

Court of Queen's Bench of Alberta

Citation: Hein v. Barrett, 2008 ABQB 548

Date: 20080904
Docket: 0001 17944
Registry: Calgary

Between:

George Hein, Ella Hein, Robert Filkohazy, Arlene Filkohazy and G&E Hein Farms Ltd.

Plaintiffs

- and -

**David Barrett, Chinook Accounting and Tax Services Ltd., Meyers Norris and Penny,
Wiley O'Brien and Sturgeon, William Herman, Ross Todd and Company, Ronald
Pedersen and Shumacher Gough and Pedersen**

Defendants

- and -

**David Barrett, Chinook Accounting and Tax Services Ltd., Meyers Norris and Penny,
Wiley O'Brien and Sturgeon, William Herman, Ross Todd and Company, Ronald
Pedersen, Shumacher Gough and Pedersen and Michael Stefanishion**

Third Parties

**Reasons for Judgment
of
J.B. Hanebury, Master in Chambers**

[1] This is an application by David Barrett and Chinook Accounting and Tax Services Ltd. for an order extending the time to file and serve a third party notice. It is opposed by the intended third parties, William Herman and Ross Todd and Company, who are defendants in the action.

[2] The facts are of utmost importance in this case as there has been an intervening period of approximately seven years between the date when the notice could have been filed and the hearing of this application.

FACTS

[3] The statement of claim was filed on November 8, 2000, alleging that the plaintiffs suffered certain losses due to negligent advice which resulted in the reassessment of their tax returns. Barrett and Chinook Accounting filed their statement of defence on June 19, 2001, and a third party notice was filed by William Herman and Ross Todd and Company naming Barrett and Chinook Accounting as third parties on May 17, 2001. A notice to co-defendant was filed by Pedersen and Shumacher naming Barrett and Chinook Accounting on July 24, 2001. A third party notice was filed by Wiley O'Brien and Sturgeon naming Barrett and Chinook Accounting on October 10, 2001.

[4] On November 5, 2001 counsel for Barrett and Chinook Accounting forwarded to counsel for Herman and Ross Todd and Co. a copy of Barrett's and Chinook Accounting's statement of defence and stated that they would "as you have already done, be filing a third party notice."

[5] On May 9, 2002, counsel for the plaintiffs wrote to counsel for Barrett and Chinook Accounting advising that there were a number of actions before the Federal Court of Canada arising out of appeals of the Canada Customs and Revenue Agency (CCRA) reassessments of the plaintiffs' tax returns. Counsel for the plaintiffs advised that he had been negotiating a settlement with the Department of Justice in relation to those appeals, failing which they would be proceeding to trial. He said that the outcome of the hearings or settlement negotiations would substantially impact the plaintiffs' action against Barrett and Chinook Accounting. In fact, the action could be academic. Counsel for the plaintiffs proposed that "we agree to hold the present Queen's Bench action in abeyance pending settlement or determination of the corporate appeal." He concluded by saying:

Please advise whether you are willing to enter into an informal standstill agreement to hold the file in abeyance while the federal court action proceeds. If you do not receive such instructions, please contact me so that I can determine what steps need to be take (sic) to proceed with the Queen's Bench action.

On January 24, 2003 a letter was sent to all counsel by counsel for the plaintiffs proposing that:

[W]e wait until Mr. Bourassa has concluded his negotiations with CCRA, by mid-March, 2003 we should be in a position to reevaluate the claim against your client. At that time, either Mr. Bourassa or myself will hopefully be in a position

to contact you to both inform you about the terms of the settlement with CCRA and to determine what steps would be necessary to proceed or conclude the action with your client.

[6] On February 10, 2004, counsel for the plaintiffs wrote to counsel for Barrett and Chinook Accounting and advised that they continued to await a decision by the CCRA with interest and once that decision was made “we will be proceeding with the lawsuit.”

[7] During 2002 and 2003 counsel for Herman and Ross Todd and Co. wrote numerous times to counsel for the plaintiffs asking the status of the CCRA appeal and whether the plaintiffs would discontinue their action against Herman and Ross Todd and Co. In December, 2003, counsel for Herman and Ross Todd and Co. wrote to all defendants’ counsel asking if they had heard anything in relation to the matter. One counsel, Mr. Peacock, responded that he had heard nothing but didn’t propose to “prod him [plaintiffs’ counsel] into action.” In February, 2005, counsel for the plaintiffs sent a letter to all parties advising that he would like to arrange for discoveries. It appears that discoveries did not occur in September, 2005, and counsel for another defendant wrote to the plaintiffs’ counsel asking again about the terms of the settlement between the plaintiffs and the CCRA. In any event, in late 2005 the parties started to exchange affidavits of records. On December 13, 2005, Barrett and Chinook Accounting filed their affidavits of records.

[8] On May 16, 2006, counsel for one of the defendants wrote to counsel for another, copying all defendants’ counsel, noting that the five-year “drop dead” rule would apply after October 24, 2006, at least in relation to that counsel’s client.

