SUPREME COURT OF NOVA SCOTIA

Citation: *Young v. Merrill Lynch Canada Inc.*, 2013 NSSC 225

Date: 2013-07-11
Docket: Syd No. 238251
Registry: Sydney

Between:

Brian Young and Nancy Young

Plaintiffs

v.

Merrill Lynch Canada Inc., a body corporate

Defendant

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: June 10, 2013, in Sydney, Nova Scotia

Counsel: Blair Mitchell, for the Plaintiffs
William Ryan, Q.C., for the Defendant

By the Court:

[1] In 2005, the Plaintiffs Brian and Nancy Young commenced an action against Merrill Lynch Canada Inc., in relation to the management of funds invested by them. This Court is now being asked to dismiss the Plaintiffs' action due to a failure to advance the claim in a timely fashion.

[2] There are two motions before the Court, one brought by the Prothonotary pursuant to Rule 4.22 and one brought by the Defendant, pursuant to Rule 82.18. The Prothonotary did not actively participate in the proceeding, given that the Defendant filed its own subsequent motion. The Defendant filed an affidavit of Ms. Gia Ghassemi in support of its motion, with the Plaintiffs filing an affidavit of Mr. Young. Ms. Ghassemi was cross-examined at the request of the Plaintiffs. Further, the Defendant raised admissibility concerns with respect to several provisions contained in the Young affidavit.

Procedural Background

[3] Although specific aspects of the evidence will be referenced further herein, it is helpful at this early juncture to review the procedural history of the claim.

[4] On January 7, 2005, the Plaintiffs filed an Originating Notice and Statement of Claim, by their solicitor Mr. Kimball. Although the pleadings

indicate that they were customers of the Defendant from 1999, it would appear that the cause of action related to events which took place in 2001, and involving their advisor, Mr. Morrison.

[5] On March 3, 2005 the Defendant filed a Statement of Defence, by its current counsel, Mr. Ryan.

[6] The Plaintiffs filed a List of Documents on March 14, 2005, with the Defendant proceeding to also do so on March 22, 2005.

[7] A Notice of Intention to Proceed was filed by Mr. Kimball on April 3, 2008.

[8] On January 30, 2009, a Notice of New Counsel was filed by Mr. Dingwall, indicating he would be representing the Plaintiffs.

[9] An Appearance Day Notice was issued by the Prothonotary pursuant to Rule 4.22 on February 11, 2010.

[10] An Appearance Day Notice was issued by the Prothonotary pursuant to Rule 4.22 on March 1, 2013, directed to Mr. Dingwall and Mr. Ryan.

[11] On April 10, 2013, a Notice of New Counsel was filed by Mr. Mitchell, indicating he would be representing the Plaintiffs.

[12] On May 9, 2013, the Defendant filed a Notice of Motion seeking a dismissal of the action pursuant to Rule 82.18.

[13] Although the scheduling of discoveries had been a topic periodically discussed between the parties, none have yet been undertaken.

Issues for Determination

[14] As noted above, this matter is primarily a motion to dismiss pursuant to Rule 82.18. However, the Court will also be required to make a ruling with respect to the appropriateness of several provisions in the Young affidavit. Because the nature of the test for dismissal under Rule 82.18 may very well impact on the relevancy of some of the evidence being offered, the Court views it as being preferable to address the requirements for dismissal, then consider the affidavit evidence, and finally apply the admitted evidence accordingly.

[15] The issues for determination can therefore be articulated as follows:

a) What is the appropriate test for a dismissal under Rule 82.18?

b) Should provisions of the affidavit of Brian Young be struck?

c) Do the present circumstances warrant a dismissal of the Plaintiffs' claim?

Analysis

a) What is the appropriate test for a dismissal under Rule 82.18?

[16] Rule 82.18 provides:

> A judge may dismiss a proceeding that is not brought to trial or hearing in a reasonable time.

[17] The Defendant argues that the case law developed under the 1972 Civil Procedure Rules should have limited applicability to new Rule 82.18, as the test for dismissal is now arguably less stringent. It is submitted that the consideration of what is a "reasonable time" within that rule, must be informed and expanded upon by Rule 4.22. It is submitted that the 5 year time frame specified in that provision for a Prothonotary to make a motion for dismissal, is a strong indication of what time frame would be considered unreasonable for a motion brought under Rule 82.18.

[18] In his written submissions, Counsel for the Defendant argues:

> Under Rule 82.18, it is submitted that the threshold to be met by the moving party on a motion for dismissal for want of prosecution has been lowered. Rather than having to show inordinate and inexcusable delay with resulting prejudice, the moving party on a motion to dismiss for want of prosecution is simply required to satisfy the Court that the plaintiff has failed to bring her action forward to trial in a "reasonable time", a standard which is lower than the "inordinate delay" test applied under the old Rules and, in the Defendant's submission, better accords with the stated objective of the new Rules as set

> out in Rule 1.01, namely the "just, speedy, and inexpensive determination of every proceeding".

