Federal Court  Cour fédérale

Date: 20240131

Docket: T-1342-20

Citation: 2024 FC 160

Edmonton, Alberta, January 31, 2024

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

TRINA COMARTIN AND
PURE ELEMENTS ENVIRONMENTAL SOLUTIONS LTD.

Plaintiffs

and

WILLIAM PATRICK MARSH
(ALSO KNOWN AS BILL MARSH),
URBAN SYSTEMS LTD.,
SINCERUS (HAWK SPRINGS) GP LTD.,
SINCERUS (HAWK SPRINGS) LIMITED PARTNERSHIP,
ALBERT REMPEL, AND
SPRINGS UTILITY CORPORATION

Defendants

ORDER AND REASONS

[1] The Defendants jointly bring a motion pursuant to Rule 167 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], seeking the dismissal of the Plaintiffs' action for delay or alternatively, requiring the Plaintiffs to post security for costs. The action, which was commenced in

November 2020, is a specially managed proceeding that has been the subject of two status reviews by the Court.

[2] While acknowledging some delay, the Plaintiffs resist the motion on the basis that the Defendants have failed to meet their burden to demonstrate undue delay. In any case, the Plaintiffs assert that the individual Plaintiff, Trina Comartin, Director of the corporate Plaintiff, faced such formidable personal hardships during the period of delay that the Court should exercise its discretion to dismiss the Defendants' motion. Further, the Plaintiffs assert that the Defendants have failed to meet the requirements of Rule 416 requiring the posting of security for costs.

[3] For the reasons that follow, I will dismiss the motion under Rule 167 upon the Plaintiffs' posting of security for costs.

I. Factual Background

[4] The Plaintiffs commenced the underlying action for copyright infringement against the Defendants on November 9, 2020. The Defendants filed their Statements of Defence in January and February 2021. Affidavits of documents were exchanged in March 2021. Thereafter the action stalled. On January 6, 2022, the Chief Justice issued an Order allowing the action to continue as a specially managed proceeding. I was appointed as Case Management Judge.

[5] The Chief Justice's Order required the parties to confer and the Plaintiffs to provide a proposed timetable for the completion of the steps necessary to advance the proceeding in an

expeditious manner. On January 25, 2022, then counsel for the Plaintiffs filed a timetable setting out agreed upon deadlines. That timetable was memorialized in my Order of January 27, 2022.

[6] The Order set out the following timelines:

a. Initial examinations for discovery would be completed by 15 June 2022;

b. Undertaking responses would be provided by 31 July 2022;

c. Examination on undertaking responses would be completed by 31 August 2022;

d. Expert reports would be exchanged by specific deadlines; and

e. A pre-trial conference would be requested by 15 February 2023.

[7] On April 4, 2022, then counsel for the Plaintiffs purported to withdraw as solicitor of record.

[8] It is uncontroverted that the parties did not undertake any of the steps contemplated by my January 27, 2022 Order. Indeed, no further activity occurred until April 26, 2023, when the Court Registry requested the Plaintiffs provide a status update. When no response was received by April 28, 2023, I issued the following Direction:

> Upon the Plaintiffs being required to requisition a Pre-Trial Conference (PTC) by February 15, 2023 and upon noting that no PTC has been requisitioned; **and upon noting that the Plaintiffs did not respond** to an April 26, 2023 request for a status update from the Court's Registry, the Plaintiffs are directed to provide a status update together with a timetable for steps leading to a PTC not later than May 15, 2023, **failing which this action will be struck** for delay without further notice to the Plaintiffs.

[9] On May 12, 2023, Ms. Comartin, now self-represented, responded to this second status review by providing a proposed timetable but without conferring with the Defendants. On June 13, 2023, I convened a case management conference with the parties. At the case management conference, the Defendants advised of their intention to bring the within motion. Ms. Comartin was directed to retain counsel.

[10] On July 14, 2023, the Plaintiffs filed a Notice of Change of Solicitor, appointing Heer Law as counsel.

