



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Woon v. Brothers*, 2026 NLSC 2

Date: January 15, 2026

Docket: 201701G4785

BETWEEN:

SHAWN WOON

FIRST PLAINTIFF

AND:

DEANNA YOUNG

SECOND PLAINTIFF

AND:

KENNETH J. BROTHERS

FIRST DEFENDANT

AND:

MAURICE RUMBOLT

SECOND DEFENDANT

AND:

NL REALTY LTD.

THIRD DEFENDANT

AND:

**TIMOTHY J. THOMAS, AS
EXECUTOR AND TRUSTEE FOR THE
ESTATE OF ROWENA ELIZABETH
STRICKLAND**

FOURTH DEFENDANT

Before: Justice Garrett A. Handrigan

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: January 16, 2025 and December 8, 2025

Summary:

The four Defendants applied under Rule 40.11 of the *Rules*, to dismiss the Plaintiffs' claim against them based in contract and tort for want of prosecution. The Plaintiffs opposed the Application, claiming mainly that the Defendants had failed to prove they would be prejudiced if they went to trial.

HELD: The Court allowed the Applications to Dismiss and found the Plaintiffs' delay in prosecuting their claim was both inordinate and inexcusable; and that the Defendants proved on a balance of probabilities they would suffer serious prejudice if the proceedings continued. It awarded costs to the Defendants to be taxed under Column 3 of the Scale of Costs.

Appearances:

Judy M. Manning Appearing on behalf of the Plaintiffs

Michael Williams Appearing on behalf of the First Defendant

Isabella Monika
Koltunski Appearing on behalf of the Second and Third Defendants

Jonathan E. Noonan,
K.C. Appearing on behalf of the Fourth Defendant

Authorities Cited:

CASES CONSIDERED: *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (Nfld. C.A.); *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 2 W.L.R. 366 (Eng. C.A.); *Fennelly v. Lloyd's Underwriters*, 2021 NLSC 160; *Wiegert v. Rogers*, 2019 BCCA 334

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] Shawn Woon and Deanna Young (the “Plaintiffs”) bought land in Deer Lake, NL, on or before July 12, 2013. They retained Kenneth Brothers (the “1st Defendant”) as their lawyer on the transaction, but they say he also represented Rowena Strickland (the “4th Defendant”), who sold the land to them. Ultimately, the Plaintiffs discovered that they could not build a house on the land, as they say they intended to do.

[2] The Plaintiffs sued the 1st Defendant, their lawyer, as well as Maurice Rumbolt and NL Realty Limited (the “2nd & 3rd Defendants”), the realtors on the transaction and Timothy Thomas, the 4th Defendant, as Rowena Strickland’s Executor. They based their claim on negligence, breach of contract and other causes of action. To that end, they filed a Statement of Claim in this Court on July 13, 2017, naming Mr. Brothers, Mr. Rumbolt, NL Realty Limited and the Estate as 1st, 2nd, 3rd & 4th Defendants respectively.

[3] On November 25, 2024, the 1st Defendant applied to this Court under Rule 40.11 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the “Rules”) to dismiss the Plaintiffs’ Statement of Claim for want of prosecution, as did the 2nd & 3rd Defendants, on December 17, 2024, and the 4th Defendant on October 9, 2025. I heard the three Applications together on December 8, 2025, and reserved my judgment until now.

THE ISSUE

[4] Should the Plaintiffs' Statement of Claim be dismissed for want of prosecution?

THE LAW

Statutory

[5] Rule 40.11 of the *Rules*, provides:

40.11. Where a plaintiff does not apply to set a proceeding down for trial, the defendant may apply to set it down for trial or apply to the Court to dismiss the proceeding for want of prosecution, and the Court may order the proceeding to be dismissed or make an order that is just.

Case Law

[6] While *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (Nfld. C.A.) is dated, its statement of the law that applies to dismissal of statements of claim for want of prosecution in this jurisdiction is generally valid. In paragraph 12 of *Penney*, Gushue, J.A. quoted from the judgment of Salmon, L.J. of the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543. 2 W.L.R. 366 (Eng. C.A.), at 561 as to that law:

A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the *Rules of the Supreme Court* or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:

(i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognize inordinate delay when it occurs.