[19] With respect, I cannot agree with the Defendant's assertion that new Rule 82.18 should be interpreted as altering the test developed in case law considering the 1972 Rules relating to motions to dismiss for want of prosecution. Further, Rule 4.22 does not create a measure of "reasonableness" for the purposes of applying Rule 82.18, of 5 years.

[20] In my view, the provisions contained in the 1972 Rules do not materially differ from those in the current provisions. Former Rule 28.13, the predecessor to Rule 83.18, reads as follows:

> 28.13 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.

[21] The Defendant argues that Rule 4.22 must be read in conjunction with the current Rule 82.18, and as such, creates a new 5 year bench-mark for reasonableness. However, under the 1972 Rules, the prothonotary was also mandated to move for dismissal of lagging proceedings. That former provision, Rule 28.11 provided:

> 28.11 (1) Each prothonotary shall maintain a General List that lists proceedings in which the pleadings are closed and for which no date of trial has been fixed.
>
> (2) Where a proceeding has been on a General List for a period of **three (3) years**, the prothonotary shall give the parties notice in Form 28.11A that they have thirty (30) days to file a notice of intention to proceed.

> (3) Where the parties do not indicate their intention to proceed within the time set out in subsection 2, the prothonotary shall issue an order in Form 28.11C dismissing the proceeding. (Emphasis added)

[22] Like the current rule, the 1972 Rules also provided in Rule 1.03 as follows:

> 1.03 The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

[23] The case law which developed under the 1972 provisions clearly did not utilize the three year time frame contained in former Rule 28.11(3) as a benchmark for considering whether a particular time lag constituted an unreasonable delay. I cannot conclude that there was any intention to do so under the comparable provisions of the new Rules. Further, given that the time lag required to trigger prothonotary action has **increased** from 3 years under the 1972 Rules, to 5 years under current Rule 4.22, it is difficult to accept the Defendant's proposition that the drafters of the new Rules specifically intended that "the threshold to be met by the moving party on a motion for dismissal for want of prosecution has been lowered".

[24] In **Braithwaite v. Bacich**, 2011 NSSC 176, this Court opined that the jurisprudence developed under former Rule 28.13 had continuing applicability to motions brought pursuant to current Rule 82.18. Having been presented with no authorities to the contrary, and having rejected the Defendant's proposition as noted above, I reach the same conclusion herein.

[25] The considerations on a motion for dismissal for want of prosecution are summarized in **Braithwaite, supra**, as follows:

> 7 In my view, the factors to be considered in relation to such a motion, are well established, and not controversial. As stated by Hamilton, J.A. in *MacMillan v. Children's Aid Society of Cape Breton*, 2006 NSCA 13:
>
> > [5] The test for dismissal of an action for want of prosecution is well established. It is summarized in *Clarke v. Sherman et al.* (2002), 205 N.S.R. (2d) 112; 643 A.P.R. 112 (C.A.):
> >
> > > [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.
>
> 8 It is clear that in addressing such a motion, the Court must consider not only all three of the enunciated factors, but must also undertake a balancing of justice between the parties, most notably, considering the plaintiff's position (See *Brogan v. RBC Dominion Securities Inc.*, 2009 NSSC 351). It is equally clear that each case must be determined on the basis of its own particular circumstances.
>
> 9 The Defendants have asserted however, that in some circumstances, the third factor as outlined above, may be presumed, resulting in a plaintiff carrying the burden of establishing there has been no serious prejudice. This approach has clearly been adopted, in appropriate circumstances (see *Martell v. McAlpine Ltd.* (1978), 25 N.S.R. (2d) 540), and recently re-articulated by the Court of Appeal in *MacMillan, supra*, as follows:
>
> > [19] The case law indicates prejudice may be presumed in some circumstances. The judge referred to this case law and found that in the circumstances of this case they should presume serious prejudice rather than require the respondents to prove it:
> >
> > > [23] Mr. Justice Chipman of our Court of Appeal in *Saulnier v. Dartmouth Fuels Ltd.* (1991), 106 N.S.R. (2d) 425, ... confirmed the Cooper test in Martell on the question of onus at page 430 ... I quote:
> > >
> > > > 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.'
>
> [24] And finally in *Moir v. Landry* (1991), 104 N.S.R. (2d) 281 (N.S.C.A.), this was a case involving a three year delay. Mr. Justice Hallett, of the Court of Appeal, writing for the Court, noted that the onus to establish prejudice falls on the defendant except in cases of unusual long delay, such as the ten years in Martell. Justice Hallett said at page 284 in Moir v. Landry, supra ...:
>
> > A plaintiff has a right to a day in Court and should not lightly be deprived of that right. Therefore, it is only in extreme cases of inordinate and inexcusable delay that a Court should presume serious prejudice to the defendant in the absence of evidence to support such a finding.

