IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Forgotten Treasures International Inc. v. Lloyd's Underwriters,* 2025 BCSC 222

Date: 20250131
Docket: S186084
Registry: Vancouver

Between:

Forgotten Treasures International Inc.

Plaintiff

And:

Lloyd's Underwriters, Endeavour Insurance Services Limited, HUB International Canada West ULC, HUB International Limited and Mark Loewen

Defendants

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Before: The Honourable Justice Warren

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	N. Hopewell
Agent appearing on behalf of Counsel for the Plaintiff on January 31, 2025 only:	V. Critchely
Counsel for the Defendants Lloyd's Underwriters and Endeavour Insurance Services Limited:	A. Schwisberg
Counsel for the Defendants HUB International Canada West ULC, HUB International Limited and Mark Loewen:	M. Bellomo
Place and Date of Hearing:	Vancouver, B.C. January 27, 2025
Place and Date of Judgment:	Vancouver, B.C. January 31, 2025

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THE COURT:

Introduction

[1] The defendants have applied, pursuant to Rule 22-7(7), to dismiss this action for want of prosecution. The original notice of civil claim ("NOCC") was filed on May 25, 2018, more than six-and-a-half years ago. The notices of application were filed in December 2024..

Background

[2] The plaintiff was the operator of a treasure hunt to raise money for cancer research. Among the prizes were two eagle sculptures, one of solid gold and encrusted with gems and the other of solid silver. The gold sculpture is valued at over $1 million, while the silver one is valued at approximately $50,000. The claim arises out of the denial of insurance coverage for the loss, on May 29, 2016, of those sculptures.

[3] On May 29, 2016, Mr. Ron Shore, the principal of the plaintiff, was in possession of the sculptures. He had them in a backpack. He alleges that they were stolen from him during a violent robbery as he was in the process of placing the backpack into his car. He alleges he was seriously injured during the robbery.

[4] The sculptures were insured by the defendants Lloyd's Underwriters ("Lloyd's") and Endeavour Insurance Services Limited ("Endeavour") under a policy in effect from February 3, 2016 to February 3, 2017 (the "Policy"). I will refer to Lloyd's and Endeavour collectively as "Lloyd's".

[5] The plaintiff submitted a proof of loss to Lloyd's on August 12, 2016. Lloyd's denied the claim asserting breach of what is referred to as the Two Person Accompanying Warranty, or "TPAW". The material part of the TPAW provides:

> This insurance excludes loss of, or damage to, the insured's interest when in transit and/or course of transit UNLESS the insured interest is in the close personal custody and control of the Assured and an officer, employee, independent contractor, designated employee or representative of the

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> Assured at all times other than when deposited in a bank safe and/or vault and/or while in custody of Customs.

[6] Mr. Shore claims that the denial of coverage was a breach of the Policy. He advances that claim, among others, against Lloyd's. Among other things, he says that, at the material time, he was accompanied by an associate named Ms. Tanya Merx and, as such, was in compliance with the TPAW.

[7] In the alternative, the plaintiff claims against HUB International Canada West ULC, HUB International Limited, and Mark Loewen (collectively, "HUB"), who were the insurance brokers for the Policy. It is alleged that if the Policy did not cover the loss of the sculptures, then HUB's negligence, breach of contract, or breach of fiduciary duty caused loss to the plaintiff.

[8] The Policy is a renewal of an insurance policy that was first placed through HUB in 2010. Discussions between the plaintiff and Mr. Loewen regarding the placement of that insurance began in 2009.

<u>Litigation History</u>

[9] The plaintiff filed the NOCC on May 25, 2018. That was three days before the second anniversary of the loss. The plaintiff was initially represented by one lawyer, who was counsel of record, but Mr. Shore was in contact with another lawyer, Greg Allen, who assisted in the background from time to time.