II. Legal Principles

[11] Rule 167 provides as follows:

Dismissal for delay	**Rejet pour cause de retard**
167 The Court may, at any time, on the motion of a party who is not in default of any requirement of these Rules, dismiss a proceeding or impose other sanctions on the ground that there has been undue delay by a plaintiff, applicant or appellant in prosecuting the proceeding.	167 La Cour peut, sur requête d'une partie qui n'est pas en défaut aux termes des présentes règles, rejeter l'instance ou imposer toute autre sanction au motif que la poursuite de l'instance par le demandeur ou l'appelant accuse un retard injustifié.

[12] The parties agree on the legal principles that apply to a motion for dismissal for delay. The conjunctive, tri-partite test endorsed by the Federal Court of Appeal in *Canada v Aqua-Gem Investments Ltd*, 1993 CanLII 2939 (FCA) and confirmed recently in *Sweet Productions Inc v Licensing LP International SÀRL*, 2022 FCA 111 at para 35 [*Sweet Productions*] directs the Court to determine whether:

i. There has been undue delay;

ii. The delay is excusable; and

iii. The defendants are likely to be seriously prejudiced by the delay.

[13] In *Sweet Productions*, the Federal Court of Appeal concluded that dismissal of the action is not a presumptive remedy upon a finding of undue delay. Rather, Rule 167 grants the Court wide discretion to craft a remedy that is appropriate in the circumstances of each case: *Sweet Productions* at para 45. It remains however, that "For a case to be allowed to move forward, there must be a fair prospect (usually within the framework of case management) that the plaintiff is intent on bringing the case to its end and has the means to do so. The Court cannot simply rely on a mere belief or hope that a plaintiff will change course in the absence of any substantiating evidence": *Sweet Productions* at para 46.

[14] Rule 167 reflects the Federal Court's philosophical concern about the systemic cost of prolonged litigation to both the Court and to litigants, and vests control over the pace of the proceedings in the Court rather than the parties. Motions under Rule 167 are infrequent, largely

owing to the extensive use of special management in this Court. Nevertheless, as the present motion demonstrates, the objectives of a case management regime can be frustrated by the failure of parties to adhere to the directions and orders of the case management judge.

[15] Against these general principles and the purpose of Rule 167, I will address whether the Plaintiffs' action should be dismissed for delay or whether another remedy is more appropriate.

A. *Has there been undue delay?*

[16] Inordinate or undue delay is measured from the commencement of a proceeding and not from the last step taken: *Behnke v Canada (Department of External Affairs)*, 2000 CarswellNat 1543 at para 25. In the present matter, the delay is roughly 38 months.

[17] The Plaintiffs urge the Court to find there has been no undue delay. They assert that the Court, in assessing the delay, overall, should view it as two discrete periods within the 38 months. The first delay, the Plaintiffs say, is nine (9) months in duration, from March 2021, until January 2022, when the Court first initiated its status review.

[18] The Plaintiffs reason that this period of delay was not inordinate or unreasonable because the Plaintiffs had been served with the Defendants' production of 5,946 documents and required time to review and analyze that production.

[19] The second delay, the Plaintiffs say, is 15 months and occurred between January 27, 2022, when the Court issued the scheduling Order and April 2023, when the Court commenced its second

status review. The Plaintiffs urge the Court to consider that the sum of the two delay periods is less than two years of the total 38 months elapsed. Viewed in this way, the Plaintiffs argue that a delay of less than two years does not constitute undue delay.

[20] The Plaintiffs point out, presumably in mitigation, that during the 38-month period, they retained new counsel and engaged in settlement discussions with the Defendants. They also refer to a number of decisions of this Court that have refused to dismiss for delay where the delay is for less than two years: *Pilot v McKenzie*, 2021 FC 396 at para 14.

[21] Rule 167 is silent on the length of delay required to trigger a determination of undue delay. Instead, the Court has discretion to assess the individual circumstances of each proceeding and the conduct of the parties to those proceedings to determine whether the delay is undue. What is inordinate in one proceeding may not be in another. However, in every case, Rule 167 requires the Court to consider the imposition of sanctions less drastic than dismissal.

