost because of the delay. Furthermore, RBC has been in contact with Mr. O'Neill on two occasions and could have filed a Notice of Examination. As the plaintiffs did not have Mr. O'Neill's contact information, it is argued that they could not have done the same.

[46] Several Nova Scotia cases have dealt with the question of presumed prejudice. In *Martell*, *supra*, the cause of action arose from alleged damage to a home caused by construction blasting in 1967. The action was commenced, and after some activity between 1968 and 1970, nothing occurred for seven years. By the time of the application, about ten years had elapsed since the cause of action arose. MacKeigan, C.J.N.S. held that, given the length of time, the burden was on the plaintiff to establish that the defendant had not been seriously prejudiced by witnesses becoming unavailable, their recollections being affected or documents being lost. In separate reasons, Cooper, J.A. stated that the seven-year delay raised a presumption of prejudice, requiring the plaintiff to give a satisfactory explanation. The Court ruled that the plaintiff could not establish that the defendant would not suffer prejudice as a result of the long delay. The plaintiff

had not provided any evidence that key witnesses could be produced or that important records were still available.

[47] In *Anil Canada, supra,* Nathanson, J. applied a presumption of prejudice against the plaintiffs where the defendants had not provided proof of prejudice. The factors favouring the presumption were that one corporate defendants had ceased to exist, witnesses and defendants had retired, changed jobs or moved, and 9 to 13 years had passed since the events complained of.

[48] In *Saulnier v. Dartmouth Fuels Ltd.* (1991), 106 N.S.R. (2d) 425 (N.S.C.A.), Chipman, J.A. said, at para. 24:

> All that can be said generally about onus is that while the onus is initially upon the defendant as applicant to show prejudice, there may be cases where the delay is so inordinate as to give rise in the circumstances to an inference of prejudice that falls upon the plaintiff to displace. The strength of the inference to be derived from any given period of delay will depend upon all the circumstances in the case. A review of the record and the positions advanced by the parties in this case leads to the conclusion that the inference of prejudice is dubious.

[49] In *Saulnier*, the total delay was six years, but there had been complete inaction for four years after settlement negotiations. One factor mitigating the hardship to the defendant was that the claim was one for fire damage, and there had

been a detailed investigation by the insurer (paragraph 25). Although the delay was inordinate and inexcusable, no presumption of prejudice was applied.

[50] Although *Martell, supra*, is frequently cited as a basis for the proposition that a presumption of prejudice arises if there is a lengthy delay without activity, in *Moir v. Landry, supra,* Hallett, J.A. took the view that the applicant in *Martell* had established prejudice by evidence. He said, at para. 8:

> The comments of Chief Justice MacKeigan and Cooper, J.A., in the *Martell* case that indicate there is an onus on the plaintiff to satisfy the Court that the defendant has not been seriously prejudiced by the delay must be read in the context of that case, recognizing that in the *Martell* case there had been a delay of ten years and in that case the defendant's counsel had signed an affidavit that in his belief memories of witnesses had been impaired and that many records would no longer be available. It is only in cases of extremely lengthy delay, such as the ten years in the *Martell* case, that the concept of a presumed prejudice [would] be considered.

[51] Hallett, J.A. stated that "as a *general rule* the defendant to succeed on an application for dismissal for want of prosecution must not only show inexcusable and inordinate delay but show that such delay has caused serious prejudice to the defendant's right to a fair trial" (para. 10; emphasis by Hallett, J.A.).

[52] In *Savoie v. Fagan, supra,* after a motor vehicle accident, the plaintiff commenced actions in New Brunswick in September 1987 and in Nova Scotia in

May 1988. He underwent an independent medical examination in April 1988. The defendants filed a defence to the Nova Scotia action in June 1989. Dealing with the application to dismiss, Bateman, J.A., for the court, said, at paras. 4-8:

