Civil Procedure
Law 225

Winter 2023

Lecture Notes No. 11

SIMPLE MOTIONS

Please familiarize yourself with **Rule 37** (procedure) and **Rule 39** (evidence) in respect of pre-trial motions, particularly: jurisdiction, service, motion records, and cross-examination on affidavits. The rules are straight-forward but please read the various provisions carefully.

Some common motions:	**Rule**
Extend or abridge time.	3.02
Joinder of claims.	5.02
Add parties	5.03
Correct a party's name	5.04
Consolidation	6.01
Appoint Litigation Guardian	7.02(1.1)
Appoint representative for unascertained party	10
Leave to intervene as a party	13.01
Extend time for service of pleadings	3.02
Validate service	16.08
Remove lawyer as solicitor of record	15.04(1)
Set aside order noting party in default	19.03
Set aside default judgment	19.08
Exempt the action from mandatory mediation	24.1.05
Provide particulars	25.10
Strike out all or part of pleadings	25.11
Amend pleadings	26.01
Summary judgment	20.01
Determine question of law	21
Inspection of documents	30.04(5)
Production of documents from non-party	30.10(1)
Inspection of property	32.01
Notice of examination	31.02
Compel Answers	34.10
Medical Examination of a party	33.03
Directions for oral examination of a party	34.14
Taking evidence before trial	35.06
Grant Certificate of Pending Litigation	42.01

A. JOINDER AND CONSOLIDATION

(i) Joinder

Rule 5

5.01 (1) A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party.

(2) A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding.

(3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding.

5.02 (1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,

(a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding; or

(c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

(2) Two or more persons may be joined as defendants or respondents where,

(a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding;

(c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;

(d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of

the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or

(e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

...

(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

...

(6) The court may by order relieve against the requirement of joinder under this rule.

...

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

(a) order separate hearings;

(b) require one or more of the claims to be asserted, if at all, in another proceeding;

(c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;

(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

(e) make such other order as is just.

Tanner v. McIlveen Estate
2012 ONSC 2983 (Ont. S.C.J.)

Two patients of the defendant physician sued for sexual assault and sought to join their claims and argue that each other's evidence was admissible in their trial as similar fact evidence. The defendant resisted and moved to sever the two trials under Rule 5.05.

Lederman J.:

> [8] **The Master found that the plaintiffs met the test for joinder. She found that the claims shared common issues of law and fact. The expert evidence necessary to establish the standard of care will be common to both plaintiffs' claims. The evaluation of the admissibility of similar fact evidence at trial is in and of itself an issue of mixed fact and law that is common to both plaintiffs. Moreover, multiplicity of proceedings which would unduly inconvenience the expert witnesses and possibly other witnesses at trial should be avoided.**
>
> [9] The Master found that, furthermore, if the plaintiffs' claims are severed, there could be different determinations reached by two different trial judges on the issue of the admissibility of similar fact evidence. As a result, the continued joinder of the plaintiffs' claims would allow for the efficient judicial determination of the admissibility question.
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> ...
>
> **[21] Rulings on the admissibility of similar fact evidence are solely within the authority of the trial judge. Depending on such findings, the trial judge has the power to allow the action to proceed or to sever the claims into two trials in order to avoid prejudice. Moreover, in this way, if the trial judge determines that the plaintiffs' evidence constitutes admissible similar fact evidence in support of each other's case, the trial judge can allow the action to proceed and thereby avoid the risk of inconsistent findings and verdicts that could arise if there were to be two trials; if the similar fact evidence is held to be inadmissible, the trial judge may order that there be two separate trials.**
>
> **[22] In the end, the Master considered whether continued joinder would unduly complicate or delay or cause undue prejudice as is required by Rule 5.05 and reasonably exercised her discretion to conclude that, at this stage of the proceeding, severance was not appropriate.**

[23] In doing so, the Master has made no error of law nor exercised her discretion on wrong principles and, accordingly, there is no basis to interfere with her decision.

[24] Having so found, it is unnecessary to consider whether the Master erred in concluding that joinder of the claims in the first instance was appropriate.

Buhlman v. Peoples Ministries Inc.
2009 CanLII 26918 (Ont. S.C.J.)

A school closed and 24 plaintiffs sued for wrongful dismissal. The school moved to separate the trials of the claims notwithstanding that all were represented by the same lawyer and that the actions were all against the same defendant.