[22] In this case, I do not accept the Plaintiffs assertion that the delay is not inordinate or undue. I find the delay is undue. The Court is hard-pressed to come to any other conclusion where, as here, the Court has already initiated two status reviews and made the action a specially managed proceeding. Put another way, the Court has invested significant judicial resources trying to rescue this proceeding. Indeed, following the first review, I issued an Order setting timelines for next steps. The parties had negotiated and agreed upon those timelines but neither party took any steps in compliance with that Order. As this Court noted in *Putjotik Fisheries Ltd v Mercy Viking (Ship)*, 2006 FC 491 at paras 24 and 25, referring to *Ferrostaal Metals Ltd v Evdomon Corp* (2000), 181

FTR 265, when an Order is made pursuant to a status review, any unjustified default is serious and the Court will have little tolerance for the party in default.

B. ***Is the delay excusable?***

[23] In argument before me, Plaintiffs' counsel urged the Court to consider the totality of the hardships faced by the Plaintiffs, and in particular, Ms. Comartin, during the delay period. Those hardships include very personal misfortunes; the difficulties associated with being self-represented after April 2022; financial pressures on the corporate Plaintiff; and the failure of the Defendants to communicate with them once they became self-represented. These various circumstances are set out in detail in Ms. Comartin's affidavit filed on this motion.

[24] In her affidavit, Ms. Comartin deposes to various personally traumatic events involving members of her family that she experienced during the delay periods. There is no need to recite those circumstances here. It is necessary only to note that it is uncontroverted that Ms. Comartin was dealing with very challenging personal issues.

[25] In addition to those personal challenges, Ms. Comartin led evidence concerning her relationship with her former counsel. She deposes that she was unaware of the January 27, 2022 scheduling Order and that her former counsel neither advised her of the Order nor of the obligations set out in the Order. She indicates she only became aware of the Order after the Court Registry sent the April 26, 2023 request for a status update. Following receipt of the April 28, 2023 Direction, Ms. Comartin deposes that she contacted the Court Registry and complied with the

Direction by providing a status update and a timetable for steps leading to a pre-trial conference, as directed by the Court.

[26] In the Plaintiffs' written representations and in oral argument, they argue that the Defendants, who were represented by counsel ought to have been aware or were aware of the Plaintiffs self-represented status and should have taken steps to communicate with the Plaintiffs. Instead, they argue, the Defendants remained silent and chose to wait out the delay. They assert that had the Defendants communicated with the Plaintiffs, they would have known of the scheduling Order and its obligations. This, they say, is borne out by the fact that once they became aware of matters, they took steps to comply with the Court's Directions, including by retaining new counsel.

[27] The Defendants, while acknowledging the personal challenges faced by Ms. Comartin, argue that the delay is inexcusable. They note that the delay has been persistent and from the outset of the action. Further, they argue that the Plaintiffs bear the onus to move their action forward; the Defendants have no such obligation. In any case, they note that the bulk of the personal challenges cited by Ms. Comartin occurred at a time when the Plaintiffs were still represented by counsel and cannot form the basis of excusable delay.

[28] The Defendants further argue that the Plaintiffs were very much aware that they were unrepresented as of April 2022, and yet took no steps to retain new counsel until directed by the Court to do so in 2023. This failure, the Defendants assert, created delay and is inexcusable.

[29] I agree with the Defendants. The Plaintiffs have not satisfied me that the delay is excusable. While I am sympathetic to Ms. Comartin's personal hardships, those events took place between September 2021 and March 2022, when Counsel represented the Plaintiffs. Thus, they do not form the foundation of excusable delay.

[30] Furthermore, I find it entirely unhelpful for the Plaintiffs to suggest that blame somehow lies at the feet of the Defendants. In any action, the plaintiff bears the obligation to move the litigation forward. I know of no situation where the onus would shift to the defendant. That is not to say that the defendant does not have corresponding obligations, which I shall address later in this Order, but the ultimate responsibility rests with the plaintiff.

[31] Here, the Plaintiffs have failed to demonstrate that the delay was excusable. The Court acknowledges that Ms. Comartin acted with alacrity once she was confronted with the Court's April 28, 2023 Direction. However, I regard the steps taken after April 28, 2023, including the appointment of new counsel as remedial in nature and only resulted from the Court's second intervention on the action.