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

[7] In *Fennelly v. Lloyd's Underwriters*, 2021 NLSC 160, Burrage, J. summarized the law this way at paragraph 7:

There are thus three questions to be addressed on this application: (1) Has there been an inordinate delay? (2) If so, is the inordinate delay inexcusable? (3) Are Lloyd's and/or Anthony likely to be seriously prejudiced by the delay?

[8] I will apply this law to my analysis of the issue I stated above; to which I turn now, starting with the background to it.

ANALYSIS

Background

[9] The Plaintiffs live in Fort McMurray, AB, although they relocated recently to Edmonton, AB so that Ms. Young can access medical treatment that she requires. In 2013 the Plaintiffs retained the 2nd & 3rd Defendants as their realtors in buying land at 20 Moss' Lane, Deer Lake, NL. The transaction closed on or before July 12, 2013

and the deed transferring the title to the Plaintiffs was registered at the Registry of Deeds for the Province of Newfoundland and Labrador on July 25, 2013.

[10] The Plaintiffs say as well that they retained the 1st Defendant as their lawyer on the transaction and that Rowena Strickland owned the land. It appears that Ms. Strickland died since the transaction and her Estate is represented by the 4th Defendant, who is also a lawyer. The Plaintiffs say that they intended to build a house on the property.

[11] At paragraph 9 of the Statement of Claim, the Plaintiffs also say they applied to the Town of Deer Lake for a permit to develop the land. However, they note that they received a letter from the Town in June 2017 advising them “...that the permit application did not adhere to the *Town of Deer Lake Development Regulations*, and that the ‘*[t]he property does not have 50 feet of frontage on a road that is up to town standards*’ and that ‘*[t]he property does not have access to town water and sewer.*”

[12] In paragraph 10, the Plaintiffs also claim that they “...have become aware of efforts to preclude their access to the Property, specifically, through the installation of a locked gate or fencing device in or about Moss’ Lane, in the Town of Deer Lake, which prevents the Plaintiffs from accessing their lot located at 20 Moss’ Lane.”

[13] The Plaintiffs make other allegations about how the 1st Defendant neglected his professional obligations to them. In particular, they say that he failed to obtain a “Legal Survey” or a “Surveyor’s Real Property Report”; and further state at paragraph 11 of the Statement of Claim:

...the First Defendant affixed, or caused to be affixed, to the Indenture of Conveyance, ...a copy of the Indenture of Conveyance as between Donald Moss (Sr.) and Rowena E. Strickland dated May 22, 1976, which contained a hand-drawn sketch purporting to depict the legal boundaries of the Property that is the subject of the impugned real estate transaction.

[14] The Plaintiff also claims at paragraph 17 of the Statement of Claim that “...First Defendant was in a conflict of interest in representing both them, as purchasers, and the vendor in the impugned real estate transaction.”

[15] As to the 2nd & 3rd Defendants, the Plaintiffs allege, at paragraph 20 that a “...contract existed between the Plaintiffs and...[the Defendants] whereby [the Defendants] agreed to perform the duties of a real estate agent for the Plaintiffs in relation to the impugned real estate transaction.” Generally, the Plaintiffs say at paragraph 23, that the 2nd & 3rd Defendants “...failed to meet the standard of practice applicable to real estate agents in the Province of Newfoundland and Labrador.”

[16] Finally, as to the 4th Defendant, at paragraph 29 of the Statement of Claim, the Plaintiffs say “...that a contract existed between [them] and the Fourth Defendant” and “... it was a term of the contract that the Fourth Defendant would convey a property that could be accessed by the Plaintiffs and developed by them as a residential property suitable for human habitation...”

[17] The Plaintiffs filed their Statement of Claim on July 13, 2017, and then served it on the Defendants. I do not know when the Plaintiffs served the Defendants with the Statement of Claim; but while they were all served, only the 4th Defendant has filed a Defence to the Claim. Regardless, each Defendant has filed an Application to Dismiss the Plaintiffs’ claim. I will set out the particulars of those three Applications now, starting with the first of them, which the 1st Defendant filed on November 25, 2024.