> Appellants' counsel, Mr. Miller, had been provided with medical reports generated in the late summer and early fall of 1987. On September, 12, 1989, appellants' counsel wrote to Mr. Garson [plaintiff's counsel] asking for any additional medical reports and copies of Mr. Savoie's law school file. He received no response. There was no further action until January 11, 1994, when the Prothonotary gave notice of intention to dismiss the action pursuant to Civil Procedure Rule 28.11, the case having been on the General List for more than three years. The notice called for an answer within 60 days to forestall dismissal of the action. On March 4, 1994, by letter, Mr. Garson, advised that his client intended to continue with the action.
>
> The request for medical records and additional information in Mr. Miller's letter of September 12, 1989, remained unanswered. On June 28, 1994, Raymond Wagner, Mr. Savoie's current counsel, advised that he was assuming conduct of the action. On July 18, 1994, counsel for the appellants acknowledged receipt of Mr. Wagner's letter and noted the years of inaction on the file. In reply, on July 29, 1994, Mr. Wagner advised that he intended to proceed with the matter and was gathering medical records which he would provide as soon as available. Hearing nothing, Mr. Miller again wrote to Mr. Wagner on August 29, 1994. He asked for an explanation for the prolonged delay in advancing the action. On September 19, 1994, Mr. Wagner advised that he had received several medical documents that he would provide after review. On the matter of delay, he responded that Mr. Savoie was of the view that his previous solicitor had not moved the matter forward efficiently.
>
> No further material being forthcoming, Mr. Miller again wrote Mr. Wagner on March 21, 1995, noting that the eighth anniversary of the accident was approaching and absent some action on the file he anticipated instructions to apply for dismissal for want of prosecution.
>
> Mr. Wagner replied indicating that he anticipated receipt of requested medical information shortly and intended to expeditiously pursue the matter. On August 16, 1995, Mr. Miller again wrote to Mr. Wagner. Receiving no response, Mr. Miller followed up with letters dated October 11, 1995 and December 8, 1995. On December 19, 1996, Mr. Wagner advised that he would forward a volume of documents and a settlement proposal in January of 1997. Such was not forthcoming.

[53] The defendants applied for dismissal for want of prosecution in July 1997. The Chambers judge dismissed the application. On appeal, Bateman, J.A. held that the ten-year delay "was of sufficient length to give rise to a presumption of prejudice" to the defendants/respondents (para. 20). She held that the plaintiff/respondent's statement in his affidavit that "he does not believe that the appellants will be seriously prejudiced, that he has excellent recall of the events surrounding the accident and that he knows of no eroded memories in other witnesses" was "not sufficient to rebut the presumption of prejudice, bearing in mind the comments of McKeigan, J.A. in *Martell*..." (para. 23). She continued:

> The impact of delay can vary depending upon the nature of the case. In this regard, the comments of Macdonald, J.A. from *Martell*, *supra* are instructive. Although in dissent on the result, he said at p.554:
>
> > In cases such as those arising out of motor vehicle accidents one can readily appreciate how a delay of several years or longer can so affect the memory of witnesses as to what they saw and observed as to make it practically impossible for a defendant to then properly prepare and present his case.

[54] Bateman, J.A. held that the appellants had established prejudice, and set out the details:

> It is the appellants' submission that not only did the respondent fail to offer evidence sufficient to rebut the presumption of prejudice arising from the delay, but that the appellants had shown actual prejudice. I agree. In particular the appellants say:

> (i) The respondent failed to respond to a request in 1989 that the respondent provide his law school records. (The respondent had commenced attendance at Dalhousie Law School in 1983 and took a leave of absence in 1986, graduating in 1990.) Those records are no longer available.
>
> (ii) In 1994 the respondent was asked to produce copies of income tax records, in relation to any loss of income claim. The respondent is now not certain what, if any, records are available for the pre-1991 period.
>
> (iii) In August of 1994 the appellants requested all relevant medical reports and records relating to Mr. Savoie to that date. They were not produced. In particular the running chart notes of the doctor who treated him immediately after the accident have not been produced and the respondent does not know if they are available.
>
> (iv) The respondent does not know where the physiotherapist with whom he had extensive therapy after the accident is today.
>
> (v) The respondent has suffered a series of accidents since the motor vehicle accident in 1987 - in particular, a boating accident in September of 1988, a fall in April of 1995, a fall down stairs in December of 1996, a serious car accident in January 1996 resulting in a closed head injury and a fall on ice in January of 1997. The relationship of these accidents to the respondent's current state of health will be difficult to determine. Sorting out the complexities of the respondent's medical situation will be difficult as the appellants have not conducted further independent medical examinations after these events.
>
> (vi) While the respondent professed excellent recall of the events leading up to the accident, on cross-examination at the application counsel for the appellants established that he is reported to have given substantially different estimates (to various medical professionals) of the speed at which the vehicle was traveling and the location in which the vehicle came to rest. The speed of the vehicle is particularly material on liability.

[55] Based on these submissions, “the appellant had established that, should the action continue, there would be actual prejudice on both the question of liability and damages” (para. 26). The result of proceeding would be a patent injustice. Bateman, J.A. said, at paras. 27-28:

> In my view, a patent injustice would result if the action were permitted to proceed. I make this determination taking into account the prejudice presumed to result from this inordinately lengthy delay; the fact that the delay was not adequately explained; the fact that the respondent is not an unsophisticated plaintiff, being both a lawyer and involved in other personal injury actions at the relevant time; that there is a serious issue of liability; that the respondent's professed excellent [recollection] of the events is suspect; that the appellants, although no onus lies upon them to do so, actively prompted the respondents to move the action along, and warned of this application some two years in advance.
>
> The words of Lord Diplock in *Allen v. Sir Alfred McAlpine & Sons Ltd.* (1967), [1968] 1 All E.R. 543 (Eng. C.A.) are apt. At p.553:
>
> > Moreover, where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. *There may come a time, however, when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible.* When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed. [Emphasis by Bateman J.A.]