[10] On June 8, 2018, counsel for Lloyd's emailed the plaintiff's then counsel requesting additional particulars of the allegations in the NOCC of misconduct by Lloyd's independent adjuster, a person named Rich Mancuso. After initially agreeing to provide the particulars, the plaintiff's counsel reversed his position and refused to do so. Counsel for Lloyd's then advised that Lloyd's would apply for an order requiring the provision of particulars.

[11] On October 5, 2018, the plaintiff filed a requisition to enter default judgment against Lloyd's despite knowing that Lloyd's intended to apply for particulars prior to

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filing a response. On November 5, 2018, the registry rejected that requisition for default judgment.

[12] On November 8, 2018, Lloyd's filed a notice of application seeking an order for further particulars and an order for an extension of the deadline for filing a response.

[13] On November 16, 2018, the plaintiff filed a second requisition to enter default judgment against Lloyd's, without informing Lloyd's, despite the fact there was ongoing communication between counsel at the time.

[14] On December 6, 2018, default judgment was entered against Lloyd's. Lloyd's discovered this on December 10, 2018, which was the day before its application for particulars and an extension to file its response was scheduled to be heard.

[15] Lloyd's application came before a master on December 11, 2018. At that time, Lloyd's counsel also asked that the default judgment be set aside. The plaintiff's counsel refused to consent to an order setting aside the default judgment despite the master criticizing his professionalism and suggesting that he should consent. Ultimately, the master adjourned the matter to allow Lloyd's to formalize an application to set aside the default judgment.

[16] On December 18, 2018, Lloyd's filed a second notice of application seeking to set aside the default judgment.

[17] On February 29, 2018, Lloyd's applications, that is the original application for particulars and an extension of time to file a response and the second application to set aside the default judgment, were heard together by Justice Baird. On April 3, 2019, he ordered that the default judgment be set aside. He also dismissed the application for particulars, but he gave Lloyd's an extension to file its response.

[18] The plaintiff appealed the order setting aside the default judgment. Mr. Shore acted personally for the plaintiff on the appeal.

[19] On July 18, 2019, Lloyd's filed its response to civil claim.

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[20] On October 27, 2020, after the hearing date in the Court of Appeal had been adjourned once at the plaintiff's request, the plaintiff's appeal was heard. On November 30, 2020, it was dismissed with costs.

[21] After settling the costs order against it on or about December 4, 2020, the plaintiff took no further steps for more than six months.

[22] On June 18, 2021, the plaintiff filed a notice of change of lawyer, appointing Mr. Allen as counsel of record, and also served its list of documents. On October 25, 2021, Lloyd's served its list of documents. The plaintiff did nothing further for about 11 months.

[23] On September 29, 2022, the plaintiff filed a notice of intention to proceed, but no actual steps were taken by the plaintiff until January 2023 when an amended notice of civil claim was filed.

[24] On April 19, 2023, plaintiff's counsel indicated that the plaintiff wished to bring an application for summary trial. Counsel for Lloyd's advised he was not available until November 2023.

[25] Plaintiff's counsel took no further steps until August 5, 2024, when he wrote to Lloyd's counsel to say, again, that he intended to proceed with a summary trial application. At that point, Lloyd's counsel objected to the delay in prosecuting the action.

[26] On October 1, 2024, the plaintiff served a second notice of intention to proceed. On October 2, 2024, counsel for the HUB defendants informed plaintiff's counsel that instructions were being sought to apply to have the case dismissed for want of prosecution.

[27] On October 30, 2024, Lloyd's and HUB confirmed their instructions to bring the dismissal for want of prosecution applications. Lloyd's notice of application was then filed on December 10, 2024. HUB's notice of application was filed on December 16, 2024.