[18] In his Application, at paragraph 2, the 1st Defendant sets out the “procedural history” of the Plaintiffs’ cause of action:

2. The procedural history of this proceedings, insofar as it is relevant to the Application is as follows:
 - a. Statement of Claim was issued on July 13, 2017;
 - b. A Waiver of Statement of Defence was provided by counsel for the Plaintiffs to counsel for the First Defendant;

- c. Statement of Defence of the Fourth Defendant was filed on or about March 27, 2018; [and]
- d. The [First Defendant's] Notice of Intention to Proceed was filed on October 7, 2024.

[19] The 1st Defendant claims at paragraph 3 of his Application to Dismiss, that “[n]o substantial steps in this litigation have been made by the Plaintiffs to move forward their claim since the issuance of the Statement of Claim in July 2017, more than seven years ago”. The 1st Defendant also noted in his Application that he sought “progress updates” from the Plaintiffs by writing, phoning or emailing their counsel on July 14, 2017, August 9, 2017, April 30, 2024, May 7, 2024, June 17, 2024, July 8, 2024 and September 23, 2024, to which Plaintiffs’ counsel provided limited or no responses, but nothing to show that the Plaintiffs had a plan for moving the claim forward.

[20] Based on the Plaintiffs’ inactivity and the lack of information as to the Plaintiffs’ intentions for the action, the 1st Defendant claims further at paragraph 3 that “...there has been an inordinate and undue delay in moving this litigation forward, all at the cost of and with prejudice to the Defendants despite the Defendants’ best efforts to move this matter towards a timely conclusion.”

[21] The 2nd & 3rd Defendants filed their Application to Dismiss on December 17, 2024. The procedural history in their Application is practically identical to that which the 1st Defendant provided in his Application, including a waiver from the Plaintiffs of the time limit for filing a Statement of Defence. I will not repeat the history here.

[22] The 2nd & 3rd Defendants, as did the 1st Defendant, notes the efforts they made to contact the Plaintiffs’ counsel by telephone and/or correspondence on January 23, 2018, October 4, 2019, January 15, 2020, April 20, 2020 and September 13, 2024, by all of which they sought an “update regarding the status of the action” (see paragraphs 4, 5, 6, 7, 8 & 9 of the 1st Defendant’s Application to Dismiss).

[23] At paragraph 3 of the 2nd & 3rd Defendants' Application to Dismiss, the Defendants also claim, "inordinate and undue delay in moving this litigation forward, all at the cost of and with prejudice to the Defendants despite the Defendants' best efforts to move this matter towards a timely conclusion".

[24] In the 4th Defendant's Application to Dismiss, that he filed on October 9, 2025, he confirms that the Plaintiffs served their Statement of Claim on him on January 11, 2018. He sets out the full procedural history of the action as it pertains to him in paragraph 2 of his Application to Dismiss:

2. The procedural history as regards the Applicant [4th Defendant] is as follows:
 - i. Statement of Claim was issued on July 13, 2017;
 - ii. Statement of Claim was served on the Applicant on January 11, 2018;
 - iii. Applicant's Demand for Particulars was filed on January 18, 2018;
 - iv. Reply to Demand for Particulars was filed on February 22, 2018; [and]
 - v. Applicant's Defence was filed on March 23 [sic], 2018.

[25] As with the other three Defendants, counsel for the 4th Defendant contacted Plaintiffs' counsel repeatedly by email for updates asking if the Plaintiffs intended to proceed with their claim. He noted these dates in particular at paragraph 8 of his Application to Dismiss: July 7, 2020; August 6, 2020; November 25, 2020; November 19, 2021; and January 27, 2022. He also inquired of Plaintiffs' counsel whether she was still retained by the Plaintiffs and if the Plaintiffs would discontinue their action against his client. If not, he noted, "[a]s early as July 7, 2020...", that his client might apply to "strike" the Statement of Claim.

[26] The 4th Defendant summed up his position in paragraph 9 of his Application to Dismiss:

9. The Applicant's position is that the delay by the Respondent [the Plaintiffs] in moving the proceeding forward is inordinate, without justifiable excuse, and has resulted in real and inferred prejudice to the Applicant.

[27] This is the background to the Defendants' Applications to Dismiss the Plaintiffs' Statement of Claim. I turn now to discuss the issue I stated earlier in these reasons against that background.

