

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Barbara M. Hamilton
Mr. Justice Christopher J. Mainella

BETWEEN :

DUKE BEARDY, CHRISTINA GARSON,)
RANDY BEARDY, WALTER MARTIN,)
JOAN OUSKAN, NORMAN FLETT and)
ROYAL TRUST CORPORATION OF)
CANADA, in their capacity as Trustees of the)
Tataskweyak Trust)
)
(Plaintiffs) Appellants)

P. Halamandaris
for the Appellants

- and -)

MERRILL LYNCH CANADA INC and)
RICHARD R. SHALLA, JR.)
)
(Defendants) Respondents)

G. M. Fleetwood
for the Respondents

- and -)

Appeal heard and
Decision pronounced:
October 24, 2018

LILIANA KOSTIC and STEVEN JAMES)
WESTMAN)
)
(Defendants))

- and -)

BETWEEN :)
)
MERRILL LYNCH CANADA INC and)
RICHARD R. SHALLA, JR.)
)
(Plaintiffs by Counterclaim))

- and -)
)
DUKE BEARDY, CHRISTINA GARSON,)
RANDY BEARDY, WALTER MARTIN,)
JOAN OUSKAN, NORMAN FLETT,)
MICHAEL GARSON and ROYAL TRUST)
CORPORATION OF CANADA)
)
)
(Defendants to the Counterclaim))

CHARTIER CJM (for the Court):

[1] The plaintiffs appeal the decision of the motion judge to dismiss their action for delay.

[2] In her reasons, the motion judge correctly stated the legal principles for a defendant to bring a motion to dismiss for delay under r 24.01 of Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88. She reviewed the history of the litigation, noting that the events that led to the claim had occurred between 2000 and 2001; that the action was commenced in 2003; that the examinations for discovery had been substantially completed between 2007 and 2008; and, that nothing had happened since the January 2012 failed mediation. While she found there was no specific prejudice, she did find the delay to be excessive and that the defendants had suffered inherent prejudice by the mere passage of time. It was open to the motion judge to conclude in this way. Key to her decision was the absence of an explanation for the inordinate delay from the plaintiffs and the fact that they did nothing to move the action forward despite being put on notice more than two years earlier that this motion to dismiss for delay was forthcoming.

[3] On appeal, the plaintiffs refer to *Treaty Land Entitlement Committee of Manitoba Inc v Merrill Lynch Canada Inc et al* (12 September 2017), Winnipeg CI05-01-41864 (Man QB) an endorsement decision from another judge where a similar motion for delay had been dismissed. That decision had been pronounced a few weeks before this motion judge's decision. On the face of that decision, the chronology of events are different.

[4] The motion judge's decision is discretionary and is entitled to deference unless the judge erred in principle or made a palpable and overriding error on the facts. Despite the able argument of counsel, given the lengthy history of the action and the plaintiffs' unexplained inactivity, we are not convinced that there is a basis to set aside her finding that the defendants were "significantly prejudiced." Appellate intervention is unjustified.

[5] The plaintiffs' appeal is dismissed with costs.

Chartier CJM

Hamilton JA

Mainella JA