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Legal Principles

[28] The test for dismissing a claim for want of prosecution was revised by a five-member panel of the Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473. The revised test was subsequently summarized by the Court of Appeal in *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, 2024 BCCA 288. It has three components:

1. Has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?

2. If so, has the plaintiff shown that the delay is excusable?

3. If not, is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[29] The new test differs from the old test in two respects: (1) serious prejudice to the defendant arising from delay is not a discrete element of the test, but rather is a factor to consider at the interests of justice stage of the analysis; (2) the impact of the delay on trial fairness is not, invariably, the overriding factor in considering whether it is in the interests of justice to permit a claim to continue: *Giacomini* at para. 68. These changes reflect the increasing recognition that unreasonable delays in civil proceedings cause systemic harm in undermining public confidence in the justice system and the public interest in a justice system that delivers timely and affordable justice: *Giacomini* at paras. 30-31, 51-58.

[30] If, having regard to the circumstances of the case, it is not in the interests of justice to allow an action characterized by inordinate and inexcusable delay to continue, the remedy of dismissal is not excessively harsh or punitive; rather, it is justified. At the same time, a plaintiff's interest in a trial on the merits remains an important consideration, and applications for dismissal for want of prosecution are not to be viewed as a matter of routine: *Giacomini* at paras. 74, 75. Finally, while there is no obligation on a defendant to take any step to move the case forward, a defendant's inaction in the face of lengthy delay by the plaintiff may weigh against

dismissal of the action at the interests of justice stage of the analysis: *Giacomini* at para. 76.

[31] In *Giacomini,* the chambers judge dismissed the application to dismiss for want of prosecution on application of the old test. This result was upheld by the Court of Appeal despite the reformulation of the test. In dismissing the appeal, the Court of Appeal concluded that even accepting it was correct to characterize the delay as inordinate and inexcusable, it was in the interests of justice to allow the claim to proceed to trial. The factors the Court emphasized (paras. 79-83) in the interests of justice analysis were:

- the absence of actual prejudice to the defendants' ability to defend the action;
- the vagueness of the evidence of prejudice in the form of ongoing stigma to reputation;
- a length of delay (about three-and-a-half years) that was "concerning", but arose in circumstances where the plaintiff was engaged in ongoing investigation of the claim during the period of delay;
- the complexity of the claim, which involved construction defects that required some time to investigate;
- the failure of the defendants to insist on a deadline for the filing of an amended notice of civil claim or to follow-up when the amendment was not filed, and the passage of about a year-and-a-half without the defendants pressing the plaintiff to commit to timelines for steps in the litigation; and
- it could not be said the claim was bound to fail.

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Analysis

Has the delay been inordinate?

[32] An inordinate delay is one that is "uncontrolled, immoderate, excessive and out of proportion to the matters in question" given the circumstances of the case: *Giacomini* at para. 38.

[33] Delay is typically measured from the date of commencement of the action, and it is considered holistically; the question is whether the overall delay is inordinate: *Giacomini* at para. 39; *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38.

[34] The overall delay in this case is more than six-and-a-half years. Of the roughly two-and-a-half years following the commencement of the claim, two years was wasted on the plaintiff's imprudent taking of default judgment and subsequent misguided attempts to preserve it. In the more than four years since the release of the Court of Appeal's decision upholding the striking of the default judgment, the plaintiff did nothing more than serve a list of documents (June 2021) and file an amended pleading (January 2023). While, in the spring of 2023, plaintiff's counsel advised that the plaintiff wished to bring a summary trial application, upon being advised that defence counsel had no availability until November 2023, that prospect was dropped in the sense that there were no further communications between counsel about the preparation of materials or the scheduling of a hearing. Plaintiff's counsel did not raise a summary trial again until August 2024, some 15 months later. At that point, counsel for the defendants indicated they were seeking instructions to apply to dismiss the claim for want of prosecution, and these applications ensued.

