

**CITATION: CURLEW GARDENS DEVELOPMENTS INC. et al v. TERRAPROBE INC.
et al, 2023 ONSC 5531
COURT FILE NO.: CV-17-00569735-0000
MOTION HEARD: 2023-07-05**

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CURLEW GARDENS DEVELOPMENTS INC. et al, plaintiffs

AND:

TERRAPROBE INC. et al, defendants

BEFORE: ASSOCIATE JUSTICE R. FRANK

COUNSEL: D. Silver, counsel for H. Poch, lawyer for the plaintiffs / moving parties

Jiku J. Elamathail for the defendant / responding party, Terraprobe Inc.

HEARD: July 5, 2023

REASONS FOR DECISION

[1] This is a motion by the plaintiffs for an order (i) extending the time to set the action down for trial; and (ii) setting a timetable for the completion of the remaining steps in this action. The defendant Terraprobe Inc. (“Terraprobe”) brings a cross-motion for: (i) a status hearing, requiring the plaintiffs to show cause why this action should not be dismissed for delay; and (ii) an order dismissing the action against Terraprobe.

[2] For the reasons that follow, I decline to dismiss the action for delay, and I grant the plaintiffs’ motion for an order extending the time to set the action down for trial and setting a timetable for the completion of the remaining steps in this action.

A. BACKGROUND

[3] The plaintiffs commenced this action by notice of action issued in February 2017. The statement of claim was delivered in March 2017. The plaintiffs claim \$1,000,000 in damages arising from, among other things, alleged negligence with respect to the assessment and remediation of contamination found at a property owned by the plaintiffs.

[4] Terraprobe delivered its statement of defence and crossclaim in September 2017. The plaintiffs delivered a reply to Terraprobe’s statement of defence and crossclaim in September 2017. The action was discontinued as against the defendant Fieldgate Construction Management Limited (“Fieldgate Construction”) in September 2017.

[5] Beginning in early 2017, plaintiffs' counsel contacted A&A Environmental Consultants Inc. ("A&A"), an environmental consultant that had undertaken a hydrogeological study and completed certain remedial work at the property in issue. Over the following months, plaintiffs' counsel had discussions with A&A about identifying materials necessary to review the chronology of relevant events and for the purposes of preparing the plaintiffs' affidavit of documents.

[6] In late 2017 and early 2018, the plaintiffs formally retained A&A and Dyson & Associates Inc. ("Dyson") as potential environmental experts in this action (the "Plaintiffs' Experts"). Extensive and continuing communications followed with respect to the preparation of expert reports in support of the plaintiffs' claim. This included correspondence and discussions among plaintiffs' counsel, the Plaintiffs' Experts, and representatives of the plaintiffs about the preparation of expert reports and the necessary documentation to prepare such reports. Beginning in 2018, the Plaintiffs' Experts prepared and provided plaintiffs' counsel with draft expert reports. Multiple iterations of the draft reports were prepared, reviewed by plaintiffs' counsel, and discussed among the Plaintiffs' Experts and plaintiffs' counsel.

[7] In addition, the record discloses continuing communications between plaintiffs' counsel and representatives of the plaintiffs regarding the documentation required for the preparation of the plaintiffs' affidavit of documents and the expert reports. The plaintiffs' representatives sought updates on the status of the action and inquired whether it would be possible to "speed things up". Reports from plaintiffs' counsel included anticipated timelines for the examinations for discovery.

[8] Document collection by the plaintiffs, work with the Plaintiffs' Experts, and the preparation of further drafts of the experts reports continued through to the spring of 2020. Following some delay at the outset of the pandemic, plaintiffs' counsel continued to compile documents for the plaintiffs' affidavit of documents, prepare for discoveries, and finalize the expert reports. Plaintiffs' counsel updated the plaintiffs to advise that discoveries would likely not be held until later that year or early 2021 due to restrictions relating to the pandemic. Plaintiffs' counsel also continued to research relevant case law.

[9] In spring 2021, plaintiffs' counsel continued to work with the plaintiffs' representative and the Plaintiffs' Experts to locate relevant documents and information both for the expert reports and for the plaintiffs' affidavit of documents. Plaintiffs' counsel advised the plaintiffs that once the damages calculations were completed by the plaintiffs' damages expert, it was anticipated that the matter could then move to the discovery stage. Work was continued on the plaintiffs' damages report and affidavit of documents into 2022.

