

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walco Industries Ltd. v. McDougall*,
2026 BCSC 1678

Date: 20260903
Docket: S163683
Registry: Victoria

Between:

Walco Industries Ltd.

Plaintiff

And

Vernie McDougall and Venom Industrial Inc.

Defendants

Before: The Honourable Justice LeBlanc

Reasons for Judgment

Counsel for Plaintiff:

N. E. Worsley

Counsel for Defendants:

M. D. Cedrone

Place and Date of Hearing:

Victoria, B.C.
August 31, 2026

Place and Date of Judgment:

Victoria, B.C.
September 3, 2026

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Introduction

[1] The defendants apply to dismiss this action for want of prosecution pursuant to Rule 22-7(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [SCCR].

[2] The action was commenced in 2016 and arises from events which are alleged to have occurred in 2014 and 2015.

[3] The revised framework governing dismissal applications for want of prosecution was established in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473. The first two questions are: (a) has the defendant established that the plaintiff's delay in prosecuting the action is inordinate; and (b) is the delay inexcusable? If both of those questions are answered in the affirmative, the court is to move to the third and final question: is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[4] The plaintiff concedes that the first two questions are to be answered in the affirmative. The question on this application is whether it is in the interests of justice for the action to proceed despite the inordinate and inexcusable delay.

Procedural Background

[5] Mr. McDougall was employed by the plaintiff from approximately May 2014 to March 2015 and resigned effective March 22, 2015.

[6] The action was commenced on September 1, 2016.

[7] In 2016 and 2017, the parties exchanged lists of documents.

[8] The notice of civil claim was amended on July 25, 2017. The amended notice of civil claim seeks damages for breach of employment, disgorgement of profit, accounting and tracing of all revenue generated by the defendant's breach of fiduciary duty and payment of that amount to the plaintiff, punitive damages, interest, and costs.

[9] There was no written agreement between the plaintiff and Mr. McDougall, and the plaintiff relies on implied oral terms it alleges form part of the employment agreement.

[10] By letters dated December 18, 2017, March 19, 2018, June 20, 2018, and October 12, 2018, the defendants sought further document disclosure, and particulars of the claim. The defendants also sought to schedule examinations for discovery. The plaintiff does not appear to have substantively responded to these requests until it took the step in 2022 to schedule an examination for discovery.

[11] On April 12, 2022, the plaintiff served the defendants with an appointment to examine for discovery scheduled to occur on April 29, 2022.

[12] On April 13, 2022, the defendants served a demand for particulars. The plaintiff has not responded to the demand.

[13] The parties agreed to adjourn the examinations for discovery to January 18 and 19, 2023.

[14] The plaintiff was examined on January 19, 2023, and the examination was adjourned pending production of documents by the plaintiff.

[15] On March 2, 2023, the defendants requested a response to the requests made at the plaintiff's examination for discovery. Those requests have not been responded to by the plaintiff.

[16] On April 14, 2026, the plaintiff requested disclosure from the defendants. Counsel for the defendants informed counsel for the plaintiff that a notice of intention to proceed was required due to the inactivity on the file which exceeded a year.

[17] On April 15, 2026, the plaintiff served the defendants with a notice of intention to proceed. In response, this application was filed.

[18] In ten years, the plaintiff has done very little to advance this litigation. The parties agree that the litigation remains at the document disclosure stage.

Applicable Legal Principles

[19] An application to dismiss a claim for want of prosecution is brought pursuant to Rule 22-7(7) of the SCCR:

(7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[20] As inordinate and inexcusable delay has been conceded, the applicable legal principles that I will be summarizing focus on the question of whether it is in the interests of justice for an action to proceed.

[21] As a starting point for assessing the interests of justice, the Court of Appeal in *Giacomini* adopted the non-exhaustive list of factors set out by the Saskatchewan Court of Appeal in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48. Those factors are:

- a) the prejudice the defendant will suffer defending the case at trial;
- b) the length of the delay;
- c) the stage of the litigation;
- d) the impact of the delay on the defendant's professional, business or personal interests;
- e) the context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed;
- f) the reasons offered for the delay;
- g) the role of counsel in causing delay; and
- h) the public interest in having cases that are of genuine public importance heard on their merits.

[22] The Court of Appeal in *Giacomini* added the following further factor to the *International Capital* list: the merits of the action -- if an action is bound to fail, then the interests of justice favour its dismissal:

Discussion

[23] I will now review the circumstances of this case with regard to the test as outlined in *Giacomini*.