Master Brott:

[7] The Statement of Claim identifies that each of the plaintiffs entered into a standard form employment agreement with the defendant which was renewed annually by the defendant. Peoples submits that the plaintiffs' claims for damages arise as a result of alleged breaches of contract arising from separate transactions. Peoples submits that there are only three common occurrences as follows:

(a) All plaintiffs were employed by the defendant;

(b) 21 of the 24 plaintiffs received Notices of Termination on the same day; and

(c) All of the plaintiffs had similar written employment contracts.

[8] The defendant asserts that what is at issue is whether the plaintiffs were wrongfully dismissed and that determination rests on whether or not they have been given improper notice. To determine notice, the court will look at the age, length of service, compensation and other relevant factors. It is the defendant's position that the factors relating to each plaintiff vary significantly.

...

[10] In assessing whether there are issues of fact or law common to the plaintiffs' claims in the context of multi-party litigation, the focus should be on whether there is a common issue of fact or law that bears sufficient importance in relation to the other facts or issues in the proceeding.

[11] The Statement of Claim sets out ten causes of action and of those, all plaintiffs share six of the ten causes of action. They include claims for wrongful dismissal, breach of contract, restoration of the salary freeze, performance bonus, punitive damages and retaliatory conduct.

[12] Peoples submits that the common issues of fact between the plaintiffs' claims (namely employment by Peoples and when notice was received) bear limited importance in relation to the other facts in the proceeding. It asserts that the plaintiffs were all employed in various capacities, they each had different circumstances of employment, (part-time, maternity leave, health issues et al), they each worked for the defendant for a different length of time, they each had different training and they each mitigated their damages differently.

[13] The defendant asserts that because there is no commonality between each of the plaintiffs, separate productions, examinations and expert evidence will be necessary because of the significantly different claims advanced by each of the plaintiffs.

[18] The pleadings and the evidence establish numerous facts and law which militate against severance. The claims of all of the plaintiffs arise from the same standard form employment contract. All plaintiffs were terminated at the same time. Many of the commonalities, which I accept for the purposes of this motion, are outlined at paragraphs 31 – 33 of the responding parties' factum. Further there is a good possibility that some of the plaintiffs will rely on the evidence of other plaintiffs at trial. Should the claims be severed, there would be an increase in cost and length of each trial.

[19] Although there are some differences with respect to the claims of each of the plaintiffs, I agree with Molloy, J in Suguitan v McLeod, [2002] O.J. No 878 (S.C.J.) that "the trial judge will easily be capable of sorting out which evidence relates to which plaintiff".

[20] On the issue of prejudice, I am not satisfied that the defendant has put forth a strong factual foundation of potential adverse consequences. The caselaw is clear that the court must consider what is fair and just, given the consequences of a joined or separate action on each of the parties. On the evidence before me, I find that if severance is granted, the plaintiffs will suffer great inconvenience, significant adverse financial challenges and delay. I am satisfied that the joinder of the plaintiffs' claims balances the

interests of the administration of justice and fairness to reach the most expeditious and least expensive result.

(ii) Consolidation

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule, the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

...

Soilmec North America Inc. v. D'Elia
2011 ONSC 5214 (Ont. S.C.J.)

The plaintiff sued one defendant for failing to pay on a lease of drilling equipment and retaining the equipment after the lease terminated. The plaintiff also sued the defendants' directors personally in a separate action. The plaintiff sought to consolidate the two actions.

Boswell J.

[14] Orders to consolidate proceedings, or requiring that they be heard together, are discretionary. In exercising the discretion granted by Rule 6.01, courts have looked not only at the factors enumerated in the rule, but also whether the balance of convenience favours such an order...

[15] The purpose of consolidating proceedings is to save expense and to avoid a multiplicity of pleadings and proceedings, with the potential for inconsistent results...

[16] **Consolidation differs in significant ways from an order that matters be heard together... Consolidated actions proceed as one. They typically require parties to re-plead so that there is just one set of pleadings. There is one set of discoveries and one pre-trial. All issues are subsequently dealt with in one trial. Actions ordered heard together, however, maintain their distinct identities. But that said, the court maintains the discretion to order common discoveries and pre-trials. In other words, many of the same economies may be realized even though actions are not formally consolidated.**

[17] Ultimately, in exercising the discretion under Rule 6.01, the court must be mindful of the direction in Rule 1.04(1) to interpret and apply the Rules so as to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

The Principles Applied to this Case

[18] In this instance, it is clear that the two proceedings – the KC Action and the Directors' Action – arise from the same transaction. In effect, the Plaintiff is seeking to impose personal liability on the Directors for any damages arising from KC's breach of the lease agreement. The breach of the lease by KC is an issue common to both proceedings.