C. ***Are the Defendants likely to be seriously prejudiced by the delay?***

[32] Before me and in their written representations, the Defendants argue that they have suffered business prejudice and reputational harm as a result of the unresolved allegations of infringement raised in the action: *R v Cragg & Cragg Design Group Ltd*, 1998 CarswellNat 1046 [*Cragg*] at paras 2, 3 and 23.

[33] In support of their position, the Defendants filed a number of affidavits on this motion, including those of Albert Rempel, an individual Defendant and authorized representative for Sincerus (Hawk Springs) GP Ltd., (Sincerus GP), Sincerus (Hawk Springs) Limited Partnership (Sincerus LP), and Springs Utility Corporation; Lynda Cooke, authorized representative of Urban Systems Ltd.; and William Marsh. Each of the three affiants deposes to some prejudice suffered because of the ongoing litigation. For example, Ms. Cooke, is a professional engineer who deposes that the existence of the litigation has an ongoing detrimental effect on Urban Systems and continues to cause reputational harm for her as a professional engineer.

[34] William Marsh, who is also a professional engineer, deposes that the Defendant, Urban Systems Ltd., has not employed him since the spring of 2019. He further deposes that the allegations made against him in the action, that is, of being accused of utilizing the work of another professional engineer for personal gain without acknowledgment, is very harmful to his professional reputation.

[35] The affiant, Albert Rempel, deposes that some of their investors have expressed concern about the allegations made against the Sincerus Defendants. He deposes that the unfounded and unproven allegations call into question the Defendants' integrity and business ethic.

[36] In response, the Plaintiffs concede that prejudice is "inherent" in long delays but suggest that the Defendants have not provided evidence to support the assertion that the Defendants might receive less than a fair trial, or that they have sustained financial damage, as was the case in *Cragg*. Rather, the Plaintiffs assert that the Defendants have failed to adduce evidence of actual harm

suffered and merely rely on the belief that they will suffer harm. To that, the Plaintiffs add that any prejudice which has or is likely to be suffered by the Defendants does not outweigh the prejudice to the Plaintiffs of being denied the opportunity to bring their case to hearing.

[37] In my view, the Defendants are not required to lead evidence of actual prejudice suffered. As the Court in *Sweet Productions* concluded at para 35, the test is whether the defendant is likely to be seriously prejudiced by the delay. Here, I am satisfied that Defendants have met their onus to show the likelihood of prejudice.

D. ***Are other sanctions appropriate?***

[38] That, however, does not end the matter. As dismissal is not the presumptive remedy on delay, I must determine whether there is a less drastic measure that should be considered in lieu of dismissal. Generally, the imposition of case management would be the fall back position. Unfortunately, that route has not proven successful in this case.

[39] During the hearing of this matter, I asked counsel for the Plaintiffs what other measures the Court might consider. Counsel was unable to offer any suggestions but did opine that the appointment of new counsel, with a new vision, should provide the Court with some measure of comfort. Indeed it does. However, it does not allow me to sufficiently conclude that there is a fair prospect the Plaintiffs are intent on bringing this action to an end. The Court cannot rely on mere statements of hope or belief. I am satisfied that some further measure is required to forestall dismissal.

[40] As an alternative position on their motion, the Defendants seek an order for security for costs. Attached to their motion record is a Bill of Costs totalling $29,931.00 to the end of trial. The Plaintiffs take the position that the evidence they have led does not support the posting of security by the Plaintiffs pursuant to Rule 416(1)(g). In any event, the Plaintiffs assert that if the Court was inclined to direct the posting of security, it should not exceed $9,710.00 and should be payable by installments.

[41] I do not intend to analyze the request for security for costs through the lens of Rule 416. Rather, guided by Rules 3 and 55 of the *Rules*, I am ordering security for costs as a measure to ensure the Plaintiffs move this matter forward to hearing in the most expeditious and just manner. The posting of security should also provide the Defendants with some measure of comfort that their costs will be recoverable.

[42] As to the quantum, I am of the view that the Plaintiffs must post $10,000.00, with $5,000.00 payable not later than 14 days following the date of this Order. The remaining $5,000.00 shall be posted following the first round of examinations for discovery. If the Plaintiffs fail to post the security, the action will be dismissed.

