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**Something Happened (with apologies to Joseph Heller)**

**By Jonnette Watson Hamilton**

**Cases Considered:**

*Brentech Services Ltd. v. Sunray Manufacturing Inc.*, 2008 ABQB 301

"Want of prosecution" is a curious and old-fashioned phrase. It refers to an absence of steps taken in a court action by the person who started the lawsuit. It is an allegation and finding of indefensible and excessive delay in carrying a lawsuit through to its conclusion.

When there has been a want of prosecution, the person sued can ask the court to dismiss the action. In Alberta, there are two different rules and two different tests for dismissing actions for want of prosecution. The first, Rule 244.1, states that a court must dismiss an action if it has been five years since a step was taken that materially advances the lawsuit (see *Alberta Rules of Court*, Alta. Reg. 390/1968). The only arguments in a Rule 244.1 application tend to be arguments about whether some step moved the lawsuit towards its conclusion in a significant enough manner. The second, Rule 244(1), provides that the court may dismiss an action if there has been delay. The test for dismissing a claim under Rule 244(1) is a tripartite sequential test set out in the English case of *Allen v. McAlpine*, [1968] 1 All E.R. 543, and adopted by the Alberta Court of Appeal in *Kuziw v. Kucheran Estate*, [2000] A.J. No. 944. It is a test of (a) inordinate delay, (b) which is inexcusable, and (c) likely to seriously prejudice the applicant. Defendants tend to use Rule 244.1 if five years have gone by since anything happened and Rule 244(1) if it has been less than five years.

In *Brentech Services Ltd. v. Sunray Manufacturing Inc.*, Sunray's application to dismiss the claim had been brought before Master L.A. Smart under Rule 244(1). Master Smart granted the order and Brentech appealed.

The appeal was heard by my former colleague, who was elevated to the Bench just last December, the Honourable Mr. Justice Keith Yamauchi. He first addressed the standard of review for an appeal from a master's decision. He relied upon the December 2006 Alberta Court of Appeal decision in *Dickey v. Pep Homes Ltd.*, 2006 ABCA 402. I had pointed out the *Dickey* decision in an earlier blog which had considered Mr. Justice Yamauchi's first written judgment: "The Standard of Review on Appeals of Masters' Decisions to the Court of Queen's Bench." (I'm not saying, of course, that my former colleague read that blog; he may have but he certainly would not tell me if he did. It is not the sort of thing a judge tells an academic about. Perhaps

counsel was simply better prepared on the law in this case.) In any event, on an appeal from a master, a Court of Queen's Bench judge basically hears the application *de novo*, or all over again, but without entirely disregarding what the master ordered and why.

Applications for orders dismissing actions for want of prosecution and their *de novo* appeals typically involve recitals of long list of things done by one party or another. There is a start date, the date the plaintiff began their action. There is an end date, the date the defendant applied to the court to dismiss the plaintiff's claim on the basis of want of prosecution. In between there is a list, long or short, of things that happened between the start date and the end date. It is a list of documents that got filed, orders that were granted, letters that were exchanged by counsel, etc.

*Brentech Services Ltd. v. Sunray Manufacturing Inc.* is typical in this regard. Paragraphs 4 to 7 list who did what and when in Brentech's action alleging breach of contract and loss of profits as a result. Brentech started the lawsuit in January 2002. Quite a bit happened in the first half of 2002, but nothing happened in 2003, 2004, 2005 or 2006. Brentech hired new lawyers in January 2007 and those new lawyers tried to make something happen.

Sunray immediately objected to the four and a half year delay and the prejudice that they suffered as a result of that delay. I said nothing happened for four and a half years, but the lack of action was in the lawsuit. The building housing Sunray's business records and all of those records were destroyed in a fire in the summer of 2003. That same summer, the legal files with Brentech's action and other documents relevant to the action were lost when the sewer backed up and their lawyer's home was flooded — the home of their first lawyer that is, not the one appearing on this application. Because of this destruction by fire and flood, Sunray said they had no documents to use in defending against Brentech.

As already mentioned, the leading case in Alberta on Rule 244(1) is *Kuziw v. Kucheran Estate*, the 2000 Court of Appeal decision that adopted the tripartite sequential test of (a) inordinate delay, (b) which is inexcusable, and (c) likely to seriously prejudice the applicant. Mr. Justice Yamauchi begins his analysis of the application with this leading case.

Was there inordinate delay? How long is "inordinate"? Rule 244.1 provides some guidance, as Mr. Justice Yamauchi noted. It states judges must dismiss actions when nothing has happened for five years. Rule 244(1) therefore applies to delays of less than five years. "Inordinate" was defined in *Kuziw* at para. 31 as "much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case." Inordinate is therefore case and fact specific.

So what were the specific facts here? Brentech had sued and Sunray had filed a statement of defence. Then Sunray served Brentech with a demand for further and better particulars (details) of Brentech's claim and with a notice that they would be asking the court for an order that Brentech provide better particulars. Both parties appeared before Mr. Justice Marshall on March 5, 2002 and the clerk's notes indicated that he granted Sunray an order saying they did not have

to file their amended statement of defence until eight days after Brentech provided better particulars.

Brentech therefore had to do something first; they had to provide more details of their claim to Sunray. Sunray did not have to do anything until that happened. Brentech tried to argue that the delay was Sunray's fault and that Sunray had a duty to move Brentech's action along. However, as Mr. Justice Yamauchi noted, it was up to Brentech to keep its own action moving along; it could not pass the blame to Sunray. Sunray demanded particulars and backed up that demand with a court order requiring Brentech to deliver those particulars. Once Sunray did what was legally required of them, they could sit back and wait for something to happen. In this case, nothing happened for four and a half years and that was inordinate delay.

Was the inordinate delay inexcusable? In *Kuziw*, the Court of Appeal stated that it was up to the delaying party to put forward a credible excuse for the inordinate delay. The delay might have been the fault of Brentech's first lawyer but that was no excuse.

Was the inordinate and inexcusable delay likely to seriously prejudice Sunray? Defendants such as Sunray can rely on Rule 244(4) to establish prejudice. Rule 244(4) states that when a court "finds that the delay in an action is inordinate and inexcusable, that delay shall be *prima facie* evidence of serious prejudice to the party that brought the application." Thanks to the presumption in Rule 244(4), Sunray did not have to prove the delay seriously prejudiced it. It was up to Brentech to raise a legitimate doubt about the existence of serious prejudice to Sunray and it did not.

Mr. Justice Yamauchi therefore decided that the master was correct to order that Brentech's action be dismissed for want of prosecution. Nothing happened for four and a half years and so something happened; Brentech lost, for all time, the opportunity to recover from Sunray what it alleged it had lost.