[19] There are, however, significant differences between the two actions. For instance, the parties are different. There is an additional plaintiff in the KC Action. The Defendants are entirely different between the claims. More significant, however, are the differences in the issues to be determined. While KC's purported breach of the lease is an issue common to both proceedings, the issues are otherwise substantially different. The KC Action is essentially a claim for damages arising from a purported breach of contract. In the Directors' Action, the Plaintiff seeks to fix the individual Defendants with liability based on their roles as directors of KC. The claim is grounded, for the most part, in tort...

[20] In my view, **the most advantageous method of proceeding is to order the two matters heard one after the other, beginning with the KC Action. Essentially the Plaintiff asserts that KC breached the lease and should be responsible in damages. Further, that the Directors should be personally liable for their roles in causing KC to commit the alleged breaches. If the court**

determines in the KC Action that there has been no breach, or that no damages were suffered, then there really is no substance to the Directors' Action. If the same judge hears both actions, one after the other, then there is little risk of an `inconsistent finding regarding whether KC breached the lease or not.

[21] In the meantime, both actions remain at the pleadings stage. Affidavits of Documents have not been exchanged and discoveries have not yet been held. The court has the discretion under Rule 6.01(2) to give directions regarding the process to be followed in the two proceedings to avoid unnecessary costs or delays. In my view, it makes sense that there be common discoveries and pre-trials in the actions. But the actions should otherwise be tried separately, with the Directors' Action to immediately follow the KC Action.

[22] One of the benefits of proceeding in the fashion I have outlined is that the trial judge will, pursuant to Rule 6.02, retain the discretion to order that the actions proceed other than as I have directed. It may be that, as a result of further developments in the actions, there is good reason to proceed in a manner other than what I have outlined. The trial judge will have the discretion to proceed as he or she sees fit, at the relevant time. Arguably, based on the wording of the rule, the same discretion is not retained if the actions are consolidated.

B. DETERMINE A POINT OF LAW UNDER RULE 21

21.01 (1) A party may move before a judge,

(a) **for the determination, before trial, of a question of law** raised by a pleading in an action **where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs**;

Gowling Lafleur Henderson v. Springer
2013 ONSC 923 (Ont. S.C.J.)

Per Himel J.

[20] In ***Toronto Dominion Bank v. Deloitte Haskins & Sells*****, (1991) 5 O.R. (3d) 417(Gen. Div.)** at para. 3, R.A. Blair J. listed the following principles or tests to be applied on a motion under Rule 21.01(1) as follows:

(i) the allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven;

(ii) the moving party, in order to succeed, must show that it is plain, obvious, and beyond doubt the plaintiff could not succeed;

(iii) the novelty of the cause of action will not militate against the plaintiff; and,

(iv) the statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies.

[21] In *Toronto Dominion Bank*, he also wrote at para. 54: "I am of the view that these same principles or tests apply whether the motion is brought under rule 21.01(a) or (b). Both involve a consideration of legal principles applied to facts as set out in the pleadings."

[22] The test to be applied on a motion to strike a pleading under Rule 21 is, assuming that the facts as stated in the statement of claim can be proven, whether it is "plain and obvious" that the pleading discloses no reasonable cause of action : see Hunt v. Carey, [1990] 2 S.C.R. 959 at para. 33. Only if the action is certain to fail because it contains a radical defect should it be struck (*Hunt* at para. 33). On such a motion, no evidence is admissible. The motions judge is to read the pleadings generously with allowance for inadequacies due to drafting deficiencies...

[23] **Rule 21.01(1)(a) is designed to shorten proceedings by determining legal issues before trial where the law is clear, the law is not hypothetical, the law is not dependent upon disputed facts and the legal conclusion is plain and obvious. The court should not at this stage of proceedings dispose of matters of law that are not fully settled in the jurisprudence...**

C. DISMISSAL FOR DELAY

48.14 (1) Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances, subject to subrules (4) to (8):

1. The action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action.

2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off.

Exceptions

(1.1) Subrule (1) does not apply to,

(a) actions placed on the Commercial List established by practice direction in the Toronto Region; and

(b) actions under the Class Proceedings Act, 1992. O. Reg. 487/16, s. 8 (2).

…

Order to Client

(3) A lawyer who is served with an order made under subrule (1) shall promptly give a copy of the order to his or her client. O. Reg. 170/14, s. 10.

