

SUPREME COURT OF NOVA SCOTIA

Citation: *Ballam Insurance Services Limited v. Fundy Computer Services Ltd.*,
2022 NSSC 277

Date: 20221003

Docket: *Halifax*, No. 356720

Registry: Halifax

Between:

Ballam Insurance Services Limited

Plaintiff

v.

Fundy Computer Services Ltd. and Atlantic Datasystems Inc.

Defendants

Judge: The Honourable Justice Gail L. Gatchalian

Heard: September 29, 2022, in Halifax, Nova Scotia

Counsel: Gavin Giles, K.C., for the Plaintiff
Colin Piercey and Manon Landry, for the Defendants

By the Court:

Introduction

[1] In this motion, the Defendants, Fundy Computer Services Ltd. and Atlantic Datasystems Inc. (“Fundy”), seek an order dismissing the Action for want of prosecution under Civil Procedure Rule 82.18, which states that “[a] judge may dismiss a proceeding that is not brought to trial or hearing in a reasonable time.”

[2] The Plaintiff, Ballam Insurance Services Limited (“Ballam”), filed the Notice of Action on October 4, 2011, eleven years ago. The Action concerns a dispute about information technology services provided by Fundy to Ballam in 2010 and 2011. An Amended Notice of Action was filed on January 23, 2014. Discoveries of the parties’ witnesses took place on June 18 and 19, 2014. Fundy says that, since then, Ballam has done very little to advance the matter. Fundy says that the last meaningful step taken by Ballam was on February 17, 2016, when Ballam provided a partial response to discovery undertakings, fulfilling approximately half of them.

[3] In response, Ballam says that it has taken steps to move the Action forward; for example, it was taking steps to obtain an expert report. Ballam says that several

factors that were out of its control contributed to the delay: the first expert changed employment in 2017; although Mr. Giles is counsel of record for Ballam, his associate, Michael Blades, had primary carriage of the file and departed the firm in October or November of 2019; and the COVID-19 pandemic negatively affected counsel's contact with the second expert.

[4] On September 3, 2021, the Prothonotary filed a motion to dismiss the Action under Civil Procedure Rule 4.22 because five years had passed since the Action had been filed and no trial dates had been set. This prompted Ballam to request a Date Assignment Conference on October 25, 2021, and the Prothonotary withdrew the motion. The parties participated in the Date Assignment Conference on February 22, 2022. Trial dates have now been set for February and March, 2024.

[5] There are four questions to answer in this motion:

1. Was there inordinate delay?
2. If so, was the delay inexcusable?
3. If so, does the inordinate and inexcusable delay give rise to a substantial risk that it is not possible for Fundy to have a fair trial or is it likely to cause or to have caused serious prejudice to Fundy?

4. If so, attempting to balance the interests of the parties, what outcome would do justice between them?

Fagan v. Savoie, 1998 NSCA 41 at paras.12-13; *Braithwaite v. Bacich*, 2011 NSSC 176 at para.7; *Clarke v. Ismaily*, 2002 NSCA 64 at para.8.

Inordinate Delay?

[6] I am satisfied that, in the circumstances of this case, there has been inordinate delay. The Action was filed eleven years ago. It concerns events that happened eleven to twelve years ago. Discovery examinations were conducted over eight years ago. Since that time, Ballam has done little to advance the matter. Half of Ballam's discovery undertakings remain outstanding and Ballam has still not produced an expert report. See *Fagan, supra* at para.20; *Atlantic Canada Opportunities Agency v. Ferme D'Acadie*, 2008 NSSC 334 at para.29; *Moir v. Landry* (1991), 104 N.S.R. (2d) 281 (NSCA) at para.11; *Braithwaite, supra* at para.16; and *Crewswell v. Murphy*, 2018 NSSC 11 at paras.4-12.

Inexcusable Delay?

[7] The law infers that an inordinate delay is inexcusable unless the plaintiff makes out a credible excuse to rebut that inference: see *Clarke, supra* at para.7.

[8] Fundy does not take issue with the passage of time from the initial filing of the Action on October 4, 2011 to the conduct of discoveries in June of 2014. Fundy now says that Ballam took too long to provide its initial response to the discovery undertakings. However, in light of the fact that Fundy took a further eight months to provide the clarifications requested by Ballam, and that Ballam would require some further time to complete the remaining undertakings, I find that the delay from discoveries to the end of 2016 was excusable.

[9] Ballam has not satisfied me that the delay from 2017 to the present, almost six full calendar years, is entirely excusable. While I accept that Mr. Blades' departure and the onset of the pandemic caused some disruption to Ballam's trial preparation, the delay caused by these two events is minimal compared to the overall delay since 2017. Ballam began to deal directly with the second expert in early 2017. Ballam has not satisfactorily explained why it still does not have an expert report. Neither has Ballam satisfactorily explained why approximately half of its discovery undertakings remain outstanding to this day. I do not accept that Mr. Blades' departure and/or the onset of the pandemic explains this lengthy delay.