[26] The Court will apply the above considerations to the evidence before it in this motion. At this juncture, the Court will turn to the Defendant's concerns relating to the affidavit sworn by Brian Young.

b) Should provisions of the affidavit of Brian Young be struck?

[27] Mr. Young's affidavit was sworn on June 1, 2013. It is comprised of 98 paragraphs and attaches 20 exhibits. The Defendant raises objections in relation to 48 paragraphs and an exhibit. Generally, the objections are raised alleging "the affidavit is rife with hearsay, irrelevant and privileged information."

[28] The parties hereto are in agreement as to the authorities the Court must and should consider in addressing the contents of the Young affidavit. Both parties acknowledge the applicability of Rules 39.02, 39.04, 22.15 as well as the oft-

quoted decision of Davison, J. in **Waverley (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)**, (1993) 123 N.S.R. (2d) 46.

[29] Rule 39.02 contains a directive that affidavits must include admissible evidence. It provides:

> 39.02(1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.
>
> (2) An affidavit that includes hearsay permitted under Rule 5.13 of Rule 5 - Application, Rule 22.15 of Rule 22 - General Provisions for Motions, another Rule, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.

[30] Rule 39.04 further provides:

> 39.04(1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> (a) information that is not admissible, such as an irrelevant statement or submission or plea;
>
> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[31] The rules of evidence applicable to motions are addressed in Rule 22.15. It provides:

> 22.15(1) The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.
>
> (2) Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:
>
> (a) an ex parte motion, if the judge permits;
>
> (b) a motion on which representations of fact, instead of affidavits, are permitted, if the hearsay is restricted to facts that cannot reasonably be contested;
>
> (c) a motion to determine a procedural right;
>
> (d) a motion for an order that affects only the interests of a party who is disentitled to notice or files only a demand of notice, if the judge or the prothonotary hearing the motion permits;
>
> (e) a motion on which a Rule or legislation allows hearsay.
>
> (3) A party presenting hearsay must establish the source, and the witness' belief, of the information.
>
> (4) A judge, prothonotary, commissioner, or referee may act on representations of fact that cannot reasonably be contested.

[32] **Waverley, supra**, continues to provide valuable direction regarding the appropriate content of affidavits. Davison, J. summarizes the fundamental principles as follows:

> 20 It would helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
>
> 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.

> 2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
>
> 3. Affidavits used in applications may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".
>
> 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.
>
> 5. The affidavit must state that the affiant believes the information received from the source.

[33] In its submissions, the Defendant helpfully categorized its admissibility objections based upon particular sections of the Young affidavit. The Plaintiffs structured their response in the same fashion, and the Court will do the same.

(a) Paragraphs 9 – 19

[34] The Defendant asserts:

> All of these paragraphs are irrelevant to the motion for dismissal by the Prothonotary and for want of prosecution by the Defendant. These are simply unsupported allegations against the Defendant which do not bear at all on this motion.

[35] The above referenced paragraphs fall under a heading entitled "Initial History" in the affidavit. These paragraphs purport to outline Mr. Young's evidence relating to his dissatisfaction with the manner in which his investments were being handled by Mr. Morrison, as well as his attempts, pre-writ, to seek redress regarding his complaints. This includes reference to a complaint made in February 2002, and the resulting internal investigation undertaken by the

Defendant over an 18 month period. As noted above, all of this occurred in the time-frame prior to the Plaintiffs filing their Originating Notice and Statement of Claim.

[36] The Plaintiffs assert that all of these passages are relevant as they relate to the elements of both "inexcusable delay" and "serious prejudice" which must be considered by the Court on a motion for dismissal under Rule 82.18.

[37] I agree with the Plaintiffs. The Court must turn its mind to whether the delay in advancing this claim was "inexcusable". The Plaintiff Young's affidavit explaining the various steps taken pre-writ is relevant to that determination. The Defendant argues that in considering the extent of the delay, that the Court should consider the time elapsed not just from the filing of the claim, but from the date the cause of action arose. In my view, the Defendant cannot assert that pre-writ delay "counts", without then affording the Plaintiffs the opportunity to present evidence as to why it was excusable.

[38] Further, those paragraphs referencing the Defendant's internal investigation over an 18 month period bears upon the determination as to whether the Defendant was seriously prejudiced by virtue of the delay. The Plaintiffs submit that early on, even before the filing of a claim, the Defendant had the opportunity to collect

documents and fully investigate based upon the Young complaint received. This is relevant to assessing the nature and degree of prejudice resulting from the delay.