Timetable

(4) Subrule (1) does not apply if, at least 30 days before the expiry of the applicable period referred to in that subrule, a party files the following documents:

1. A timetable, signed by all the parties, that,

i. identifies the steps to be completed before the action may be set down for trial or restored to a trial list, as the case may be,

ii. shows the date or dates by which the steps will be completed, and

iii. shows a date, which shall be no more than two years after the day the applicable period referred to in subrule (1) expires, before which the action shall be set down for trial or restored to a trial list.

2. A draft order establishing the timetable.

Status Hearing

(5) If the parties do not consent to a timetable under subrule (4), any party may, before the expiry of the applicable period referred to in subrule (1), bring a motion for a status hearing.

(6) For the purposes of subrule (5), the hearing of the motion shall be convened as a status hearing.

(7) At a status hearing, the plaintiff shall show cause why the action should not be dismissed for delay, and the court may,

(a) dismiss the action for delay; or

(b) if the court is satisfied that the action should proceed,

(i) set deadlines for the completion of the remaining steps necessary to have the action set down for trial or restored to a trial list, as the case may be, and order that it be set down for trial or restored to a trial list within a specified time,

(ii) adjourn the status hearing on such terms as are just,

(iii) if Rule 77 may apply to the action, assign the action for case management under that Rule, subject to the direction of the regional senior judge, or

(iv) make such other order as is just.

Party Under Disability

(8) Subrule (1) does not apply if, at the time the registrar would otherwise be required under that subrule to dismiss an action for delay, the plaintiff is under a disability.

…

Prescott v. Barbon
2018 ONCA 504 (Ont. C.A.)

An action in negligence was commenced in 2010. The defendant pleaded guilty to impaired driving and his insurer denied coverage under the terms of the policy based on him not driving the vehicle with the owner's consent. The Registrar dismissed the action in August, 2018. In the time frame before the Order became final the Plaintiff sought to note the Defendant in default but was prevented from doing so by the Registrar's Order. To make matters worse, the Plaintiff's lawyer did not notify the Plaintiff until well after. In 2014 (2½ years after the Registrar's order), the Plaintiff moved to set aside the Order which was granted. The Master set aside the Registrar's Order and an appeal was allowed by a Superior Court Judge. The Appeal was taken to the Court of Appeal by the Plaintiff / Moving Party.

Pepall J.A.:

> [**14] The legal test for setting aside a registrar's order dismissing an action for delay was originally described by Master Dash in *Reid* and adopted by this court in *Scaini v. Prochnicki* (2007), 85 O.R. (3d) 179, [2007] O.J. No. 299, 2007 ONCA 63:**
>
> > **(i) have the plaintiffs provided a satisfactory explanation for the litigation delay;**
> >
> > **(ii) have the plaintiffs led satisfactory evidence to explain that they always intended to prosecute this action within the time limit set out in the rules or a court order but failed to do so through inadvertence;**
> >
> > **(iii) have the plaintiffs demonstrated that they moved forthwith to set aside the dismissal order as soon as the order came to their attention; and**
> >
> > **(iv) have the plaintiffs convinced the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiffs' delay or as a result of steps taken following the dismissal of the action?**
>
> **[15] This is not a rigid, one-size-fits-all test. Rather, a contextual approach is required**: *Scaini*, at paras. 23-25. Prior to *Scaini*, a plaintiff had to satisfy each of the four elements. Thereafter, courts were to consider and weigh all relevant factors to determine the order that is just. See, also, *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872, 2007 ONCA 695. In *Hamilton (City) v. Svedas Koyanagi Architects Inc.* (2010), 104 O.R. (3d) 689, [2010] O.J. No. 5572, 2010 ONCA 887,

at para. 23, Laskin J.A. observed that the overriding objective is to achieve a result that balances the interests of the parties and takes account of the public's interest in the timely resolution of disputes. The four *Reid* factors provide a structured approach to achieving this result.

[16] This appeal involves an order dismissing an action as abandoned but the same principles apply.

…

II. Primary responsibility for action's progress lies with plaintiffs

[29] The master then considered the four criteria contained in Reid. Dealing with the first criterion, he did not find the lawyer's explanation for the delays to be satisfactory. However, he also observed that the respondents had to accept part of the blame for the dismissal. The SCJ took issue with this finding. She stated that the party who commences the proceeding bears the primary responsibility for its progress, and the master erred in law in concluding that the respondents were at fault for not filing a defence. She said that the rule governing administrative dismissals places no obligation on defendants to file a defence to prevent a registrar's dismissal, and as such, the master's approach in treating the respondents as blameworthy created a categorization that does not exist under the Rules of Civil Procedure.