[9] It appears that no application under the “drop dead” rule was brought and the action continued, albeit at a rather leisurely pace. On January 4, 2007, counsel for the plaintiffs finally provided the long requested settlement agreement with the Minister of National Revenue. In May, 2007, he provided the details of the reassessments of his clients’ tax returns. On November 16, 2007, counsel for Barrett and Chinook Accounting provided a copy of the draft third party notice, prepared in 2001, to counsel for Herman and Ross Todd and Co. and asked for consent to its filing. Counsel for Herman and Ross Todd and Co., refused to consent and this application was set down for June 5, 2008. It was heard on August 12 and 15th, 2008. A pretrial conference has been scheduled for this fall.

[10] The third party notice arises from the same set of facts that underlie the main action and David Barrett swears that it is his belief that, should the court allow the late filing of the third party notice, it is unlikely there will need to be additional documents produced in respect of the pleadings and that only minimal, if any, additional examinations for discovery may be required. He also swears that the defendants were aware of the anticipated filing of this pleading.

ANALYSIS

[11] Counsel agreed that in deciding this application there were three factors to be considered. The court must consider the length of the delay, the explanation for the delay, and the relative prejudice to parties.

[12] The applicants rely on rules 66 and 548 of the Alberta Rules of Court. Rule 66 provides that:

(1) When a defendant claims against any person (whether or not that person is already a party to the action) that the person is or may be liable to him for all or part of the plaintiff's claim against him he may serve a third party notice.

...

(4) A third party notice shall be sealed with the Court seal, filed with the Clerk of the Court within 6 months from the time the defendant has filed his defence or demand of notice, but before he has been noted in default or has had judgment entered against him, and served within 30 days of filing.

Rule 548 provides:

(1) Unless there is an express provision that this Rule does not apply, the court may enlarge or abridge the time appointed by these Rules or any rules relating to time or fixed by any order for doing any act or taking any proceeding upon such terms as may be just.

(2) An enlargement may be ordered although the application therefore is not made until after the expiration of the time appointed or allowed.

[13] Counsel provided several decisions considering rules 66 and 548 in relation to the late filing of third-party notices.

[14] In *Flight v. Dylan* 2001 ABQB 211, the court commented on the approach to be taken in an application to extend the time to file a third party notice. It said at paragraph 29:

I therefore respectfully disagree... that *every* case of delay beyond the six-month time frame contemplated by Rule 66(4) requires the defendant to advance a reasonable excuse before any consideration of prejudice comes into play. I would agree with the approach taken in *Grandwood Flooring, supra*, namely that a short delay would result in a different weighing exercise, focusing primarily on the existence of any prejudice. As one moves further away from the six-month deadline, the weighing exercise will focus more on whether the delay is excusable. In the case of a significant delay, as in *Lister, supra*, the failure to advance a reasonable excuse for the delay will, without more, be fatal to an application to extend time.

At paragraph 12 the court said that “these cases suggest to me that the further one is situated along the path of delay, the stronger the need for evidence of a credible reason for delay and the weaker the need for opposing parties to show prejudice.”

[15] In *Lister v. Calgary (City)* (1997) 47 Alta. L. R. (3d) 14 (C.A.), the Court of Appeal considered an appeal from an order granting the applicant an extension of four and a half years to file its third party notice. The court noted that the onus is on the party moving for leave to extend, to lead the evidence explaining the delay which justifies the late pleading. The court found that there was no evidence that could explain the 4 ½ year delay or justify the significant time extension requested. Therefore, the order extending time was set aside.

[16] In *Amoco Canada Petroleum Co. Ltd. v. Propak Systems Ltd.* 1999 ABQB 716, the court considered a notice to co-defendant which was not filed within the requisite 10 days after filing the statement of defence, but over five years later. The court found that the delay was inordinate, and, relying on *Lister* and other case law, the court held that Propak had not advanced a reasonable excuse for delay. The application was denied.

[17] In *Van Troyen Holdings Ltd. v. Hunt Oil Co. of Canada Inc.* 2005 ABQB 626, the delay in issue was three years. The third party notice was not being used to obtain indemnity but its issuance was sought on the basis that all of the issues were interrelated and should be tried together. The court found that no prejudice would result from the delay; the matter was not really urgent; and the litigation had been conducted at a “leisurely pace.” The court came to the conclusion that it was more important that all of the interlocking issues be tried at once, than it was to have a quick trial of the issues between the plaintiff and the defendant. There was little to be gained by severing the various issues. Furthermore, no prejudice had been demonstrated by the proposed third party. The fact that he would become involved in litigation was not sufficient to establish prejudice within the meaning of the rule. The cases of *Lister*, *Flight*, and *Van Troyen Holdings* were not referred to in coming to this conclusion.

[18] In *Lam v. Bockman* 2006 ABQB 101, McMahon J. commented on the factors to be considered when applying to extend the time for the filing of a third party notice:

The three factors to be considered are the length of the delay, the explanation offered for the delay and the relative prejudice to the parties. I agree with the comments of Moreau J. in *Flight v. Dillon* (*supra*) that when the delay is short, then the focus will primarily be on the existence of prejudice. As the delay increases, the focus will be more on whether the delay can be excused.