Discussion

[28] I noted above that Burrage, J. stated the law that applies to Applications to Dismiss in *Fennelly* and I repeat it here for ease of reference:

There are thus three questions to be addressed on this application: (1) Has there been an inordinate delay? (2) If so, is the inordinate delay inexcusable? (3) Are Lloyd's and/or Anthony likely to be seriously prejudiced by the delay?

[29] Let me examine each of these questions now to see if the Defendants' Applications should be allowed.

(1) Has there been inordinate delay?

[30] In *Wiegert v. Rogers*, 2019 BCCA 334, at paragraph 32, Dickson, J.A. of the British Columbia Court of Appeal offered these helpful observations about when a plaintiff's delay in prosecuting an action becomes "inordinate":

Inordinate delay is delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question... As Justice Saunders explained in *Sun Wave Forest Products Ltd. v. Xu* ..., the concept is relative: some cases are naturally susceptible of fast carriage or call for more expeditious prosecution than others. Although there is no universal rule as to when time starts to run, the date of commencement of the action is typically identified as the point from which delay is measured. The delay should be analysed holistically, not in a piece-meal fashion,

and the extent to which it may be excusable is highly fact-dependent: *Ed Bulley Ventures Ltd. v. Pantry Hospitality Corp...*

[31] In paragraph 8 of their Statement of Claim, the Plaintiffs say that their property transaction closed on or about July 12, 2013, and they understood that “...they had good and marketable title to the Property”. In paragraph 9, they say they submitted an application to the Town of Deer Lake “...for a permit to develop their property...” and that they “...became aware of the rejection of their application on or about June 28, 2017, upon receiving a copy of an unsigned letter from the Town dated June 27, 2017, wherein the Town denied the issuance of a permit to develop the property...”

[32] The Plaintiffs’ issued their Statement of Claim on July 13, 2017, 15 days after they received the Town’s rejection letter. I heard the Defendants’ Applications to Dismiss the Plaintiffs’ action on December 8, 2025, almost eight- and one-half years after the Plaintiffs began these proceedings. The Plaintiffs did not respond to the Applications formally, but they did file a Notice of Intention to Proceed on November 6, 2025, and then they submitted a “Brief” on November 7, 2025 in which they responded to the three Applications to Dismiss.

[33] Except that, in their “Brief” the Plaintiffs did not respond specifically to the Defendants’ claim that they had delayed inordinately in prosecuting their action. This is all of what the Plaintiffs said in that behalf, at paragraph 18:

18. Has there been an inordinate delay? The Plaintiffs dispute that the facts herein give rise to a finding of inordinate delay, noting that whether there is “inordinate delay” depends on the type of case....

[emphasis in original]

[34] Quite simply, as they state at paragraph 19 of their Brief, the Plaintiffs did not try to account for the delay. While they agreed that “...neither of the Defendants has a positive obligation to move the Plaintiffs’ case forward” they said that “...given that neither the First Defendant nor the Second Defendant nor the Third Defendant

has filed a Statement of Defence in the within matter, the inaction of these Defendants ought to weigh against the dismissal of the Plaintiffs' action.”

[35] The Plaintiffs' latter position that three of the four Defendants have not filed their Defences to the claim, is a recurring theme in the Plaintiffs' Brief. I will deal with that submission shortly when I consider whether the delay is excusable; but first I want to address the length of the delay here to show why it is clearly inordinate. As I explain.

[36] First, I note that there is nothing self-evident about the Plaintiffs' claim that makes it inherently difficult to prosecute; nor have they provided me with anything from which I might find that it is. The claim is based in both tort and contract and all elements of the claim would surely have crystallized before the Plaintiffs filed their Statement of Claim in 2017, and quite likely long before they did so.

[37] For example, the real estate transaction that underlies the claim closed on or before July 12, 2013, four years before the Plaintiffs filed their Statement of Claim in this Court. The Plaintiffs, however, say nothing in either their Statement of Claim or their Brief about what may have happened in those four years to prevent them from filing their Claim; so, I find that there was none.

[38] I compiled the table which follows to show the procedural steps that have been taken in this matter since the Plaintiffs started the proceedings in July 2017. For clarity, I show in bold the two steps that the Plaintiffs took in almost a decade to advance these proceedings by what they filed in this Court since they started it.