(b) Paragraphs 20-29

[39] The Defendant asserts:

> These paragraphs allege that relevant documents have not been disclosed by Merrill Lynch. This is the first time that any such suggestion has been made. Certainly, the Plaintiffs have at no time brought a motion for production. These issues are irrelevant to this motion.

[40] Unlike the section of the affidavit previously referenced, the provisions contained in paragraphs 20 through 29 are less uniform in nature.

[41] Paragraph 20 asserts that based on information received from Counsel, the Defendant's list of documents does not appear to include any documentation in relation to the 18 month investigation. As this relates to the issue of "serious prejudice" this provision will remain.

[42] Paragraph 21 speculates as to why such materials may have been excluded from the Defendant's list of documents. It should, as speculation, be struck.

[43] Paragraph 22 relates to a very recent request made by the Plaintiffs for a particularization of documents which are asserted to be subject to litigation privilege. Although the outcome of such an inquiry may be ultimately relevant to

the issues to be adjudicated upon, I am not convinced that such is relevant to the issues to be determined by this Court. This provision should be struck.

[44] Paragraphs 23 through 28 contain evidence relating to Mr. Young undertaking a securities course, and based upon the information gained therefrom, his view as to what documents Merrill Lynch would necessarily had in relation to his transactions. In my view, all of these provisions infringe upon the prohibition against opinion evidence, speculation and also are in the nature of argument. They are to be struck.

[45] Paragraph 29 asserts that the Defendant has never alleged the Plaintiffs' list of documents was inadequate to allow an adequate defence. This statement relates to the issue of "serious prejudice" and is relevant.

(c) Paragraph 30 / Paragraphs 50-56

[46] Although the Defendant addressed paragraph 30 separately from paragraphs 50 through 56, the concern is the same, namely that the Plaintiff Young speaks to his health condition, without such evidence being properly supported by medical evidence.

[47] Paragraph 30 contains the statement: "Secondly, my own ability to respond to this claim has been compromised by my own health." Paragraphs 50 through 56

serve to provide in more detail the nature of Mr. Young's health difficulties, including his understanding of the diagnosis he has received as well as the physical restrictions he has encountered.

[48] I disagree with the Defendant that evidence of this nature must be addressed by a medical professional. Its purpose is not to prove that Mr. Young has a particular medical diagnosis, but rather as a general explanation of his physical difficulties. He is fully able to testify as to his experience in terms of his health. This evidence goes to whether the delay in advancing the claim was "inexcusable", and is relevant.

(d) Paragraph 34

[49] This provision asserts that based upon Plaintiffs counsel's review of the file, various steps have not been taken by the Defendant, nor concerns expressed regarding prejudice arising from the delay.

[50] The Defendant asserts such a provision "is hearsay evidence that is not permitted by the rules of court." The content of the paragraph are relevant to both issues of delay and serious prejudice. The real concern is whether it is appropriate for the outcome of Mr. Mitchell's file review to be placed before the Court through his client's affidavit. Often, the Court encounters affidavits filed by parties or law office staff purporting to swear to the contents of files, either the Court's or the

lawyer's. Such is permitted where the Court is being asked to determine a procedural right, as specifically contemplated by Rule 22.15(c). Here, it is not clear what file Mr. Mitchell reviewed, although I assume it was either the file retrieved from prior counsel or perhaps the Plaintiffs' personal file. This uncertainty is troublesome when the Court is being asked to admit hearsay evidence. Without knowing what file was reviewed, and having some sense as to its completeness, it would be improper in my view to admit hearsay statements as to the purported contents, or more importantly, lack of contents of "the file." This paragraph is struck.

(c) Paragraphs 41-43

[51] Along with paragraphs 41 through 43 of the Young affidavit, the Defendant seeks removal of Exhibit "A", which is a detailed settlement proposal prepared on behalf of the Plaintiffs in September of 2009. The Defendant's rationale is succinctly put forward in their pre-motion brief as follows:

> 21. In addition to containing improper hearsay and irrelevant evidence, the Young Affidavit contains settlement documents and discussions which are impermissible. Settlement privilege is a public policy based privilege developed to encourage open negotiations aimed at fostering settlement. Sopinka, Lederman and Bryant, in *The Law of Evidence in Canada*, 2nd Ed Supp. (Markham: LexisNexis Canada Inc., 2004):
>
> > The second theory of admissibility, i.e. all admissions in the course of negotiations towards settlement are protected by a privilege based on public policy is now universally adopted in Canada.