In that case the delay was 10 months and the application was allowed.

[19] Two other cases not referred to by the parties are also of assistance.

[20] In *Calgary Mack Sales Ltd. v. Shah* 2005 ABCA 304, the defendant sought to file a third party notice two and a half years late. No evidence was led by opposing counsel. The court found that the litigation had slumbered for two years; there was no evidence of any prejudice;

and, the defendant deposed to circumstances which explained the delay, even though the defendant may not have displayed “full diligence.” The court said at paragraph 24:

Had the lawsuit been productive during the interval, one might have found the delay undue, or even inferred prejudice. But the suit slept for much of the time anyway...Two or so years’ delay is not commendable, but it is not gross. In the absence of prejudice, and with some explanation, it is forgivable.

[21] The issue of delay was also considered in *Condominium Plan 9512180 v. Prairie Land Corp.* 2008 ABQB 269. In that case the court considered the cases of *Lam* and *Flight* and held that the longer the delay, the more important the claimant’s excuse becomes. When the delay is short, said the court, even absent an excuse, the applicant will succeed if the proposed third party cannot demonstrate any prejudice.

[22] The court found that the filing of statements of defence to the amended amended statement of claim started the six month time frame for the filing of the third party notice. Therefore, even though the original claim was filed in 2000, the time period only began in 2006, resulting in a delay of 11 or 12 months which the court did not find to be very long. Furthermore, the information that formed the basis of the third party claim only came to light at examinations in mid-2007 and the applications to file the third party notices were brought several months later. The court considered the lack of prejudice and commented at paragraph 29:

Another factor that courts will consider is how the litigation has been pursued. Courts are more likely to allow for Third Party Notices to be served outside the six month period if the litigation has been conducted at a “leisurely pace”...Though complex, this litigation has been ongoing for around eight years and can hardly be characterized as “urgent.” This is one more factor that weighs in favour of granting the defendants’ applications.

The court allowed the applications because the delay was relatively short, there was no evidence of prejudice and the reason for the delay was compelling.

[23] From this case law the following principles emerge:

1. Three factors are considered when determining an application to extend the time for filing a third party notice: the length of the delay, the reason for the delay and the prejudice to the third party.
2. Depending on the length of the delay, different weights may be given to the other two factors.
3. For a short period of delay, the primary consideration is prejudice, and an excuse for the delay is of less importance.

4. The relevant importance of these factors is reversed as the length of the delay increases. The longer the delay the greater the importance of an excuse for the delay and the lesser the importance of the question of prejudice.
5. When there is a significant delay, the lack of a reasonable excuse, without more, will be fatal to the application.
6. The pace of the litigation can also be considered when deciding the weight to be assigned to each of the three factors.

[24] In this case the delay is six to seven years. It is extraordinarily long. Barrett and Chinook Accounting argue that they were party to an informal standstill agreement and that was the reason for the delay. The informal standstill, they argue, only truly came to an end with the provision of the results of the CCRA settlement in January, 2007 and the subsequent reassessment information in May, 2007.

[25] A review of the evidence provides some support for this position, at least until 2005. While no formal standstill was entered into, it is clear the litigation was stalled awaiting the results of the CCRA appeals. As those appeals or a settlement had the possibility of ending the litigation against at least some of the parties, there was good reason to hold the action in abeyance. However, in 2005, despite the failure to obtain a copy of the CCRA settlement agreement, Barrett and Chinook Accounting filed their affidavits of records. They argue that they did so as an understanding of the amount of their potential liability did not affect those documents. However, they argue, they continued to hold off filing the third party notice as they needed the CCRA settlement agreement in order to ascertain what their potential liability was. That agreement, dated 2003, was finally provided to them in January, 2007. In November, 2007, they wrote to counsel for Herman and Ross Todd and Co. seeking their consent to the filing of the third party notice.

[26] On the evidence presented there was a reasonable excuse for the delay until 2005. However, with the 2005 correspondence from the plaintiffs seeking the setting of discovery dates and the filing of affidavits of records, including those of Barrett and Chinook Accounting, any informal standstill understanding or assumption among the parties had come to an end. There is no evidence to support any further arrangement, expressly or implicitly. Therefore, there is a 23 month period during which the claim had been re-activated and these defendants failed to file their third party notice.

[27] As noted by the Court of Appeal in *Calgary Mack Sales*, such a delay is not “commendable” but it is “not gross.” There is some explanation, albeit not a strong one, for the delay and there is a total lack of prejudice. In fact, counsel for Herman and Ross Todd and Co. acknowledged that there was no prejudice other than the passage of time. The potential third parties have had notice of this claim since 2001. With the third party claim based on the same facts and closely interrelated with the existing litigation, any actual prejudice might be to other parties if all matters were not tried together.

[28] Therefore, the time for filing the third party notice is extended. The notice must be filed and served within 15 days of this date of these reasons.

[29] Costs of this application will be in the cause.

Heard on the 12th and 15th day of August, 2008.

Dated at the City of Calgary, Alberta this 4th day of September, 2008.

J.B. Hanebury
M.C.C.Q.B.A.

Appearances:

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