Event	Date
Statement of Claim Filed	July 13, 2017
Defence of 4 th Defendant Filed	March 27, 2018
Notice of Intention to Proceed Filed by 1 st Defendant	October 11, 2024

Application to Dismiss Claim Filed by 1 st Defendant	November 25, 2024
Application to Dismiss Claim filed by 2 nd & 3 rd Defendants	December 17, 2024
Application to Dismiss Claim filed by the 4 th Defendant	October 9, 2025
Notice of Intention to Proceed Filed by 1st & 2nd Plaintiffs	November 6, 2025
Applications to Dismiss Heard and Judgment Reserved	December 8, 2025

[39] The scantiness of the Plaintiffs' efforts is remarkable. Short of filing their Statement of Claim on July 13, 2017 and their Notice of Intention to Proceed on November 6, 2025, eight and one-half years later, they took no formal steps to advance their claim in the seven and one half years between when they started the claim and when the 1st Defendant filed his Application to Dismiss it. I also note that it was almost a year after the 1st, 2nd & 3rd Defendant filed their Applications to Dismiss and a month after the 4th Defendant filed his Application to Dismiss that the Plaintiffs filed their Notice of Intention to Proceed.

[40] In short, the Plaintiffs' delay here is, to adopt the language of Dickson, J.A. in *Wiegert, supra*, "immoderate, uncontrolled, excessive and out of proportion to the matters in question".

(2) If so, is the inordinate delay inexcusable?

[41] The Plaintiffs do not try to explain their delay, so much as they claim that it was the Defendants' inattention and neglect that hamstrung them from perfecting their action.

[42] The Plaintiffs note that the Defendants are looking for relief under Rule 40.11 of the *Rules* which provides:

40.11. Where a plaintiff does not apply to set a proceeding down for trial, the defendant may apply to set it down for trial or apply to the Court to dismiss the proceeding for want of prosecution, and the Court may order the proceeding to be dismissed or make an order that is just.

[43] The Plaintiffs submit at paragraph 11 of their Brief, that it would be “inappropriate” for me to hear the Defendants’ Applications to Dismiss because only one of the four Defendants has filed a Defence and “the pleadings... have not closed.” The Plaintiffs contend that they cannot apply to set the matter down for trial until the pleadings are closed so this should foreclose any further consideration of the Defendants’ Applications to Dismiss.

[44] This is how the Plaintiffs expressed it in paragraph 21 of their Brief:

It is incumbent upon the First Defendant and the Second Defendant and the Third Defendant to each file a Statement of Defence in order to close the pleadings in this matter, which will prompt this action to move forward to the discovery stage. ...

[45] The underlying submission to the Plaintiffs’ opposition to the Defendants’ Applications to Dismiss is that the three Defendants (1st, 2nd & 3rd) who have not filed their Defences are causing the delay by not filing Defences to the Statement of Claim. In reply, those three Defendants say that counsel for the Plaintiffs granted them waivers of filing their Defences and that is why they held off doing so.

[46] Counsel for the First Defendant, then Thomas E. Williams, K.C., provided an affidavit in support of the Application to Dismiss that he filed for his client. I note this from paragraph 2(a) of Williams, K.C.’s affidavit:

On or about July 13, 2017, the Plaintiffs issued their Statement of Claim. Counsel for the Plaintiffs, Ms. Judy Manning, subsequently granted a waiver of Defence to counsel for the First Defendant, which is confirmed by the email of Thomas Johnson of O’Dea Earle to Ms. Judy Manning on July 14th, 2017 confirming their conversation that if Ms. Manning is to require a Statement of Defence that she will provide the First Defendant a reasonable period of notice. This email is attached hereto as **Exhibit “A”**. [emphasis added]

[47] This from the **Exhibit “A”** that Williams, K.C. referred to:

Without Prejudice

Dear Judy:

This is further to my call to you this afternoon.

...

As agreed, if you should require a Defence in relation to this matter you will give us a reasonable period of written notice so that we may instruct counsel as appropriate.