1. Has there been an inordinate delay?

[24] It is conceded that there has been inordinate delay.

[25] The action was commenced in 2016 and there have been two periods of activity. In 2016/2017, the parties exchanged lists of documents, and the plaintiff filed the amended notice of civil claim. Other than requests sent by the defendants nothing occurred on the action until 2022/2023 when the parties attended examinations for discovery. This application was brought ten years after the claim was commenced when the plaintiff sought to engage in further document discovery after a three-year dormant period.

[26] Although there have been discussions between counsel from time to time, the fact is that other than the document disclosure in 2016/2017 and the examinations for discovery in 2022/2023, there have been no substantive steps taken by the plaintiff to advance the litigation. In fact, the plaintiff has failed to respond to examination requests and demand for particulars.

[27] Even if it had not been conceded, I would have found the delay to have been inordinate.

2. Is the delay inexcusable?

[28] This too is conceded by the plaintiff.

[29] The plaintiff does not provide an excuse for the delay.

[30] The plaintiff's evidence with respect to the delay consists of the following paragraph:

18. It has at all material times been Walco's intention to continue pursuing this proceeding and to obtain the outstanding discovery responses

and document production arising from the January 19, 2023 discoveries.

[31] Absent an explanation, the delay must be inexcusable.

[32] Although conceded, I have no difficulty in concluding that there has been inordinate delay and that the delay is not excusable.

[33] I now turn to the question of whether it is in the interests of justice to allow the action to proceed despite the existence of the inordinate and inexcusable delay.

3. Is it in the Interests of Justice for the Action to Proceed?

a. Prejudice the Defendant will Suffer in Defending the Case at Trial

[34] Relevant prejudice exists in situations where a defendant's ability to defend a claim has been impaired: *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 50. Serious prejudice may be established through factors such as failing memories, unavailability of witnesses, and the loss or destruction of evidence: *Wiegert v. Rogers*, 2019 BCCA 334 at para. 33.

[35] In this case, Mr. McDougall deposes that that evidence may no longer be accessible, available, dated and/or more difficult to locate due to the length of the delay. In particular, he says:

19. The passage of time has materially impaired my ability to recall operational details, communications, scheduling matters, customer interactions, and other events alleged in this proceeding.
20. Records relevant to the allegations in this action are no longer readily available or may no longer exist due to the substantial passage of time.
21. The Plaintiff's claims concern operational and business activities allegedly occurring more than a decade ago.
22. The ongoing delay has materially prejudiced my ability to fairly defend against the allegations advanced by the Plaintiff.
- ...
30. At no time did I agree to, consent to, or acquiesce in the Plaintiff allowing this proceeding to remain dormant for prolonged periods.
- ...

38. The prolonged continuation of this litigation has imposed significant financial strain upon me.

[36] The evidence demonstrates that by the time the disclosure issues were being pursued, certain categories of potentially relevant records were no longer available, including historical cell phone records and emails.

[37] I accept that in the ten years that has elapsed, memories have faded and documents may not be as readily accessible.

[38] In *0690860 Manitoba Ltd.*, the Court of Appeal recognized that prolonged delay inherently risks deterioration of evidence and that the passage of time may impair the ability of parties to fairly investigate and defend claims.

[39] In my view, the prejudice can be readily observed in the defendants' efforts to obtain particulars of the plaintiff's claim without receiving a response. Without particulars, I accept that the defendants do not know the full extent of the case being brought against them. For example, the defendants sought particulars of the information communicated to Mr. McDougall in confidence which resulted in a detriment to the plaintiff. No response was provided. Further, the plaintiff did not respond to the requests made at the examination. Without knowing the full extent of the plaintiff's case, the defendants just don't know what may or may not be relevant for litigation purposes.

[40] I accept that the plaintiff's refusal or inability to define the confidential information allegedly taken by Mr. McDougall is a further source of prejudice. The defendants cannot reasonably investigate, preserve evidence, identify responsive witnesses, assess causation, evaluate damages, or prepare a defence to the undefined allegations.

[41] I find that the defendants have established serious prejudice due to the time that has elapsed which has been exacerbated by the plaintiff's non-responsiveness to the demand for particulars and examination requests.

b. The Length of the Delay

[42] I have already determined that the length of the delay is inordinate.

c. The Stage of Litigation

[43] The litigation remains in its infancy.