[56] As such, the proceeding was dismissed.

[57] In *A.J.M. v. Children's Aid Society of Cape Breton*, 2006 NSCA 13, Hamilton, J.A. affirmed the chambers judge's decision to apply a presumption of prejudice where the delay was more than ten years. There had been no period of more than two years of consecutive delay.

[58] In this case, the delay between the filing of the Statement of Claim and the application to dismiss is about nine years. More than 12 years have passed since the relevant events took place. This length of time creates an argument for presuming prejudice, particularly if I accept RBC's view that the case revolves around evidence of oral communications between the Plaintiffs and Mr. O'Neill.

[59] On the other hand, it is imperative to consider the reasons for finding the delay to be inordinate and inexcusable, as this analysis will inform a decision on whether or not the delay is "extreme" in the circumstances.

[60] To presume prejudice to RBC puts a heavy burden on the plaintiffs. If RBC is responsible for a substantial part of the delay, or if some parts of the delay are excusable, it could be argued that this is not a case of extreme, inordinate and inexcusable delay, as contemplated by Hallett, J.A. in *Moir*, *supra*. For example, the fact that RBC could have discovered Mr. O'Neill earlier will weigh against a presumption.

[61] As articulated in *Clarke*, *supra*, there must be a causal connection between the delay and the prejudice, in particular, between the blameworthy conduct and

the prejudice (paragraph 23). The nature of the prejudice will depend in the facts. In *Clarke*, although some documents had been destroyed and medical experts had relocated, this did not prejudice the defendant such that it was not possible to have a fair trial. Also, liability was not a live issue and the majority of the evidence on damages was documentary evidence.

[62] Where liability is in dispute and the core of the case relates to oral communications between the parties, credibility will be a significant issue. In such cases, the longer the delay, the more serious the prejudice. Lord Diplock said in *Allen, supra*, at p. 553:

> Moreover, where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. There may come a time, however, when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

[63] In this case, there is a significant documentary record of the transactions between Mr. O'Neill and the Plaintiffs. RBC says many aspects of the claim relate

to communications and meetings between Mr. Kimball and Mr. O'Neill of which there is no record. Mr. Parrish does not aver in his affidavit that there is a loss of records or memory, but in argument submits that Mr. O'Neill would have lost much of his recollection of the events. Neither party has suggested that relevant documents are missing.

[64] RBC further submits that examinations for discovery have not been held, and the parties will thus not have the benefit of a discovery transcript recorded closer in time to when the events occurred. It was, however, within RBC's power to compel discoveries and mitigate the effects of the passage of time. It does not appear that the plaintiffs were aware until this application that RBC had been in contact with Mr. O'Neill, or that they knew of his whereabouts.

[65] *Moir v. Landry*, *supra,* indicates that the period of delay where presumed prejudice should be applied would be limited to cases where the delay was extremely lengthy, as in *Martell*, *Savoie* and *A.J.M.* On the basis of these cases, I am unwilling to make a presumption of prejudice in this case.

[66] Although it is the responsibility of the plaintiff to bring the matter on to trial and to conduct pretrial procedures with reasonable dispatch, I am satisfied that Mr. O'Neill's whereabouts were known to RBC, and I do not accept that RBC can rely on its own failure to take steps to secure Mr. O'Neill's evidence simply because it was not RBC's responsibility to advance the proceeding. Admittedly, Mr. O'Neill apparently did not wish to cooperate and was unwilling to provide a statement without being discovered. Faced with the position taken by Mr. O'Neill, RBC chose to wait and see whether the plaintiffs could secure his attendance at a discovery. RBC chose not to discover Mr. O'Neill or to obtain his evidence by means of interrogatories or other pretrial procedures. RBC was within its rights to proceed (or not to proceed) in this manner, but it cannot rely on the resulting lack of evidence as a basis upon which to find prejudice arising from delay.

[67] I have taken note of some Ontario caselaw that suggests that dismissal will not be granted where the defendant shares responsibility for the delay: see, for instance, *Hacquoil Construction Ltd. v. Uptown Motor Hotels Ltd.* (1976), 2 C.P.C. 73, 1976 CarswellOnt 329 (Ont. S.C. (H.C.J.)) and *Copenace v. Fort Frances Times Ltd.* (1991), 2 C.P.C. (3d) 64, 1991 CarswellOnt 374 (Ont. C.J. (Gen. Div.)). While these cases are not binding, and the Nova Scotia caselaw does not appear to

go this far, this reasoning is of some persuasive value in considering the significance of the defendant's own contribution to the delay.