[35] Given the circumstances I have just outlined, I have no difficulty concluding the delay in this case has been inordinate. Lags in advancing civil litigation are common, and are often the unavoidable result of the scarcity of judicial resources and the need to coordinate the availability of busy counsel. However, a delay of six-and-a-half years, during which the only steps taken to advance the case towards a resolution on the merits were the delivery of a list of documents and the filing of an

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amended pleading, is inordinate. This conclusion is heightened by the fact that the plaintiff wasted two years trying to preserve the default judgment and thereby avoid having to prosecute the claim on the merits. On learning the Court of Appeal had dismissed the appeal, it was incumbent on the plaintiff to "step on the gas", as Lloyd's counsel put it, but instead the plaintiff continued to delay.

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Is the delay inexcusable?

[36] Unless a credible excuse is given, inordinate delay is inexcusable: *Giacomini* at para. 40. The question is whether the plaintiff has presented a credible excuse. Delay that is intentional or tactical, in the sense of intended to prejudice the defendant, is unlikely to be excused. Delay that is caused by impecuniosity or illness may be excused. Delay caused by a lack of diligence on the part of counsel may, in some cases, be excused.

[37] I start by observing that there is no evidence indicating the delay in the case was intentional or tactical.

[38] The plaintiff advanced the following explanations for the delay:

- The focus for about two years was the attempt to preserve the default judgment.
- Due to strained financial circumstances, Mr. Shore attempted to do much of the preparatory work himself, particularly the preparation of the plaintiff's list of documents and the drafting of the amended notice of civil claim, which required him to conduct legal research. This resulted in much of the delay in 2021 and 2022, which was caused by Mr. Shore's lack of legal training and his various health challenges, including surgeries he underwent due to the injuries he sustained in the robbery, a diagnosis of PTSD in 2021 arising from his service in the Canadian Armed Forces, and some "other health problems" that resulted in a heart stress test in 2022. Further, he says he was preoccupied during this period by having to sell personal belongings to make ends meet.

- Mr. Allen did not advance the case diligently in the period after the amended notice of civil claim was filed in early 2023. This was essentially conceded by Mr. Allen in an affidavit sworn in opposition to these applications.

- A lag of about eight months was due to the unavailability of Lloyd's counsel between April and November 2023. The plaintiff is not critical of defence counsel but emphasizes that this kind of lag is an unfortunate but common reality of litigation.

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[39] I accept Mr. Allen's acknowledgment, in his affidavit, that his lack of diligence contributed to the delay between the spring of 2023 and August of 2024. The unavailability of counsel for Lloyd's during the period from April 2023 to November 2023 was also a contributing factor. That is not a criticism of Mr. Schwisberg. It is not unusual for busy counsel to be fully booked for months at a time. However, the combination of Mr. Allen's lack of diligence and Mr. Schwisberg's unavailability does excuse the delay since about April 2023.

[40] However, the plaintiff has not presented evidence that excuses the earlier delay. While I appreciate the challenges faced by lay litigants, neither Mr. Shore's personal circumstances nor his misguided efforts to preserve the default judgment provides an excuse for the delay up to April 2023. As I have already said, the time spent on the default judgment was entirely wasted, and Mr. Shore's evidence of his financial and health circumstances is vague and limited to his own bald assertions without any objective corroboration. In these circumstances, I find that the roughly five year delay up to the spring of 2023 is inexcusable. As such, it is necessary to proceed to the interests of justice analysis.

Where do the interests of justice lay?

[41] As observed by the Court of Appeal in *Giacomini* at para. 39, the tension at the heart of the court's discretion to dismiss a claim for want of prosecution reflects the tension inherent in the general object of the *Supreme Court Civil Rules* "to secure the just, speedy, and inexpensive determination of every proceeding on its merits" (R. 1-3(1)). The applicant will always emphasize the just and speedy

determination of the proceeding while the respondent will always focus on the fundamental objective of determining every proceeding on its merits.

[42] Assessing the interests of justice requires the balancing of these objectives and involves a consideration of all relevant factors, including (a) the prejudice the defendant will suffer in defending the case on the merits; (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, and in particular whether the plaintiff delayed in the face of pressure on the part of the defendant to proceed; (f) the reasons offered for the delay; (g) the role of counsel in causing the delay; (h) the public interest in having cases that are of genuine public importance heard on their merits; and (i) the merits of the action: *Giacomini* at paras. 66, 71.