[48] Counsel for the 1st Defendant followed up his email with a telephone call to counsel for the Plaintiffs, as appears below, from paragraph 2 (f) of his affidavit:

On April 30, 2024, I telephoned counsel for the Plaintiffs, Ms. Judy Manning seeking a status update, noting that no progress or steps had been taken in seven years. Plaintiffs’ counsel admitted that she had not spoken with her clients in years. I further inquired whether a Statement of Defence should be filed (given the longstanding waiver) or if the Plaintiffs intended to proceed at all. I followed up this telephone conversation on May 7th, 2024 with an email to Ms. Manning requesting if she had spoken with her clients and indicating that I had instructions to proceed with an application for the matter to be struck for want of prosecution. Ms. Manning confirmed that she reached out to her clients on that date. The May 7, 2024 email exchange is attached hereto as **Exhibit “D”**.

[49] The following quotations are both from the **Exhibit “D”** that Williams, K.C. referred to:

Judy,

Further to our conversation of April 30th I am just wondering if you have had a chance to follow up with your clients as if not then we have instructions to file a Defence and take out an application to have this matter struck for want of prosecution. If your client is prepared to file a Notice of Discontinuance, the [sic] we are prepared to consent to the same without any order as to costs. Please advise at your earliest opportunity as to how you wish to proceed.

Regards, Tom

...

Hi Tom,

I confirm that I have reached out to my clients for instructions.

I will be in touch.

Judy

[50] Williams, K.C. followed up with the further steps he took before filing the First Defendant's Application to Dismiss:

2(g). Between June and September 2024, I sent multiple follow-up communications to Plaintiffs' counsel, on June 17, July 8, and September 23, 2024, urgently requesting clarification of the Plaintiffs' intentions and warning that an application for dismissal would be brought. Plaintiffs' counsel responded only to state that she was seeking instructions, and later promised an update, but ultimately provided no concrete action to timeline. ...

[51] Counsel attached those emails as **Exhibit "E"** to his affidavit, but I need not quote from them.

[52] Counsel for the 2nd & 3rd Defendants noted having received waivers of Defence from Plaintiffs' counsel, on the same understanding as Plaintiffs' counsel provided to the 1st Defendant – "if the Plaintiffs deemed it necessary that the Second and Third Defendants file a Defence, Plaintiffs' counsel would provide reasonable notice to counsel [to that effect] ...:

- August 17 and August 23, 2017: see paragraph 3(b) of the Brief filed on behalf of the 2nd & 3rd Defendants.
- January 23, 2018: see paragraph 3(c) of the Brief filed on behalf of the 2nd & 3rd Defendants.

[53] I note for completeness that the 4th Defendant filed his Defence on March 27, 2018, so to the extent that the Plaintiffs' claim that the Defendants failure to file their Defences precludes hearing their Applications to Dismiss, this does not apply to the 4th Defendant.

[54] But I reject the Plaintiffs' claim that the Defendants have deliberately delayed this matter and that the failure of three of the four of them to file Defences has caused or even contributed to the delay in these proceedings. Simply put, counsel for the Plaintiffs waived the requirement that the Defendants file their Defences and that is why they did not file them.

[55] Counsel for the Defendants were also vigilant about their next steps in the proceeding and would readily have taken them but for the waiver that Plaintiffs' counsel gave them on behalf of her clients. In fact, counsel for the Defendants even inquired of Plaintiffs' counsel periodically about the currency of her waiver and she did not indicate that she was withdrawing it.

[56] It is disingenuous of Plaintiffs' counsel to invoke the obligations of the Defendants to file their Defences when she expressly waived their obligations to do so; and it adds to the disingenuity of counsel's plea to now claim that the failure to file Defences was, instead of the Plaintiffs' laxity, the true obstacle to progress in the proceedings.

[57] Overall, I find that the Plaintiffs' delay in prosecuting this proceeding is inexcusable. I turn now to the third question that Burrage, J. stated in *Fennelly*.

(3) Are the Defendants likely to be seriously prejudiced by the delay?

[58] As I noted above, Gushue, J.A. in *Penney* adopted the law that applies to applications to dismiss for want of prosecution, as Salmon, L.J. of the English Court of Appeal stated it in *Allen*. This is what the learned Lord Justice said about prejudice:

... This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

[59] In this cause, the Plaintiffs reviewed the potential for prejudice to the Defendants in paragraph 24 of their Brief:

...On the balance of probabilities, there is no evidence before this Court to conclude that serious prejudice has been suffered by either of the... [Defendants].