[52] The Defendant asserts that there are very strong public interests in protecting settlement privilege, explaining:

> 36. Settlement privilege is a class privilege that attaches to without prejudice documents exchanged with the goal of reaching a settlement. The justification for this privilege is rooted in the public interest of encouraging settlements. Therefore, where production of the documents would inhibit the openness of future settlement negotiations, and discourage parties from entering into settlement negotiations, the public policy rationale underlying the privilege claim precludes the disclosure of these without prejudice communications.
>
> 37. If the court were to allow the use of a settlement proposal without the consent or waiver by the other party, such would send a negative message to parties seeking to put forth frank and forthright positions in such documents and could have a chilling effect on a party's willingness to put forth written positions. Consequently, all references to such in the Young Affidavit should be struck.

[53] In response, the Plaintiffs assert that the settlement offer, as well as the paragraphs themselves, are relevant to the issue of whether serious prejudice has arisen due to the delay in advancing the claim. It is further asserted that although the existence of "settlement privilege" is acknowledged, that the present case falls within a recognized exception permitting disclosure of such discussions.

[54] The Saskatchewan Court of Appeal in **Potash Corp. of Saskatchewan Inc. v. Barton**, 2009 SKCA 7, recently articulated the settlement privilege rule and exception as follows:

> 14 It is useful to begin consideration of Mr. Barton's argument by noting that the concept of privilege attaching to communications in bona fide furtherance of settlement is, of course, a soundly established doctrine. It reflects the public policy benefits of encouraging the resolution of disputes without recourse to the courts. That policy interest was stated as follows in *Cutts v. Head* [1984] 1 All E.R. 597 by Oliver, L.J. at 605:

> That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in *Scott Paper Co. v. Drayton Paper Works Ltd*. (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.
>
> 15 However, there are also recognized exceptions to the rule which give effect to other compelling interests. One of these exceptions concerns the situation where, in the context of an application to strike a claim for want of prosecution, settlement discussions are said to explain the delay in moving matters forward. In such circumstances, numerous cases have accepted that communications made for the purpose of settlement are admissible. See: M.N. Howard, ed., *Phipson on Evidence* 15th ed. (London: Sweet & Maxwell Limited, 2000) at p. 555; *Bruneau v. 2779928 Manitoba Ltd.* (1994) 95 Man. R. (2d) 274 (C.A.); *Unilever PLC v. Procter & Gamble Co.* (1999), [2001] 1 All E.R. 783 (Eng. C.A.) at pp. 79-80; *SAAN Stores Ltd. v. 328995 Alberta Ltd.*, [2006] Y.J. No. 103, 2006 YKSC 46. That said, there appear to be no decisions of this Court on the issue.
>
> 16 The rationale for the exception concerning want of prosecution proceedings is perhaps self-evident. In the circumstances of an application to strike, precluding the admission of evidence as to the history of settlement negotiations would typically result in substantial prejudice to the plaintiff. On the other hand, the knowledge that negotiations might ultimately be referred to for the narrow purpose of explaining delay is unlikely to compromise the willingness of litigants to speak frankly with each other about the strengths of a case and the merits of possible settlement arrangements. Put another way, the exception recognized in the authorities works to prevent injustice but does not undermine the policy goals of the overall rule. In my view, this is a sound approach and it should be recognized and accepted by this Court.

[55] I am satisfied that the reference to settlement discussions contained in paragraphs 41 through 43 fall within the exception contemplated above, as does the detailed settlement proposal. As such, these paragraphs and Exhibit "A" shall remain in the affidavit, and shall only be considered by the Court in terms of the issues of delay and prejudice.

(f) Paragraphs 84 - 94

[56] Under the heading "Status of this Proceeding and Next Steps" paragraphs 84 through 98 contain Mr. Young's assertions relating to his Counsel's efforts, since April 17, 2013, to move the matter forward, most notably with the scheduling of discovery examinations. The Defendant asserts:

> These paragraphs all reference work done by Mr. Mitchell subsequent to the motion brought by the Prothonotary and by the Defendant. These are irrelevant in terms of the test for dismissal and whether or not there has been unreasonable delay.

[57] I agree with the Defendant. The Plaintiffs' apparent willingness to now expedite the proceedings does not address the issue of whether there was inordinate delay, whether the delay was inexcusable, or whether there is either presumed or actual serious prejudice to the Defendant. Further, I cannot conclude that such assertions are relevant to undertaking a balancing of justice between the parties, being the final step in the analysis. As such, these paragraphs are struck.

[58] Considering Rule 39.04(3) notwithstanding numerous paragraphs being struck, I am satisfied that the remaining portions of the Young affidavit are understandable and can stand on their own.

c) Do the present circumstances warrant a dismissal of the plaintiffs' claim?