[10] In summary, the vast majority of the almost six-year delay since early 2017 is inexcusable.

Substantial Risk of Unfair Trial or Likely to Cause Serious Prejudice?

[11] In extreme cases of inordinate and inexcusable delay, prejudice to the defendant is presumed, and the onus shifts to the plaintiff to rebut that presumption. Fundy asserts that the threshold for presuming prejudice is a delay of approximately ten years. See *Moir, supra* at para.8 and *Saulnier v. Dartmouth Fuels Ltd.*, (1991), 106 N.S.R. (2d) 425 (NSCA) at paras. 24 and 26.

[12] Even though the overall delay since the events giving rise to the claim and the filing of the Notice of Action is in the order of ten or eleven years, in the circumstances of this case, I do not find this to be an extreme case of inordinate and inexcusable delay. As stated, I have found that the delay from the filing of the Action to the end of 2016 is excusable. The inexcusable portion of the delay has occurred in the last six years. Before that, affidavits disclosing documents were exchanged, discoveries were completed, and approximately half of Ballam's undertakings have been fulfilled. Mr. Blades' departure and the pandemic caused some disruption to counsel's ability to advance the Action. I am not prepared to conclude that, on these facts, the delay has been so inordinate so as to give rise to an inference of prejudice. The onus therefore remains on Fundy to establish that there is a substantial risk of an unfair trial or that the delay is likely to cause it serious prejudice. See *Moir, supra* at paras.10-11.

[13] In my view, Fundy has not established, on the evidence, a substantial risk that the inordinate and inexcusable portion of the delay since 2017 gives rise to a substantial risk that it is not possible for Fundy to have a fair trial or that the delay is likely to cause or to have caused serious prejudice to Fundy.

[14] Edward Cooze, Information Technology Manager for Fundy, filed an affidavit in this motion. His evidence, in summary, is that to the best of his knowledge and belief, Ballam has not made available to Fundy the original physical server, the virtualization software, the Microsoft server software, the Windows Server Audit logs, the software application used by Ballam at the relevant time and known as “The Agency Manager” (“TAM”) software, and any TAM logging system that might exist. Mr. Cooze’s evidence is that it is essential for Ballam to have access to the foregoing items and information in order to ascertain the exact nature or extent of the alleged server issues.

[15] The evidence of Mr. Cooze does not establish that the required information and items are not available from Ballam. It simply expresses his belief that they have not been provided by Ballam. His evidence also does not establish when the information and items became unavailable, that is, before the end of 2016, or sometime later. There must be a causal connection between the delay and the prejudice before Ballam’s claim can be legitimately dismissed: see *Clarke, supra*

at para.23. The evidence of Mr. Cooze does not establish that, *as a result* of the delay from 2017 on that I have found to be inexcusable, there is a substantial risk of an unfair trial or that it is likely to cause serious prejudice to Fundy.

[16] Fundy also asserts that the delay has resulted in likely prejudice because “there can be no doubt that the memories of those involved have faded.” However, Fundy did not present any evidence to support this assertion. Fundy did not identify key witnesses whose memories have allegedly faded, the importance of their evidence to Fundy’s case, or when the memory loss occurred so as to result in serious prejudice to Fundy should the matter proceed.

[17] Fundy has therefore failed to satisfy me that the inordinate and inexcusable delay creates a substantial risk of an unfair trial or that it is likely to cause serious prejudice to Fundy.

Balancing the Parties’ Interests, What is a Just Outcome?

[18] Having found that the onus is on Fundy to establish that the inordinate and inexcusable delay creates a substantial risk of an unfair trial or that it is likely to cause serious prejudice, and that Fundy has not met its evidentiary burden, it is not necessary for me to attempt to strike a balance between the interests of the parties and to consider what outcome would do justice between them.

Conclusion

[19] Fundy's motion to dismiss the Action for want of prosecution is dismissed.

[20] However, Ballam must now take concrete steps to move this matter forward in a timely manner. First it must provide the answers to the outstanding undertakings. Under Civil Procedure Rule 18.16(6), a party who undertakes to do anything in the course of a discovery must perform the undertaking no more than sixty days after the day the undertaking is made, unless the parties agree or a judge directs otherwise. As it has been eight years since the discoveries, I direct that Ballam fulfill the outstanding undertakings within two months of the date of this decision.

[21] Second, Ballam informed Fundy in August of 2017 that the shares of Ballam had been sold to J.F.B. Holdings Limited ("JFB") and that all rights and claims of Ballam had been assigned to JFB. The proceedings are accordingly stayed, by virtue of Civil Procedure Rule 35.11(3), until JFB, the assignee, becomes a party. Ballam must therefore file a further amended Notice of Action adding JFB as a party. I direct Ballam to file the amended Notice of Action within two weeks of this decision.

[22] If the parties cannot agree on the costs of this motion, I will receive written submissions from Fundy within two weeks of the date of this decision, and from Ballam within one month of the date of this decision.

Gatchalian, J.