[43] An application to dismiss for want of prosecution will only succeed if, on a consideration of these and any other relevant factors, the court is persuaded that the interests of justice justify depriving the plaintiff of their presumptive entitlement to adjudication on the merits: *Giacomini* at para. 75.

Prejudice

[44] As discussed, prejudice to the defendant arising from the delay is not a prerequisite to an order dismissing a claim for want of prosecution, but it does remain an important consideration: *Giacomini* at para. 72.

[45] Prejudice, in this context, refers to the impairment of the defendant's ability to defend the claim, usually due to factors such as failing memories, the unavailability of witnesses, and the loss or destruction of other forms of evidence.

[46] Lloyd's identifies the following forms of prejudice arising from the delay in prosecuting the action.

- It is alleged that Mr. Mancuso, the independent insurance adjuster retained by Lloyd's, acted inappropriately and unprofessionally in investigating the loss

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between May 2016, when the loss occurred, and October 2016, when the claim was denied. Among other things, it is alleged that Mr. Mancuso was often unresponsive, was abrasive and combative, and failed to properly examine the claim. Lloyd's says they are prejudiced in defending the claim because Mr. Mancuso recalls little about this specific investigation and would have to rely on a general denial based on the manner in which he says he always conducts himself professionally.

- Other evidence has not been preserved through examinations for discovery and the plaintiff has not provided details concerning some 40 witnesses the plaintiff has alleged could testify about what happened on the day of the loss. In the circumstances, Lloyd's says the "trail has gone cold".
- Lloyd's says that Mr. Shore interfered with Lloyd's attempts to gather evidence from Ms. Merx. Ms. Merx gave a statement to Mr. Mancuso early in the investigation which was relied on by Lloyd's in denying coverage. However, Michael Jobson, another independent adjuster retained by Lloyd's, attempted to contact Ms. Merx again in early 2019, but she did not return his calls. Then, on April 4, 2019, the day after Justice Baird released his decision setting aside the default judgment, Mr. Shore phoned Mr. Jobson and told him to stop calling Ms. Merx because she was not going to return his calls or speak to him about the matter. Lloyd's submits that the obvious inference to be drawn from the fact that Mr. Shore knew to contact Mr. Jobson and knew his phone number is that Mr. Shore was in contact with Ms. Merx and effectively "muzzled" her.

[47] This morning I have been advised that Ms. Merx did contact Mr. Jobson days before the hearing of these applications, but it appears that he did not get any additional material information from her. This recent contact by Ms. Merx does not affect my decision so I will say nothing more about it.

[48] HUB identifies the following forms of prejudice arising from the delay in prosecuting the action:

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- It is alleged that HUB was negligent in its provision of insurance brokerage services and made misrepresentations about the coverage in oral dealings between Mr. Loewen and Mr. Shore. The Policy is a renewal of a policy that was first placed in 2010 and discussions about it began as far back as 2009. Mr. Loewen has deposed that he does not remember details of his verbal dealings with Mr. Shore, and that since his first dealings with Mr. Shore in 2009, his general ability to recall has diminished, "especially within the last four to five years." HUB says Mr. Loewen's testimony is crucial to their defence and as a result of his diminished memory, they are prejudiced by the delay.

- HUB also argues that other evidence has not been preserved through examinations for discovery.

[49] I accept that Mr. Mancuso's memory and Mr. Loewen's memory of the material events will have faded over time. As such some prejudice is presumed given that key components of the plaintiff's case arise from Mr. Shore's oral dealings with Mr. Mancuso and Mr. Loewen. However, I do not give this too much weight in my overall analysis of the interests of justice because it appears unlikely that Mr. Mancuso and Mr. Loewen would have had distinct recollections of their verbal dealings with Mr. Shore even if this case had been prosecuted expeditiously. Further, Mr. Loewen has copies of at least some of his written communications with Mr. Shore, and without going into detail, they appear to be supportive of the defence.