[10] On March 7, 2022, plaintiffs' counsel emailed Terraprobe's counsel to advise that the reminder notice of the five-year deadline that is normally set in his tickler system was inadvertently one year behind with respect to this action. Plaintiffs' counsel indicated that the plaintiffs wished to proceed expeditiously and were in the process of compiling their affidavit of documents and finalizing expert reports, and he proposed a litigation timetable. Initially, the email correspondence from plaintiffs' counsel indicated that the five-year deadline to set the action down for trial was to expire on March 14, 2022. Subsequently, plaintiffs' counsel noted that he had failed to take into consideration that the five-year deadline had been extended by O. Reg. 73/20 such that the deadline to set the action down for trial would fall in mid-September, 2022. It was unknown to

plaintiffs' counsel at that time that this email correspondence had inadvertently been sent to an incorrect email address.

[11] On May 16, 2022, plaintiffs' counsel wrote to Terraprobe's counsel asking if they could discuss the matter in order to try to agree on a consent timetable, if possible. It was unknown to plaintiffs' counsel at that time that this email correspondence had also inadvertently been sent to an incorrect email address.

[12] On July 20, 2022, plaintiffs' counsel discovered that his emails to Terraprobe's counsel had been sent to an incorrect email address. By email dated July 20, 2022, plaintiff's counsel emailed Terraprobe's counsel at his correct email address. The July 20, 2022 email included the prior emails and noted that, based on the suspension under O. Reg. 73/20, the correct calculation for the 5 year deadline to set the action down for trial would expire on August 14, 2022. Plaintiffs' counsel sought Terraprobe's consent to continue the action and attached a notice of motion, draft affidavit, draft Order and draft Consent. Plaintiffs' counsel inquired whether Terraprobe would consent to a timetable order.

[13] On August 7, plaintiffs' counsel served the plaintiffs' motion record seeking a timetable order at a status hearing. By email dated August 12, 2022, Terraprobe's counsel wrote to plaintiffs' counsel to advise that Terraprobe would oppose the plaintiffs' motion for a timetable to continue the action. On August 26, 2022, plaintiffs' counsel served the plaintiffs' affidavit of documents and Schedule "A" productions on Terraprobe.

[14] On September 6, 2022, plaintiffs' counsel received an email from the Court indicating that the plaintiffs' motion record was not filed due to a technical issue regarding the form of the notice of motion. Plaintiffs' counsel subsequently reported this matter to his professional liability insurer ("LAWPRO") which appointed counsel to investigate and ultimately assume carriage of this motion. LAWPRO appointed counsel requisitioned a long motion date before an associate justice on or about October 19, 2022.

[15] On December 5, 2022, the plaintiffs' expert liability report was served on Terraprobe's counsel. The liability expert advised that the lengthy period to compile the report was a result of internal inconsistencies in Terraprobe's reporting which he was attempting to understand and reconcile. The plaintiffs' expert damages report was served by email on January 30, 2023.

[16] There is no dispute that plaintiffs' counsel did not communicate with Terraprobe's counsel between the close of pleadings in 2018 and the attempted emails in March and May 2022. In particular, Terraprobe's counsel was not apprised of the activities undertaken by plaintiffs' counsel, the Plaintiffs' Experts, and the plaintiffs to prepare expert reports and the plaintiffs' affidavit of documents. It is also undisputed that during this period Terraprobe's counsel did not communicate with plaintiffs' counsel to inquire about the status of the action, the plaintiffs' intentions with respect to the action, or any timelines for service of the parties' respective affidavits of documents or the scheduling of examinations for discovery.

B. ISSUES

[17] The issues on this motion are whether pursuant to Rule 48.14(7) the plaintiffs have shown cause why the action should not be dismissed for delay, and whether the court should extend the deadline to set the action down for trial and impose deadlines for completion of the remaining steps necessary to have the action set down for the trial.

C. LAW AND ANALYSIS

[18] Subrule 48.14(1) provides that the registrar shall dismiss an action for delay where the action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action.

[19] Under subrule 48.14(4), subrule 48.14(1) will not apply if the parties agree to and file a timetable identifying the steps to be completed before the action may be set down for trial, providing deadlines for completion of those steps, and providing a new date before which the action shall be set down for trial. Subrule 48.14(5) provides that if the parties do not consent to a timetable under subrule 48.14(4), any party may before the expiry of the fifth anniversary of the commencement of the action bring a motion for a status hearing.