[43] Once the initial $5,000.00 is posted, the parties will confer and shall, within 30 days of the date of this Order, provide the Court with a timetable of next steps. If the parties are unable to agree, they shall requisition a case management conference for that purpose.

[44] As a final point, I was reluctant to dismiss the action because the Defendants are not entirely without fault in this matter. As I noted earlier, it is the Plaintiffs' burden to move their action forward. However, once a matter is placed into case management and the Court issues orders in the management of a case, failure, by any party to comply with the terms of the Court's Orders is a very serious matter: *Kehewin Cree Nation v Watchmaker*, 2023 FCA 250 at para 8.

[45] My January 27, 2022 Order created mutual obligations on the parties. Both parties failed to comply with that Order. While the Plaintiffs say they were unaware of the existence of the Order, there is no evidence that they took any steps to inform themselves during the period they were without counsel. They simply did nothing. That is unacceptable. The same is true of the Defendants. They agreed to the timelines and were equally bound by the terms of the Order. Yet, they did nothing to comply with an order of the Court. Before me, counsel for the Sincerus Defendants confirmed that there is no correspondence on his file evidencing any steps taken to conduct examinations for discoveries — the first of the mutual obligations set out in my Order. For this reason, I was unable to conclude that the action should be dismissed on the Defendants' motion.

[46] Going forward, the parties are reminded that orders are not mere suggestions from the Court and non-compliance will not be tolerated.

ORDER in T-1342-20

THIS COURT ORDERS that:

1. The Defendants' motion is allowed, in part.

2. The Plaintiffs shall, within 14 days of this Order, post security for costs in the amount of $5,000.00, failing which the action is dismissed with costs to the Defendants.

3. On the conclusion of the first round of examinations for discovery, the Plaintiffs shall post a further $5,000.00 as security failing which the action is dismissed with costs to the Defendants.

4. Upon posting the security for costs required by paragraph 2 of this Order, the parties shall confer and within 30 days of this Order, provide an agreed upon timetable for next steps leading to a pre-trial conference.

5. If the parties cannot agree on a timetable, they shall requisition a case management conference and provide mutual dates of availability.

6. Costs of this motion shall be in the cause.

"Catherine A. Coughlan"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1342-20
STYLE OF CAUSE:	TRINA COMARTIN AND PURE ELEMENTS ENVIRONMENTAL SOLUTIONS LTD. v WILLIAM PATRICK MARSH (ALSO KNOWN AS BILL MARSH), URBAN SYSTEMS LTD., SINCERUS (HAWK SPRINGS) GP LTD., SINCERUS (HAWK SPRINGS) LIMITED PARTNERSHIP, ALBERT REMPEL, AND SPRINGS UTILITY CORPORATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 23, 2024
ORDER AND REASONS:	COUGHLAN A.J.
DATED:	JANUARY 31, 2024

APPEARANCES:

Georgina Danzig Annette Latoszewska	FOR THE PLAINTIFFS
David A. McMillan	FOR THE DEFENDANTS WILLIAM PATRICK MARSH (ALSO KNOWN AS BILL MARSH), URBAN SYSTEMS LTD.
Matthew X. James Kyle Shewchuk	FOR THE DEFENDANTS SINCERUS (HAWK SPRINGS) GP LTD., SINCERUS (HAWK SPRINGS) LIMITED PARTNERSHIP, ALBERT REMPEL, AND SPRINGS UTILITY CORPORATION

SOLICITORS OF RECORD:

Heer Law Calgary, Alberta	FOR THE PLAINTIFFS
David A. McMillan Law Office Kamloops, British Columbia	FOR THE DEFENDANTS WILLIAM PATRICK MARSH (ALSO KNOWN AS BILL MARSH), URBAN SYSTEMS LTD.
James & McCall Barristers Calgary, Alberta	FOR THE DEFENDANTS SINCERUS (HAWK SPRINGS) GP LTD., SINCERUS (HAWK SPRINGS) LIMITED PARTNERSHIP, ALBERT REMPEL, AND SPRINGS UTILITY CORPORATION