[50] If the plaintiff had pursued the claim with dispatch, it is unlikely it would have been brought to trial prior to 2021, given the disruption to court operations caused by the COVID pandemic. By that time, roughly five years would have passed since Mr. Mancuso's dealings with Mr. Shore and roughly 12 years would have passed since Mr. Loewen's dealings with him. Mr. Mancuso deposed that he adjusts, on average, 350 claims a year. Mr. Loewen's evidence about his workload is not as specific but he has continued to work in the field, and for HUB, since 1988, and has assisted many clients which he says impedes him from remembering specific details

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of any one of his files. He has not provided any explanation for the statement in his affidavit that his memory has diminished particularly in the last four to five years. Again, it is unlikely that the inordinate and inexcusable delay has significantly increased the prejudice to the defendants that arises from the fact that Mr. Shore's verbal dealings with Mr. Mancuso and Mr. Loewen form key components of the plaintiff's case.

[51] Any prejudice to the defendants that arises from the fact that examinations for discovery have not taken place does not, in my view, arise from the plaintiff's delay. The defendants could have conducted examinations for discovery years ago.

[52] Similarly, any prejudice associated with the loss of Ms. Merx's cooperation does not arise from the plaintiff's delay. I wish to be very clear that I am not condoning Mr. Shore's apparent interference with Ms. Merx or his attempt to dissuade Mr. Jobson from investigating the claim. I agree with the submission advanced on behalf of Lloyd's to the effect that despite Mr. Shore's denial of any attempt to prevent Ms. Merx from speaking to the defendants, the only reasonable inference from the fact that he phoned Mr. Jobson soon after Mr. Jobson attempted to contact Ms. Merx is that Mr. Shore spoke to Ms. Merx. In all the circumstances, it appears that he may well have dissuaded her from cooperating from the defendants. This is troubling. However, this occurred in 2019. The loss of Ms. Merx's cooperation is not the result of the subsequent delay.

[53] Again, I do accept that Mr. Mancuso's memory and Mr. Loewen's memory of the material events will have faded over time and as such the delay has resulted in some prejudice to the defendants' ability to defend the case. However, it is likely that their memories of oral dealings with Mr. Shore would have been dim even if the case had been prosecuted expeditiously. In all the circumstances, prejudice to the defendants weighs in favour of dismissal but not heavily.

Length of the delay and the stage of the litigation

[54] The complexity of the case provides important context when assessing how the length of the delay and the stage of the litigation impact on the interests of justice

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analysis. This case is not particularly complex. In other words, this is not a case where complexity might be said to mitigate the impact of a long delay and the failure to move the case beyond the early stages of the litigation.

[55] In the result, the length of the unexplained delay, at about five years, and the early stage of the litigation weigh in favour of dismissal.

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Impact of the delay on the defendants' professional interests

[56] The allegations in the pleadings, which of course are a matter of public record, call into question the professionalism and business ethics of the defendants generally and Mr. Mancuso and Mr. Loewen in particular. I accept that it is not pleasant to be the subject of such allegations and that Mr. Mancuso and Mr. Loewen have suffered emotionally, to some extent, from the associated stigma. However, their evidence in this regard is lacking in concrete detail. There is no evidence that their careers or professional prospects have been injured in any way. To the contrary, both have continued to work in the positions they held when the events that are said to ground the claim occurred. Mr. Mancuso attached a sample of some media reports about the case, but those focus on the very unusual events leading to the loss. On my reading, none of them mention Mr. Mancuso or Mr. Loewen by name, and they refer only briefly and in general terms to the allegations made in the pleadings.

[57] In the circumstances, the impact on the defendants' professional interests weighs in favour of dismissal but not heavily.