[20] Subrule 48.14(7) provides that at a status hearing the plaintiff “shall show cause” why the action should not be dismissed for delay. The plaintiff has the onus of demonstrating that:

- (a) there is an acceptable explanation for the delay; and
- (b) if the action were to proceed, the defendants would suffer no non-compensable prejudice.¹

[21] In *Slota v Kenora-Rainy River Districts Child and Family Services*, Kimmel J. summarized the test and principles that are applied at a status hearing as follows:

29 This two-part test has been applied in the Rule 48.14(5) cases since *Faris* and various guiding principles have emerged. In a recent decision, the court conveniently summarized in one place various of these guiding principles that were cited to me by the parties in this case (see *Cedrom-Sni Inc. v. Meltwater Holding*, 2017 ONSC 3387 (Ont. S.C.J.) at para. 6):

a. The test is conjunctive, not disjunctive. Even if the plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if there would be prejudice to the defendant. And if the plaintiff is not able to provide a satisfactory explanation for the delay, it is still open to the court to dismiss the action, even if there is no proof of actual prejudice to the defendant. (See: *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544 (Ont. C.A.) at para. 33)

¹ See *Faris v. Eftimovski*, 2013 ONCA 360 at para 32; *Kara v Arnold*, 2014 ONCA 871 (“*Kara*”) at para 8

b. The responsibility to move the action along lies chiefly with the plaintiff. (See: *Faris*, supra, at para. 33) However, the conduct of a defendant is also a factor to be considered in determining whether the action should be dismissed for delay or allowed to proceed. (See: *Carioca's Import & Export Inc. v. Canadian Pacific Railway*, 2015 ONCA 592 (Ont. C.A.) at para. 53) The conduct of the defendant may be particularly relevant where the defendant engages in tactics that are not consistent with a willingness to see a case proceed expeditiously; however, a defendant cannot be accused of “lying in the weeds” to gain a tactical advantage in the absence of any initiative on the part of the plaintiff. A defendant should not be required to spend time and money to prepare for a case that is dead on the vine. (See *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, at paras. 29 and 30; see also *Bolohan v. Hull*, 2012 ONCA 121, at para. 17 [which indicates that a defendant’s conduct in the litigation could still have a bearing on the assessment of the reason for the delay])

c. The possible dismissal of an action for delay involves a careful balancing between the interests of the parties and society in timely and efficient justice on one hand and in the resolution of disputes on their merits, on the other. (See: *Kara v. Arnold*, 2014 ONCA 871 (Ont. C.A.) at para. 9; see also *Faris*, supra, at para. 24)

d. There is little to be gained in debating whether there is a bright line between the “contextual approach” applicable to motions to set aside registrar’s dismissal orders (*Scaini v. Prochnicki*, 2007 ONCA 63 (Ont. C.A.) at para. 23) and the approach taken in *Faris* to status hearings. In considering the reasonableness of any explanation for delay, the status hearing court will almost invariably engage in a weighing of all relevant factors in order to reach a just result. (See: *Faris*, supra, at para. 13 and *Kara*, supra, at para. 13)

e. It is reasonable to approach the plaintiff’s explanation for the delay in an action on the basis that “the longer the delay, the more cogent the explanation must be”. (See: *Kara*, supra at para. 17)

f. The prejudice at issue is to the defendant’s ability to defend the action as a result of the plaintiff’s delay, not as a result of the sheer passage of time. (See: *MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28 (Ont. C.A.) and *Carioca's Import & Export Inc.*, supra at para. 57)

g. A defendant’s lack of display of any sense of urgency undercuts any claim of actual prejudice. (See: *Aguas v. Rivard Estate*, 2011 ONCA 494 (Ont. C.A.) at para. 19 and *H.B. Fuller Co. v. Rogers*, 2015 ONCA 173 (Ont. C.A.) at para. 42)

30 It has been said that the intended balance between the objective of timely and efficient justice and the objective of resolving disputes on their merits is, in part, reflected in the onus on the plaintiff at the status hearing which appears to suggest a heavier emphasis on the objectives expressed in Rule 1.04 to secure the just, most expeditious and least

expensive determination of every civil proceeding on its merits (see: *Deverett Professional Corp. v. Canpages Inc.*, 2013 ONSC 6954 (Ont. Div. Ct.), at paras. 14 -16).²

[22] The decision as to whether to dismiss an action for delay is discretionary in nature.³ In applying the test and determining whether an action should be dismissed, the Court of Appeal has explained, as follows, that competing interests must be considered and weighed:

Dismissals for delay involve a careful balance between two competing values. On the one hand, the *Rules of Civil Procedure* need to be enforced in a way that ensures timely and efficient justice, in the interests of plaintiffs, defendants, and society in general. On the other hand, society in general, and the parties, have an interest in the resolution of disputes on their merits and in the availability of flexibility to avoid potentially draconian results, by providing the opportunity for parties to offer a reasonable explanation for delay when it takes them beyond established timelines.⁴

A. *Has the plaintiff provided an acceptable explanation for the delay in prosecuting the action that justifies its continuation?*

[23] Terraprobe asserts that “the 5 years permitted under rule 48.14 should be ample for a plaintiff to prepare all but the most complex cases to be set down for trial.”⁵ It argues that the plaintiffs have failed to meet their obligation to move the action forward over many years. It submits that the more than 5 year delay to secure the plaintiffs’ productions and complete expert reports is an inordinate and unreasonable delay, and that there is no explanation or no adequate explanation for the delay. Specifically, Terraprobe submits that the plaintiffs have not adequately explained the following delays: (i) the time period from commencement of the action in February 2017 to the formal retainer of the plaintiffs’ experts in late 2017 or early 2018; (ii) the absence of any communication from plaintiffs’ counsel between September 2017 and July 2022; (iii) the delayed service of the plaintiffs’ affidavit of documents and Schedule “A” productions which were served on August 26, 2022; and (iv) the delayed service of the plaintiffs’ expert reports, which were served in December 2022 and January 2023.

[24] The plaintiffs submit that they have provided a reasonable explanation for the delay. They assert that following the close of pleadings on September 18, 2017, plaintiffs’ counsel took steps to retain two experts to prepare opinions with respect to liability and damages. The plaintiffs submit that they worked diligently with those experts during the course of five years to supply the experts with the necessary documentation and information required to prepare the reports, and to compile the plaintiffs’ voluminous productions.

[25] In support of their position regarding the explanation for the delay, the plaintiffs rely, among other authorities, on the unreported decision in *Edelstein v D’Altroy, et al.*⁶ In *Edelstein*,

² *Slota v Kenora-Rainy River Districts Child and Family Services*, 2019 ONSC 126 (“*Slota*”) at paras 29-30

³ *Kupets v Bonavista Pools Limited*, 2015 ONSC 7348 (CanLII) (“*Kupets*”) at para 17

⁴ *Kara* at para 9

⁵ *Tarion v. Dunhill Development*, 2019 ONSC 6074 (“*Tarion*”) at para 22

⁶ *Edelstein v D’Altroy, et al.*, October 11, 2018, CV-12-459791 and CV-13-480346 (“*Edelstein*”) (unreported)

the court accepted the plaintiff's explanation for delay of several years that resulted from the plaintiff's work with an expert to complete remediation on her property arising from the defendants' alleged negligence. The plaintiffs submit that, as in *Edelstein*, there is an acceptable explanation for the delay in this case given the significant cost and time that was involved in retaining experts and completing expert reports and documentary production, all of which is of material importance in this case.

[26] Terraprobe submits that *Edelstein* is distinguishable because, in that case, it was necessary for the plaintiff to complete certain environmental remediation in order for its damages to be crystallized. Terraprobe argues that the facts in this action are distinguishable because in this case the remediation work had already been completed before the action was commenced. Therefore, Terraprobe submits that there was no impediment to completion of the plaintiffs' expert reports as there had been in *Edelstein*. Terraprobe also asserts that there is a difference between experts retained for remediation work (as in *Edelstein*) and experts retained for the purposes of litigation (as in this case). Further, Terraprobe submits that unlike the situation in this case, the plaintiff in *Edelstein* had taken numerous steps to advance the action, including by bringing a motion to join two actions together and attempts to choose a mediator.