[59] I turn now to consider the merits of the motion for dismissal. The Court has the benefit of the evidence of Ms. Gia Ghassemi, In-House Legal Counsel for

the Bank of America Merrill Lynch both by virtue of her affidavit sworn April 23, 2013, and her *viva voce* evidence, the remaining provisions of the affidavit of Brian Young, and the able submissions of Counsel.

Has there been inordinate delay?

[60] This action was commenced on January 7, 2005, alleging that commencing in 2001, Merrill Lynch employee William Morrison undertook a series of unauthorized and detrimental investments with the Plaintiffs' funds. Since that time, the only formal steps taken towards advancing the action towards trial was the filing of lists of documents by the parties in March of 2005. Although it would appear counsel corresponded regarding the scheduling of discovery examinations in April of 2008, nothing came to fruition in that regard. When Mr. Dingwall undertook carriage of the file in January of 2009, correspondence was again exchanged regarding scheduling of discovery dates, including in late 2009 and well into 2010. Based on the correspondence before the Court, one difficulty appeared to be locating Mr. Morrison for the purpose of his discovery.

[61] The last piece of correspondence prior to the present motion regarding arranging discovery dates appears to be correspondence from Mr. Dingwall to Mr. Ryan dated September 14, 2010, in which he responds to Mr. Ryan's request for discovery dates:

> Thank you for your letters of September 9th and 10th, 2010, in regard to the above-noted matter.
>
> Please be advised that I am travelling for the next several weeks. I will, however, endeavor to seek instructions from my client and get back from you.

[62] As it would appear from the evidence before the Court, neither Mr. Dingwall nor other counsel ever responded to Mr. Ryan's request to set discovery dates. As noted in Ms. Ghassemi's affidavit, no further contact was made on behalf of the Plaintiffs until April 5, 2013 when Mr. Mitchell advised of his retainer by filing a Notice of New Counsel with the Court, a time lapse in excess of 30 months.

[63] Of course the above is only the latest example of the Plaintiffs' periods of silence in relation to the claim. The evidence further establishes that from March 22, 2005 when the Plaintiffs' list of documents was filed until April 2, 2008 when Mr. Kimball filed a Notice of Intention to proceed, there was no activity in relation to the file, at least as it relates to communications with the Court or Defendant. This is a further period of 3 years of silence.

[64] Further, in Mr. Young's affidavit, he testified that he referred his matter to Mr. Mitchell in April of 2012, yet Mr. Mitchell apparently made no contact with the Defendant nor provide notice to the Court of his involvement until April of 2013, a full year later and only after the Prothonotary filed a motion for dismissal under Rule 4.22. Another 12 months of silence.

[65] In the present circumstances, the Court readily concludes that the delay encountered in advancing the Plaintiffs' claim has been inordinate. Unlike some claims where a plaintiff's damages may take time, sometimes years, to become fully ascertainable, such is not the case here. The Plaintiffs' losses should have been readily quantifiable if not at the time the action was filed, certainly within a reasonable timeframe thereafter.

Has there been inexcusable delay?

[66] In his affidavit, Mr. Young raises two primary grounds as to why the delay should be considered excusable. Firstly, he asserts he had difficulty finding legal counsel, and secondly, his personal health has caused difficulties in terms of his abilities to focus on the litigation and advance the matter accordingly.

[67] Neither of the above reasons serve to render the inordinate delay in this matter "excusable". In terms of legal representation, it would appear that from the time the claim was issued in January of 2005 until present, the Plaintiffs were consistently represented by legal counsel, other than perhaps interim periods of a few months at most. According to Mr. Young's affidavit, the delay in finding counsel took place prior to retaining Mr. Kimball in late 2004, and specifically following his receipt in October 2003 of confirmation from Merrill Lynch General Counsel that his internal complaint was dismissed. This pre-writ period of

approximately a year, in which the Plaintiffs attempted to find legal counsel can hardly be considered a reasonable explanation for the significant delay encountered following the filing of the claim in January 2005.

[68] Further, I cannot accept that Mr. Young's health difficulties provide an excuse for the delay encountered in relation to this matter. Although Mr. Young appears to have had some health problems, it is difficult, based upon other aspects of his evidence to accept that he was prevented from providing timely instructions to counsel. Notwithstanding being involved in a car accident and other medical concerns, Mr. Young apparently had the time, energy and faculties to undertake a real estate licensing course, successfully pass same, and be actively involved in that industry. Additionally, Mr. Young is not the sole Plaintiff in relation to this action. His spouse, Nancy Young, is a named Plaintiff, and has equivalent standing before the Court. Even if Mr. Young was encountering difficulties, there is no indication before the Court that Mrs. Young could not have given instructions to counsel or otherwise moved the litigation forward on their respective behalf's.