The context in which the delay occurred and, in particular, whether the plaintiff delayed in the face of pressure on the part of the defendant to proceed

[58] The Court of Appeal made clear in *Giacomini* that while there is no obligation on a defendant to take any step to move the case forward, a defendant's inaction in the face of a lengthy delay by the plaintiff may weigh against dismissal of the action at the interests of justice stage of the analysis: *Giacomini* at para. 76. That is the situation here.

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[59] There is no evidence that the defendants took issue with the pace of the litigation until the summer of 2024. There is no evidence that before then they put any pressure on the plaintiff to proceed. The defendants have not sought a trial date. There have been no attempts on their part to schedule examinations for discovery. There have been no attempts to compel the evidence of Ms. Merx through the Rule 7-5 procedure. The HUB defendants have not even delivered a list of documents. In the circumstances, this factor weighs against dismissal.

The reasons for the delay

[60] I have found that Mr. Allen's lack of diligence and Mr. Schwisberg's busy calendar excuse the delay since about April 2023. The delay that is inexcusable is that which occurred during the five years following the commencement of the claim. The reasons offered for much of that delay centered on the time spent attempting to preserve the default judgment and Mr. Shore's financial and health circumstances.

[61] As I made clear, the plaintiff's efforts to preserve the default judgment, in the circumstances of this case, were entirely misguided. I appreciate that Mr. Shore acted personally for the plaintiff on the appeal and, as a lay litigant, he may not have appreciated that it was virtually certain to fail. However, on his own evidence, he was receiving advice from Mr. Allen or others at Mr. Allen's firm from time to time since October 2018. A brief phone call with a lawyer would likely have apprised him of the foolishness of pursuing the appeal.

[62] In addition, and as already discussed, Mr. Shore's evidence of his financial and health circumstances is vague and limited to his own testimony without any corroborating objective evidence.

[63] In these circumstances, the reasons for the delay do not weigh in favour of allowing the claim to proceed.

Other factors

[64] Other factors that may be relevant to the interests of justice analysis include the role of counsel in causing the delay, the public interest in having cases that are of genuine public importance heard on their merits, and the merits of the action.

[65] The role of counsel in contributing to the delay has been reflected in my determination of the length of the material delay. In other words, I am assessing the interests of justice on the basis that this case involves a five year delay, having excused the roughly two years that were to a large extent caused by counsel. In these circumstances, it would not be appropriate to give weight to the role of counsel in the interests of justice analysis.

[66] This case is not one of genuine public importance and it cannot be said that it is bound to fail. In the circumstances, these factors are neutral in my analysis.

Summary of interests of justice analysis

[67] In sum, a justice system that delivers timely and affordable justice is in the public interest. In this case, the length of the unexplained delay, at about five years, is substantial and the litigation remains at an early stage. These factors weigh in favour of dismissal.

[68] The prejudice to the defendants in defending the case and the impact on the defendants' professional interests weigh in favour of dismissal but, for the reasons I have expressed, I do not give these much weight. Further, they are largely offset in the analysis by the defendants' inaction in the face of the delay.

[69] The other factors are neutral.

[70] I return to the fundamental question: on a consideration of the relevant factors, am I persuaded that the interests of justice justify depriving the plaintiff of its presumptive entitlement to adjudication on the merits: *Giacomini* at para. 75. Recognizing the importance of a plaintiff's interest in a trial on the merits, I have decided that there is not enough to tip the balance in favour of dismissal, although

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this was a close call. I have somewhat reluctantly concluded that it is in the interests of justice to allow the claim to proceed.

Conclusion

[71] The delay in this case is inordinate and inexcusable, but it is in the interests of justice to allow the claim to proceed.

[72] The applications are dismissed.

[73] As discussed on Monday when the applications were heard, the parties have leave to make submissions on costs at a later date. If that is going to be necessary they must contact Supreme Court Scheduling within 60 days of today to obtain a date for a hearing. Otherwise, as the successful party, the plaintiff would have costs in the cause on these applications.

"Warren J."

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