[27] I accept that the facts in *Edelstein* are not on all fours with those in this case, including that there was no requisite remediation work that had to be completed by the experts in this action in order to crystallize the plaintiffs' damages. Nevertheless, I find that various principles outlined in *Edelstein* are applicable in the current circumstances. For example, in *Edelstein*, the court noted as follows:

[4] ...I find that while there were a couple of periods of unexplained delay, the real issue in the prosecution of the action lies with counsel's failure to communicate with opposing counsel as to the steps the Plaintiff was taking to crystallize her damages claim. This is different than cases where no work was being done to advance the claim.⁷

[28] While I find that, unlike in *Edelstein*, there are no periods of "unexplained delay", I also find that, as in *Edelstein*, this is not a case in which no work was being done to advance the claim. Rather, the real issue with respect to the progress of this action arises from the failure by plaintiffs' counsel to communicate with opposing counsel as to the steps the plaintiffs were taking to obtain expert reports in advance of discovery and mediation. Lack of communication does not equate to a failure by the plaintiffs to take any steps to advance the litigation. Further, the following conclusions from *Edelstein* are apt:

[39] In my view, while [plaintiff's counsel] may have been waltzing when she should have been doing the foxtrot, this is different than not engaging in the dance at all. I find that [plaintiff's counsel] was doing what she and her client thought appropriate to advance the case. In their view, discovery could not be done until damages were crystallized. As such, much time was spent on the crystallization process. Communication was definitely an issue and I understand the Defendants' frustrations. [Plaintiff's counsel] should have

⁷ *Edelstein* at para 4 (emphasis added)

communicated better with opposing counsel. However, the failure to communicate does not mean that steps were not being taken. ...⁸

[29] As in *Edelstein*, while the plaintiffs may have been “waltzing when [they] should have been doing the foxtrot”, they were engaged in the litigation and plaintiffs’ counsel was doing what he and his clients thought appropriate to advance the action. In their view, it was most efficient for discovery to follow the completion of the plaintiffs’ expert reports and significant work was undertaken on that process. While plaintiffs’ counsel should have communicated this to opposing counsel, the failure to communicate does not mean that steps were not being taken by the plaintiffs. Further, while this may not have been the best approach, I accept that it was nevertheless the *bona fide* belief of the plaintiffs and their counsel that it was necessary to obtain and serve expert reports in the early stages of the litigation.⁹

[30] Further, in considering the reasonableness of any explanation for delay, the Court will almost invariably engage in a weighing of all relevant factors in order to reach a just result.¹⁰ One of the relevant factors in this case is the complexity of the action as a whole. As noted, this is an environmental claim with respect to which expert evidence will be required regarding issues of liability and damages. The complexity of the action provides part of the context for the challenges and delay in gathering documents, the number of draft expert reports, and the completion of the expert reports.¹¹

[31] Another relevant factor is the plaintiffs’ intention to move the action forward. There is no evidence that the progress of the action was put on hold. Rather, the direct evidence from the plaintiffs is that: (i) they always maintained an unequivocal intention to proceed with this matter to trial, absent fair resolution; (ii) they were in regular contact with their lawyer, and contacted him on numerous occasions to ascertain the status of the proceeding and to inquire what further steps would occur; and (iii) they have limited experience with the court system and were not aware that their claim was in jeopardy due to procedural reasons or that the action needed to be set down for trial within five years of commencing the claim.

[32] Further, although the focus of the inquiry on a Rule 48.14 status hearing is the plaintiff’s conduct, a defendant’s conduct can impact the assessment of the plaintiff’s explanations for the delay. For example, even where a defendant’s conduct is not, on its own, a bar to a request to have the action dismissed at a status hearing, it may be relevant because it demonstrates a shared responsibility for the delay. A defendant’s conduct may be relevant even where it does not actually prevent the plaintiff from moving the action forward.¹²

[33] Terraprobe argues that it cannot be accused of “laying the weeds” because it did not fail to cooperate in moving the action forward, and the action appeared to have been “dead on the vine”

⁸ *Edelstein* at para 39

⁹ *Edelstein* at para 46

¹⁰ See *Kara* at para 13; *Slota* at para 29(d); *Tarion* at para 3(5)

¹¹ *Richards-Wilcox Door Systems v. IlSCO of Canada Co.*, 2015 CarswellOnt 31 (S.C.J.) at para 10

¹² See *Slota* at para 37

as there was no indication that the plaintiffs were advancing the action forward beyond pleadings.¹³ Relying on *Edward Sobie, Executor v. Sobie*,¹⁴ Terraprobe asserts that it does lie in the mouths of the plaintiffs to argue that Terraprobe was also not in a rush to move the matter forward, or was equally responsible for the delay.¹⁵ In my view, the facts and circumstances of *Sobie* are readily distinguishable from the present case. In *Sobie*, Associate Justice Jolley found that, in the circumstances of that case, it was not the defendants' obligation to move the matter forward, but also noted that "the majority of attempts to move the matter along were at the behest of the defendants".¹⁶ In contrast, there is no evidence in this case of any attempt by Terraprobe to move the matter along. Unlike the actions of the defendant in *Sobie*, Terraprobe did not seek agreement on a discovery plan, and it did not serve an affidavit of documents or take any steps with respect to discovery. Terraprobe's counsel did not even attempt to contact plaintiffs' counsel for a status update or to determine the plaintiffs' intentions with respect to the action. As the Court of Appeal has explained in *Carioca's v. Canadian Pacific Railway Limited*:

[53] While this court has stated frequently that the plaintiff bears the primary responsibility for moving a case forward, it has also acknowledged that the conduct of a defendant is a factor, especially where a plaintiff encounters some resistance when trying to move the action along: *1196158 Ontario Inc.*, at para. 29. The suggestion that it is normal and acceptable for a defendant, if not to actively delay, to simply wait for the plaintiff to make the next move, may be based on a conventional view of litigation strategy. The objectives of timely and efficient access to justice, and effective use of court resources require all parties to play their part in moving actions forward, and for counsel to act in a way that facilitates rather than frustrates access to justice: *Hryniak*, at para. 32. For these reasons, although the burden of proof on the motion is on the plaintiff, the conduct of all parties in relation to the litigation is relevant in determining whether to restore an action to the trial list.¹⁷

[34] *Carioca's* was decided in the context of a motion to restore an action to the trial list, and it makes reference to the possibility that active resistance by a defendant can raise additional concerns. Nevertheless, the underlying principle remains that "the conduct of a defendant is a factor" and the "suggestion that it is normal and acceptable for a defendant, if not to actively delay, to simply wait for the plaintiff to make the next move, may be based on a conventional view of litigation strategy." As Kimmel J. noted in *Slota*, "I do not agree with the submission of the defendants that their conduct is only relevant if it actually prevented the plaintiff from moving the action forward."¹⁸ In my view, Terraprobe's counsel in this action could have taken at least some limited steps, without incurring any material costs, such as communicating with plaintiffs' counsel to determine the plaintiffs' intentions, and this is a relevant factor in assessing the issue of delay.

¹³ See *Slota* at para 29 (b)

¹⁴ *Edward Sobie, Executor v. Sobie*, 2018 ONSC 4205 ("*Sobie*")

¹⁵ *Sobie* at para 52

¹⁶ *Sobie* at para 52

¹⁷ *Carioca's v. Canadian Pacific Railway Limited*, 2015 ONCA 592 ("*Carioca's*") at para 53 (emphasis added)

¹⁸ *Slota* at para 37

[35] Another relevant aspect of the plaintiffs' explanation is the acknowledged error by plaintiffs' counsel that the reminder notice about the five-year deadline that is normally set in his tickler system was inadvertently set one year behind with respect to this action. After this was discovered, further complications arose when: (i) plaintiffs' counsel used the incorrect email address when contacting Terraprobe's counsel to request the defendant's consent to a timetable for completion of the steps necessary to set the action down for trial; and (ii) there was confusion as to the precise deadline for setting the action down for trial due to the temporary suspension of time for completion of steps in a proceeding pursuant to O. Reg. 73/20 under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9. These complications were further compounded when plaintiffs' counsel did not call Terraprobe's counsel to discuss the situation as he indicated he would in the email correspondence he had sent to Terraprobe counsel's incorrect email address. Notwithstanding these errors and complications, I find that the plaintiffs' moved reasonably promptly to bring this motion once it became clear that Terraprobe would not consent to an extension of the set down date. In this regard, I note that the plaintiffs' initial attempt to file their motion record with respect to this motion was not accepted by the court due to a technical issue with respect to the notice of motion. At that point, plaintiffs' counsel reported this matter to LAWPRO who appointed counsel to investigate and ultimately assume carriage of this motion, and counsel appointed by LAWPRO promptly requisitioned a long motion date and took the necessary steps to have this motion scheduled.

[36] In assessing an explanation for litigation delay, the court must be satisfied that it is "reasonable, acceptable or satisfactory". In *Kupets*, the Divisional Court held that it is an error to impose a higher standard of proof on a plaintiff.¹⁹ In my view, the plaintiffs have provided a reasonable and acceptable explanation for the litigation delay in this action. From the commencement of the action and throughout the period of delay there was regular activity by the plaintiffs and active steps were undertaken by plaintiffs' counsel, the plaintiffs and the Plaintiffs' Experts to: (i) prepare expert reports regarding liability and damages; and (ii) gather the necessary supporting documents in advance of examinations for discovery.