[60] In *Penney*, at paragraph 13, our Court of Appeal acknowledged that the onus is on the Defendant to first prove that the delay of which they complain is both inordinate and inexcusable, and then to prove that they have or will likely suffer prejudice because of the delay. Or, again, as Gushue, J.A., stated it:

In my view, counsel for the appellant is correct in his submission... that, if the first two requirements [inordinate and inexcusable delay] are satisfied, the onus still rests generally with the defendant to demonstrate that his or her right to a fair trial has been prejudiced by such untoward delay....

[61] The 1st Defendant, at paragraph 18 of their Brief, points to the lapse of time and stresses how this will affect his ability to provide credible evidence to the trier of fact if Plaintiffs' claim goes to trial. This is how he stated it in the Brief he filed in support of his Application to Dismiss:

18. In the case at hand, more than eight years have elapsed since this claim was filed. That is a significant period in which numerous prejudicial effects likely have occurred or will occur if the case now proceeds. More importantly, the potential memory fading of witnesses (including the Plaintiffs and Defendants themselves). These witnesses will struggle to recall details of the real estate transaction and discussions from 2017 or earlier as memory significantly deteriorates over years. Critical nuances about what was represented about the property, or what was intended, may be lost. The credibility and reliability of any testimony is undermined by such a long gap.

[62] The 1st, 2nd & 3rd Defendants also point to another factor that has gained traction recently in litigation dealing with delayed prosecution of claims. They refer to it under the rubric of the “interests of justice” and this is how the 2nd & 3rd Defendants describe it in their Brief at paragraph 19:

Courts across Canada have increasingly emphasized the systemic harm caused by delay and the need for a cultural shift toward timeliness and efficiency in civil litigation. In *Giacomini*, *supra* [*Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473], the court described the public harm caused by unreasonable delay, which erodes confidence in the justice system and affirmed that a plaintiff’s right to a trial on the merits does not override the defendant’s or society’s interest in the timely resolution of disputes. This same sentiment has been echoed by many courts, including in *Lethbridge Motors Co. Ltd. v. American Motors (Canada) Ltd.* [1987 ABCA 150] and *Humphreys* [*Humphreys v. Trebilcock*, 2017 ABCA 116]. In *Humphreys*, the court emphasized the right of access to the courts “is not absolute” and that claimants who fail to act with “appropriate expedition” risk losing the right to prosecute. Even in the absence of demonstrable prejudice, recent case authorities have recognized that systemic prejudice and the erosion of public confidence justifies (sic) dismissal.

[63] I agree with counsel for the Defendants that they are likely to be seriously prejudiced if I allow these proceedings to continue. Let me explain.

[64] The Plaintiffs’ claim is based on buying land in Deer Lake, NL on or before July 12, 2013. I accept that the delay that generally counts on applications to dismiss starts with the date plaintiffs begin the proceedings, which here is July 13, 2017. I noted earlier that four years had already elapsed before the Plaintiffs started their claim and while it is now eight and one half years from that date, it is actually 12 and one half years from when the factual matrix on which the claim is based coalesced.

[65] The Plaintiffs had taken only one procedural step in this action before the Defendants began to file their Applications to Dismiss in 2024, that being filing their Statement of Claim. The 1st Defendant undertook the only other procedural step, when he filed his Defence on March 27, 2018. No discoveries have been done; and no measures appear to have been taken to preserve documents and interview witnesses so as to provide a basis for witnesses to refresh their memories as they

prepare for trial. While it is only the eight and one-half years from filing the claim to the Defendants' Applications to dismiss it that count, it is undeniable that the four years that elapsed before the Plaintiffs began the proceedings would also have a prejudicial effect on the Defendants' ability to defend themselves.

[66] As counsel for the 2nd & 3rd Defendants observed in paragraph 16 his Brief, "...over time, memories fade, witnesses become unavailable, and documentary evidence deteriorates". These consequences would surely increase if the delay here is extended by four more years.