Has the Defendant suffered serious prejudice as a result of the delay?

[69] The Defendant asserts that the circumstances of the present case are such that serious prejudice should be presumed, thus placing the burden on the Plaintiffs to refute same. In the alternative, the Defendant argues that the evidence of Ms.

Ghassemi clearly establishes actual prejudice which is serious and detrimental to its ability to adequately defend the claim.

[70] The Plaintiffs assert that this is not a case where serious prejudice should be presumed, but its existence must be proven by the Defendant. It is further asserted that the evidence before the Court clearly establishes that the existence of "serious" prejudice has been successfully challenged, and any prejudice that does exist is not causally related to the litigation delay.

[71] The first step in determining whether serious prejudice exists is to determine whether this is an appropriate case for the burden to shift to the Plaintiffs, or whether proof of same remains with the Defendant. In support of its position, the Defendant asserts that the length of delay should be calculated from the date the cause of action arose, in this case 2001, not when the action was filed. As such, the delay would be 12 years and accordingly placing this matter in the category of "10 years plus" cases such as discussed in **Moir v. Landry, supra**.

[72] The Defendant relies upon a 1993 British Columbia Supreme Court decision, **Fraser v. Kokan,** (1993) 24 C.P.C. (3d) 21 as authority for the proposition that the Court should consider delay arising from the time the cause of action arose. The Plaintiffs assert that there is no authority in Nova Scotia in

support of that proposition, and that the Court should calculate the delay from the date the action was filed, resulting in a period of just over 8 years.

[73] In my view, there is not, nor should there be, a hard and fast rule as to when the Court must consider the clock begins ticking on the issue of delay, either for a determination of whether it is "inordinate", or whether it is of sufficient duration to trigger a presumption of serious prejudice. Nova Scotia cases disclose that the Courts often reference both time frames as relevant considerations. The circumstances of each case will dictate when the "delay clock" begins to tick. Parties should not presume it is when the cause of action arises, nor when the action is commenced, but rather a time found appropriate by the Court based upon the particular circumstances before it.

[74] In the present case, I do not view it as appropriate to consider the pre-writ period as part of the overall delay in this matter. The Plaintiffs did not idly sit by once a cause of action became known to them in 2001; but rather prepared and filed a complaint with the Defendant through non-Court avenues. That was not an unreasonable approach, and they should not be faulted for the 18 month time frame the Defendant required to assess the complaint and dismiss same.

[75] In the circumstances of this case, I do not consider the inordinate and inexcusable delay to be "extreme" and thus triggering a presumption of serious prejudice. The burden of proving same remains with the Defendant.

[76] Ms. Ghassemi's affidavit addressed the issue of alleged serious prejudice arising from the delay. The provisions directly relating to that issue are reproduced below:

> 3. The above-noted claim alleges that one of the former employees of Merrill Lynch, William Morrison, caused an alleged loss to Brian and Nancy Young. Mr. Morrison is no longer with Merrill Lynch.
>
> 4. The Bank of America bought out Merrill Lynch in 2008.
>
> 5. I am the third in-house counsel overseeing this claim as the in-house counsel has changed twice since the action was commenced. The first counsel was Joanne Sewell and the second was Mario Kravetzky. Given the Plaintiffs' delay in moving this matter forward, there is now no one working at Merrill Lynch who has personal knowledge of the matters stated in the Statement of Claim.
>
> 6. As a Result of there being no one currently employed at Merrill Lynch who has personal knowledge of these matters, Merrill Lynch is now prejudiced in the defence of this case.

[77] In her *viva voce* evidence, Ms. Ghassemi provided further indication of the prejudice experienced by the Defendant. She testified that at the time of swearing her affidavit, she had been in-house counsel for the Defendant for 4 months, and had "general familiarity" with the file. Ms. Ghassemi was questioned regarding her knowledge of the 18 month investigation conducted by the Defendant in 2002 and 2003. She was unaware of this investigation prior to swearing her affidavit,

and the file maintained by her predecessors did not have reference to this time-frame. She testified she has not attempted to locate or speak to the previous two in-house counsel who had corresponded with the Plaintiffs in 2002/2003. She is further unaware of the complaint process utilized by the Defendant during that time-frame.

[78] On re-direct, Ms. Ghassemi testified that there are a number of boxes containing documents relating to the former Defendant's branches in the Maritime provinces. She has personally searched the boxes seeking out files pertaining to this claim. Her search has been unsuccessful. An inventory which catalogued the branch files from specific locations has been lost, making it very difficult to find the Defendant's file from the Sydney branch during the relevant time-frame.