[37] The evidence supports the plaintiffs' contention that they have always intended to proceed with this action to trial and there is no evidence that the litigation delay resulted from a deliberate decision by them not to move the action forward. Although plaintiffs' counsel failed to communicate with Terraprobe's counsel as he should have, this does not mean that the action was lying dormant or that the plaintiffs had lost interest in pursuing it. Plaintiffs' counsel worked with the Plaintiffs' Experts continuously throughout the delay period. He had regular follow-up with the experts and responded promptly to their requests for documentation and information. There was also regular communication with the plaintiffs' representatives. Numerous drafts of the expert reports were prepared, reviewed, and revised. Further, I am mindful of the principle that "the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel"

¹⁹ *Kupets* at para 18

and that “[t]he law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor”.²⁰

[38] Taking into account the procedural history of this action, weighing all the relevant factors, and considering the necessary balancing of interests, I find that the plaintiffs have satisfied their onus and provided an acceptable explanation for the delay in this action.

B. If the action is allowed to proceed, has the plaintiff satisfied the court that the defendants would suffer no non-compensable prejudice?

[39] The second part of the two-part conjunctive test requires the court to determine whether a defendant’s ability to defend the action has been significantly prejudiced by the litigation delay occasioned by a plaintiff. In *Tarion*, Associate Justice Graham (then titled Master Graham), explained:

...the onus is on the plaintiff to demonstrate that there would be no prejudice to the defendants if the action were permitted to proceed. The fact that the plaintiff bears this onus means that the delay is presumed to be prejudicial to the defendants’ ability to defend the action. The plaintiff may rebut this presumption through evidence regarding the availability of relevant documents and key witnesses.²¹

[40] Terraprobe submits that the plaintiffs have failed to satisfy the onus of showing that the defendant is not prejudiced by the delay. It submits that certain documents may not have been preserved, some key witnesses are no longer available, and the memories of the available witnesses will have faded. It argues that “prejudice is inherent in long delays. Memories fade and fail, witnesses become unavailable, and documents and other potential exhibits are lost. The longer the delay, the stronger the inference of prejudice to the defence case flowing from that delay.”²²

[41] With respect to document preservation, Terraprobe submits that the plaintiffs have not demonstrated that all relevant documents will be available. Terraprobe acknowledges the plaintiffs’ evidence that they have preserved all of their relevant documentation but submits that there may be documents outside of the plaintiffs’ possession that have not been preserved, such as the Terraprobe’s notes and records. I do not accept this argument. Terraprobe received timely notice of the claim and, therefore, had an opportunity to obtain and preserve evidence. The statement of claim was served in accordance with the *Rules of Civil Procedure* and Terraprobe has not asserted a limitations defence. The uncontested evidence is that the plaintiffs’ documents have been preserved, including documents from the plaintiffs’ records and from relevant experts. Liability and damages reports have been served by the plaintiffs. The defendant’s assertion of prejudice resulting from its own (potential) loss of documentation is entirely speculative. In any

²⁰ *Finlay v. Van Paassen*, 2010 ONCA 204 at para 33 citing *Marché D’Alimentation Denis Theriault Ltee v. Giant Tiger Stores Limited*, 2007 ONCA 695 at para 28; see also *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173 (“*H.B. Fuller*”) at para 27

²¹ *Tarion* at para 7

²² *Walderman v. CMC Markets Canada Inc.*, 2017 ONSC 6802 (“*Walderman*”) at para 34, citing *Lagenecker v. Sauve*, 2011 ONCA 803 at para 11

event, as noted in *Slota*, a defendant cannot create prejudice by having failed to preserve relevant evidence, something that it reasonably could or ought to have done.²³

[42] In terms of key witnesses and their availability, Terraprobe asserts that it will be prejudiced because it no longer employs certain individuals who worked on the project in issue. However, several of those former employees left Terraprobe before the action was commenced, and all of them have been located and can be contacted by Terraprobe to testify at trial, if necessary. Other potential witnesses who worked on the project in issue include employees and former employees of Fieldgate Construction, the other named defendant with respect to which the action has been discontinued. In this regard, one of the Fieldgate Construction employees, Sean Fox, died, although there is no evidence as to when he passed away. Nevertheless, others who worked on the subject project are still employed by Fieldgate Construction, including Ezra Jakubovic, the owner and President, who has first-hand knowledge of the relevant factual events through his work as the Project Manager, as well as Isabel Reinoso, who worked as the Project Coordinator. Another potential witness, Terry Kaufman, who took over management of the project in 2015, remains available. Laura Spink, a hydrogeologist with the Ministry of the Environment, Conservation and Parks, also remains available. In summary, based on the evidence in the record, the plaintiffs have satisfied the onus of demonstrating that the key witnesses remain available.