[68] RBC has argued that the evidence on various specific issues will be lacking due to the deterioration of witness recall. I am not satisfied that the evidence can establish this. The evidentiary record is likely to be heavily documentary. This is not a situation like a motor vehicle accident, where the witnesses' recollections are crucial. In the circumstances, even if there is a possibility of *some* prejudice, I do not believe that the defendant has established that the delay caused it *serious* prejudice (my emphasis). I will nevertheless proceed to consider the balance between the parties' positions.

(iv) Balancing

[69] In addition to the three-step test outlined above, the court must step back and assess the positions of the parties keeping in mind the draconian nature of the dismissal remedy. In the words of Lord Salmon, in *Allen*, *supra*:

> If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his

> own fault. If, however, the delay is entirely due to the negligence of the plaintiff's solicitor and the plaintiff himself is blameless, it might be unjust to deprive him of the chance of recovering the damages to which he could otherwise be entitled.

[70] While RBC has not established all three elements of the basis test, I will nevertheless consider the additional balancing analysis, in the alternative. The plaintiffs urge the Court to consider that before the application to dismiss, RBC requested a change of solicitor by them, and consented to an order requiring its List of Documents to be filed. Furthermore, after RBC was advised that the Plaintiffs were prepared to proceed with discoveries, it made a without prejudice offer to settle.

[71] The conduct of these parties falls between the extremes outlined by Lord Salmon. While there is certainly a significant amount of delay attributable to the Plaintiffs, RBC was also responsible for some delay. It is likely that both parties will be prejudiced by the effects of the passage of time on witness recall. I note also that it is not suggested that witnesses' recall will not be assisted by the availability of the documents; it appears that the documents and the oral evidence will relate to the same general circumstances and events.

[72] In *Clarke*, *supra*, the Chambers decision was overturned on the ground that the issue balancing was not addressed. Saunders, J.A., for the Court of Appeal, reviewed the evidence before the Chambers judge "in order to assess Mr. Clarke's own conduct and strike a fair and just balance between the parties," and said, at para. 21:

> ... I cannot conclude that Mr. Clarke is personally to blame for the delay. Much of it can be explained from the fact that his first lawyer took a full two years to commence the action; he was then suspended from the practice of law; the action was initially misconceived in that the true defendants were not discovered; and that after 1996, once Judgment Recovery (N.S.) Ltd. and other counsel were engaged, the claim was not pursued as aggressively as one might have hoped. That said there can be no doubt that there ensued substantial, fairly regular and meaningful exchanges of information and documentation among the parties and their counsel in recent years. Importantly, this has included an exchange of lists of documents such as employment records, hospital documentation and physicians' files and reports. All parties have filed their pleadings. The parties have voluntarily participated in case management conferences, the first held by Davison, J. on June 29, 2000, and the second on March 1, 2001, at which time the parties agreed that discoveries of the named parties would be held by July 31, 2001. In fact, arrangements for discovery examinations of the parties and some of the plaintiff's experts were initially scheduled for July, 2001, in Ottawa and in London, Ontario. Despite these initiatives to move the litigation forward and some indications in 1999 by counsel for Raheem Ismaily that he anticipated making an application to strike on the basis of delay, it was only in July and August 2001 that the respondents applied to strike the plaintiff's claim for want of prosecution. Having regard to these circumstances and other similar features that are apparent from the record, I am of the opinion that it would be unjust to visit upon the appellant consequences that were not of his own making thereby depriving him of the chance to recover the damages for his injuries to which he would otherwise be entitled.

[73] The facts of this case are not as strong as those in *Clarke*: discoveries have not been conducted, the plaintiffs themselves are more likely to blame for the delay

and their loss is purely economic, while the plaintiff in *Clarke* was seriously injured. At the same time, RBC itself caused not inconsiderable periods of delay, and repeatedly conducted itself in such a way as to give the plaintiffs the impression that it intended to proceed. RBC attributes its own delay to the collection and preparation of documents; the three-year delay attributed to the plaintiffs in responding to the Demand for Particulars concerned the preparation of similar documentation. Moreover, the Demand for Particulars requested details of conversations with Mr. O'Neill that could have been explored through the discovery process.

[74] On balance, in view of the drastic nature of the dismissal remedy and the divided responsibility for the cumulative delay, I believe that the balance weighs in favour of preserving the proceeding.

Conclusion

[75] Although there has been inordinate and inexcusable delay, I am not prepared to hold that this is a case of such delay as to require a presumption of prejudice, nor can I find that RBC has demonstrated the existence of actual prejudice. In any

event, the balancing analysis would lead to the conclusion that the proceeding should be preserved.

[76] Accordingly, the application is dismissed. The parties shall bear their own costs.

J.