[67] I noted earlier that the Plaintiffs sent a letter to the Defendants on November 14, 2025, in which they suggested a "timeline" for advancing the proceedings:

LITIGATION EVENT	DEADLINE FOR COMPLETION
Close of Pleadings	on or before January 27, 2026
Filing and Service of Documents	on or before March 3, 2026
Examinations for Discovery	on or before August 31, 2026

[68] The Defendants did not accept the timeline the Plaintiffs proposed but pressed on with their Applications to Dismiss. Had they accepted the compromise, of course, this proposal would simply have added at least another year to the actual timeline to bring this proceedings on for a hearing; and it is well-accepted that a trial date might still be significantly delayed beyond that.

[69] Another factor that bears consideration here is the impact that unforeseen but often inevitable events have on parties' abilities to meet deadlines. My observation emerges from the serious health issues that have beset the 2nd Plaintiff in the last year and a half. Each of counsel for the Defendants expressed their empathy for the 2nd Plaintiff's unfortunate circumstances (I share their concern); but those events can be visited on anyone, and that possibility speaks to the necessity for acting in a timely and decisive manner to deal with our undertakings.

[70] Finally, I note that two of the four Defendants are lawyers, the 1st Defendant who the Plaintiffs sued in his own right and the 4th Defendant who they sued as Executor of the Estate of Rowena Strickland.

[71] The 4th Defendant filed an affidavit in support of his Application to Dismiss the Statement of Claim. He notes, at paragraph 3, that he “...undertook to act as estate trustee for the estate of Rowena Elizabeth Strickland because I was friends with Rowena’s sons, John and Derek, and had acted for the whole family. John had predeceased Rowena and Derek lived in the United States. To assist the family with administering the estate, I agreed to act as estate trustee”

[72] The 4th Defendant went on to state at paragraphs 5 and 6 of their Brief, how his decision to act as trustee has affected him, both personally and professionally:

5. THAT once I was made aware of the claim I had to retain counsel and prepare my defence as best I could.

6. THAT all of these actions – submitting the claim [to my insurer, LawPro so a claim for coverage could be made] and opening a file with my insurer, disclosing and explaining the nature of the claim and my position to partners, the estate and my counsel – have taken considerable time and caused stress and embarrassment. Having it all hanging over my head since 2017 when the claim was issued, four years after the transaction was completed, without having an opportunity to clear my name, has compounded it all.

[73] I find that the Defendants have proved on a balance of probabilities, either directly or by reasonable inference, that they will suffer serious prejudice if they are required to defend the Plaintiffs’ claim. In that behalf, I rely on these factors:

- The effluxion of time and its withering effects on the recall and the reconstruction of past events, whether it is the eight and one-half years since the Plaintiffs started the proceedings or the 12 and one-half years since the claim arose;
- The nascent state of the pleadings in this cause and the need for robust, deliberate and time-consuming procedural steps required to get ready for trial;

- The unpredictability of contingencies which may emerge with any of the parties, their witnesses, or counsel, as happened here for the 2nd Plaintiff, and the impact such developments may have on the parties' abilities to carry the matter to trial;
- The Plaintiffs' dilatory approach to this file to now and the challenge of monitoring their future behaviour to forego further delays;
- The troublesome impact of the proceedings on the 4th Defendant thus far and their continuance, and the possibility that the 1st Defendant is and may be similarly affected; and
- Generally, as Salmon, L.J. said in *Allen, supra*, "the longer the delay, the greater the likelihood of serious prejudice at the trial".

DISPOSITION

[74] The four Defendants applied under Rule 40.11 of the *Rules* to dismiss the Plaintiffs' claim against them based in contract and tort for want of prosecution. The Plaintiffs opposed the Application, claiming mainly that the Defendants had failed to prove they would be prejudiced if they went to trial.

[75] The Court allowed the Applications to Dismiss and found that the Plaintiffs' delay in prosecuting their claim was both inordinate and inexcusable; and that the Defendants proved on a balance of probabilities they would suffer serious prejudice if the proceedings continued. It awarded costs to the Defendants to be taxed under Column 3 of the Scale of Costs.

ORDER

[76] In the result, I order that:

1. The three Applications to Dismiss the Plaintiffs' claim filed by the 1st, 2nd, 3rd & 4th Defendants are allowed and the Plaintiffs' claim is dismissed for want of prosecution pursuant to Rule 40.11 of the *Rules*.
2. The Plaintiffs shall pay the Defendants the costs of their Applications to be taxed under Column 3 of the Scale of Costs.

GARRETT A. HANDRIGAN
Justice