[43] With respect to witness recollections, Terraprobe asserts that, even if witnesses are available, it will be prejudiced in defending the action because the witnesses' memories will have faded due to the passage of time. Terraprobe submits that "[t]he more time that passes, the more difficult it is to defend the case. Memories fade and even if documents are not lost, their significance becomes shrouded."²⁴ Terraprobe also argues that this is exacerbated by the complicated technical issues about which witnesses will have to give evidence, namely the delineation and remediation of ground contamination which began over ten years ago. Terraprobe asserts that the subject matter of this action is complex and that the fact witnesses will need to recall and interpret technical calculations, results from surveys and analyses, and the decision-making stemming from the relevant data and findings. Therefore, Terraprobe argues, the recollection of this highly technical information is more susceptible to fading memories. Terraprobe also submits that the prejudice is increased because there has not yet been any oral discovery through which "memories have been jogged, committed to writing under oath and preserved".²⁵ Specifically, Terraprobe relies on the evidence of Shama Qureshi that her recollection and memories surrounding the events relevant to this action have since faded.

[44] While I recognize that oral discovery has not yet taken place to assist certain witnesses to jog their memories and commit them to writing, relevant documents have been preserved and can be reviewed by witnesses to refresh their memories. Terraprobe's evidence about prejudice consists mainly of conclusory statements of prejudice that fail to explain how the delay has caused such prejudice. The evidence about "faded memories" is far from compelling and amounts to a bald assertion that witness memories have faded, which is not sufficient to demonstrate prejudice.²⁶

²³ *Slota* at paras 31 (c), citing *Labelle v. Canada (Border Services Agency)*, 2016 ONCA 187, and at para 49

²⁴ *Walderman* at para 34, citing *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544 at para 43

²⁵ *Nadarajah v. Lad*, 2015 ONSC 925 at para 144

²⁶ *Leaf Homes Limited v. Khan*, 2022 ONCA 504 at para 119, following *Ross v. Filip*, 2021 ONSC 1496 at para 108

As a result, I do not accept Terraprobe's assertions that it has suffered prejudice due to faded memories.

[45] Further, Terraprobe's assertions of prejudice must be assessed in light of how it has conducted itself in this action. The claim of prejudice is undermined by the fact that Terraprobe remained entirely passive and did not object to the pace of the litigation. Terraprobe's failure to display any sense of urgency undercuts any claim of actual prejudice.²⁷

[46] In summary, I find that there is not a strong presumption of prejudice arising from the plaintiffs' delay. I also find that, in the circumstances, any such presumption has been rebutted.²⁸ Having considered all of the circumstances, I find that the plaintiff's conduct has not materially prejudiced the defendants' ability to defend the action or the possibility of a fair trial.²⁹ In the result, I find that if the action is allowed to proceed, the defendants will not suffer any non-compensable prejudice.

D. DISPOSITION AND COSTS

[47] For the reasons outlined above, (i) the plaintiffs' motion for an order extending the time to set the action down for trial and setting a timetable for the completion of the remaining steps in this action is granted, and (ii) Terraprobe's cross-motion for an order dismissing the action for delay is dismissed.

[48] I urge the parties to try to agree on a consent timetable for the completion of the remaining steps necessary to have the action set down for trial, including a new deadline for the set down date. In the event that the parties are unable to do so within two weeks of today's date, they may request a case conference before me to set a timetable by contacting my Assistant Trial Coordinator.

[49] With respect to costs, the parties had agreed on the quantum payable that was dependant on success. Pursuant to that agreement, I order the defendants to pay costs to the plaintiffs fixed in the amount of \$14,000 (inclusive of disbursements and taxes) within 30 days.

DATE: October 5, 2023

R. Frank Associate J.

²⁷ *Slota* at paras 29 (g) and 54; *H.B. Fuller* at para 42

²⁸ See *Slota* at para 50

²⁹ See *Slota* at paras 56 and 58