[44] The pleadings are closed. Lists of documents have been exchanged and examinations for discovery conducted. The parties agree that document production remains an ongoing concern. The plaintiff seeks documents from the defendant that the defendant says are not produceable. The defendants seek particulars, documents and examination responses that have not been produced by the plaintiff. No steps have been taken to resolve the production concerns other than correspondence between counsel.

[45] No trial date has been set.

d. Impact of Delay on the Defendants' Professional Business or Personal Interests

[46] The defendants allege that they suffer prejudice because of the ongoing litigation.

[47] Counsel for the defendants have periodically attempted to move this action forward leading to legal costs that persist because the file remains extant. I accept that when legal proceedings are not pursued in a timely manner, it can increase the overall litigation cost for a party. Non-responsiveness and inactivity require additional follow-up letters and time spent adding to the litigation costs.

[48] Additionally, Mr. McDougall has the stress associated with having legal proceedings commenced against him and the uncertainty that it carries.

[49] On October 12, 2018, counsel for the defendants notified counsel for the plaintiff that instructions had been received to bring an application to strike the claim for want of prosecution as no steps had been taken for over a year. Notwithstanding

this notice, the plaintiff continued to delay progressing the litigation in a timely manner.

[50] It is important to keep in mind that there is no onus on a defendant to move a matter forward and a plaintiff that files a civil claim is expected to get on with it: *Giacomini* at para. 74. There can be no suggestion here that the plaintiff was lulled into a false sense of security on the basis that the defendants were acquiescing in the delay. The correspondence from counsel for the defendants is to the contrary.

e. Reasons Offered for the Delay

[51] The plaintiff does not offer a reason for the delay. Instead, the plaintiff says that it now wishes to move forward with resolving the document disclosure issues and pursue its claim. The plaintiff argues it would be in the interests of justice to allow it to pursue its claim.

[52] There is no evidence that would explain the reasons for the plaintiff's delay, when it was aware that the defendants sought to have the claim progress by indicating an application to dismiss for want of prosecution was being contemplated.

[53] The plaintiff relies on *HUB International Canada West ULC v. Forgotten Treasures International Inc.*, 2026 BCCA 230, where the Court of Appeal applied *Giacomini* and upheld an order permitting materially delayed litigation to continue after the interests of justice were assessed on the whole of the record. The plaintiff argues that after the court weighs the relevant considerations in this case, it favours allowing the plaintiff to continue with the action.

[54] I agree with counsel for the plaintiff that the factual circumstances in *HUB International* are materially different than in this case. In this case, I find that the defendants were taking steps to process the litigation whereas the plaintiff took a passive role and permitted the litigation to remain dormant.

f. The Role of Counsel in Causing the Delay

[55] There is some suggestion in the evidence that the plaintiff has changed counsel several times; however, I have no evidence on what impact that may have had in causing the delay.

g. Public Interest in Having Cases Heard

[56] This is a private law dispute, and it is therefore not one of public importance.

[57] As a general proposition, the interests of justice dictate that matters should be determined on their merits as opposed to a party's claim being dismissed for what might be described as more technical reasons. However, undue litigation delay undermines public confidence in the justice system and should not be countenanced: *Giacomini* at para. 74.

h. Merits of the Action

[58] Based on the record before me, I cannot assess the merits of the action.

Summary of the Interests of Justice Analysis

[59] The Court of Appeal confirmed that the court needs to consider the interests of justice as a “more nuanced balancing of the competing considerations of the interests of the defendants, and the justice system as a whole”: *Giacomini* at para. 75.

[60] In this case, I find that the plaintiff has had every opportunity to proceed with its claim. The plaintiff was obligated to advance its case, and the defendants repeatedly reminded the plaintiff of the need to move the matter forward, but to no avail.

[61] As expressed in *Giacomini*, unreasonable delay in the prosecution of an action in itself undermines public confidence in the justice system, regardless of whether the delay results in serious prejudice to the defendant's ability to defend the litigation: para. 56.

[62] I have found that the defendants' ability to defend the litigation has been compromised by the delay. This coupled with the unreasonable length of the delay without excuse and the impact that delay has on the public's confidence in the justice system, weighs in favour of striking the claim for want of prosecution.

[63] For all of the reasons expressed above, I find that dismissing the claim is not contrary to the interests of justice.

[64] The application to dismiss the claim for want of prosecution pursuant to Rule 22-7(7) is granted. The defendants will be awarded their costs of this action.

"LeBlanc, J."