[79] In his submissions, Counsel for the Defendant argues the evidence of Ms. Ghassemi clearly establishes serious prejudice and that the loss of the relevant files will prevent the Defendant from meaningfully defending the claim. The Defendant has no material other than what has been provided in the Defendant's list of documents, and Ms. Ghassemi cannot knowledgeably give instructions about a claim which is so historically dated.

[80] Mr. Ryan further submits that the passage of time has caused serious prejudices, as potential witnesses, such as Mr. Morrison and his former supervisor,

Ms. McPherson, are no longer employees of the Defendant and cannot therefore be compelled to cooperate or be subject to the "free-ranging" discovery permitted under the "old" Civil Procedure Rules.

[81] Given the passage of time, it is not unreasonable to conclude that both parties will be subject to some degree of prejudice in terms of the advancement of their respective cases. The Defendant, however, must establish "serious" prejudice, and I am unable to conclude, based upon the evidence presented, that detriment to the required level exists.

[82] I base the above conclusion on a number of considerations. Firstly, I am not satisfied that the prejudice that exists, is in fact causally related to the delay. As noted by LeBlanc, J. in **Atlantic Canada Opportunity Agency v. LaFerme D'Acadie**, 2008 NSSC 334, such is an important consideration, writing:

> 20 In Nova Scotia, an element of causation has been read into the third factor; that is, there must be a causal connection between the delay and the prejudice before the plaintiff's claim can be dismissed: *Clarke v. Ismaily* (2002), 205 N.S.R. (2d) 112. The burden is on the applicant to prove that the inordinate and inexcusable delay of the plaintiff has caused him prejudice.

[83] In the present instance, the Court is advised by the Defendant that documents have gone missing which preclude it from mustering a defence. What is also missing, however, is an indication of when the documents went missing, and more importantly, whether they are, in fact, irretrievably lost. The evidence

establishes that Plaintiffs' counsel was able to find the contact information for three of Ms. Ghassemi's predecessors, including the two who appear to have had hands-on involvement with the Young internal complaint in 2002-2003. These individuals have not been contacted to determine whether they can provide some assistance in locating the missing materials.

[84] The Plaintiffs argue that the branch files pertaining to their dealings with the Defendant's Sydney branch were most certainly obtained and in the hands of in-house counsel for the purposes of the internal investigation, which concluded in October of 2003. Given the action was commenced in January of 2005, and promptly defended, Counsel suggests this relevant file material would or should have been readily still available. There is no suggestion, at any point prior to Ms. Ghassemi's April 2013 affidavit, that necessary files have gone missing. The Plaintiffs are skeptical regarding this suggestion, and submit that if materials have been lost, it is not due to delay but through the fault of the Defendant.

[85] There is some merit to the Plaintiffs' position. The Defendant was well aware of the Plaintiffs' dissatisfaction with their employee's handling of their investment accounts and undertook an investigation in 2002 and 2003. It is difficult to imagine that those same branch files would not have been preserved and still available in 2005 to be passed along to Counsel for the purpose of

preparing its Statement of Defence. In September of 2009, the Plaintiffs put forward a settlement proposal which outlined the detailed factual assertions upon which they based their case. There was no indication at that point that the Defendant had lost documents or was prejudiced in any fashion in responding to the claim. As the evidence discloses, further attempts to arrange discoveries followed.

[86] What is also of significance to the Court is the Defendant's response to the Prothonotary's motion brought on February 11, 2010. Mr. Ryan, in his submissions, indicated that because he was dealing with Mr. Dingwall and he felt the necessary time had not elapsed, his client did not argue for a dismissal at that time. Clearly, at that juncture, there was no expressed concern to the Plaintiffs or the Court that the Defendant was impeded from mounting a defence due to a loss of materials or otherwise.

[87] It may be true that there is presently no current employees of the Defendant that have first-hand knowledge of the matters in issue. However, I cannot conclude that such presumptively gives rise to "serious prejudice". The location of both Mr. Morrison and Ms. MacPherson are apparently known. The Defendant has not contacted them, or sought their discovery pursuant to Rule 18.05. Although no longer employees, it cannot be definitively said that either or both could not

provide information valuable to the Defendant in responding to the claim. Further, although Ms. Ghassemi may be new to the Defendant as in-house counsel, I cannot accept that she is unable to give instructions to counsel in terms of the conduct of the defence.

Conclusion

[88] The delay in advancing this claim by the Plaintiffs has been inordinate and inexcusable. I am not satisfied however that the delay has caused the requisite "serious prejudice" to the Defendant. As such, the Defendant's motion, and for clarity, that brought by the Prothonotary under Rule 4.22, are dismissed.

[89] If the parties wish to be heard as to costs, written submissions are to be filed within 30 days of the release of this decision.

J.