[30] I agree with the SCJ's conclusion…

[31] There was also a more fundamental problem embedded in the master's consideration of the first and second criteria of the Reid test. There was no evidence filed from either of the appellants: no sworn affidavit, no correspondence, no testimony under oath. There was simply a bald statement from the lawyer that it had always been the intention of the appellants to proceed with the action. This was inadequate particularly given that, as noted by the SCJ, there was no reference to any conversations with the respondents, no evidence of any contact with any of the respondents between January 3, 2012 and February 2014, and only minimal contact before that time. There was no evidence that any of the respondents had asked about the status of their action in over two years. The master's finding that the respondents intended to prosecute their claim was unreasonable in light of the full factual context.

III. Prejudice

[32] The SCJ focused particularly on the master's failure to consider the finality principle in his analysis of prejudice. In that regard, she relied on H.B. Fuller Co. and Marché.

[33] Prejudice is a key consideration on a motion to set aside a dismissal order: Finlay v. Van Paassen (2010), 101 O.R. (3d) 390, [2010] O.J. No. 1097, 2010 ONCA 204, at para. 28.

[34] In addressing this issue, it is important to consider the different aspects of prejudice. In Reid, the focus is on whether a defendant would suffer "any significant prejudice in presenting their case at trial" (para. 41). The emphasis described in that decision is on the impact of delay on a defendant's ability to mount a defence to the plaintiff's claim.

…

[36] As such, in considering the fourth Reid factor, the master was required to address

(i) did the appellants satisfy their onus to establish no significant actual prejudice to the respondents' ability to defend the action as a result of the appellants' delay; and

(ii) whether in light of the delay, the principle of finality and the respondents' reliance on the security of its position should nevertheless prevail. See H.B. Fuller, at para. 28.

[37] There is no need to resort to presumptions or inferences of prejudice. The question as described by Sharpe J.A. in Marché is simply whether the interest in finality must trump the opposite party's pleas for an indulgence.

[38] The SCJ acknowledged in her reasons that the master addressed the issue of prejudice but maintained that the master erred in failing to consider the finality principle. I agree with this assessment.

[39] The master did address whether either of the respondents had suffered any significant prejudice in presenting his case at trial as a result of the appellants' delay or as a result of steps taken following the dismissal of the action and properly placed the onus on the appellants to establish that the respondents had not suffered prejudice. However, he did not consider the finality principle.

Kamalie v. Khari
2021 ONSC 7395 (Ont. S.C.J.)

A negligence action was commenced in 2013, was proceeding, but a Registrar's Order was made just after the 5th anniversary of the issuance of the Statement of Claim. A consent order setting aside the Order and imposing a timetable was granted but administrative errors in the office of counsel of the Plaintiff delayed matters. Delays in counsels' schedules caused further delay. The matter was not set down for trial in accordance with the timetable was dismissed by the Registrar. The Plaintiff moved to set the Order aside.

McGraw A.J.:

[After reviewing the Rule and basic test]

> [23] In *Cousins* v. *Roesler,* 2014 ONSC 4530, a case relied on by the Defendants, Morgan J., citing *Scaini,* held that the test for setting aside a second dismissal order is the same as for a first dismissal, however the court should examine most carefully and in some detail the cause of the additional delay, why the second deadline was missed and there should be an articulated reason for the inadvertence which is more than a bald claim from the plaintiff's lawyer (*Cousins* at paras. 5-12). The Court of Appeal has held that where a litigant is given a second chance and fails to respect a timetable set by the court, it is open to the court to consider the entire history of delay (*1196158 Ontario Inc.* at para. 25).
>
> [24] For the reasons set out below, I conclude that it is just in all of the circumstances of this action to set aside the Second Dismissal Order.
>
> **[25] With respect to the first *Reid* factor, I am satisfied that the Plaintiff has provided an "acceptable", "satisfactory" and "reasonable" explanation for the delay (*Carioca's Import & Export Inc.* v. *Canadian Pacific Railway,* 2015 ONCA 592 at para. 45; *Kupets* v. *Bonavista Pools Limited,* 2015 ONSC 7348 (Div. Ct.) at para. 18). In assessing the explanation, the totality of the circumstances must be examined having regard to the competing interests at stake and the interests of justice with the court considering the overall conduct of the litigation and not undertaking a month-by-month review (*3 Dogs Real Estate Corp.* v. *XCG Consultants Ltd.,* 2014 ONSC 2251 at para. 37; *Carioca's* at para. 46). The plaintiff bears the primary responsibility for the progress of an action and though there are situations where the defendant's conduct may be relevant, there is**

no burden on the defendant to explain the delay or move the action to trial (*Prescott* at para. 30). The longer the delay, the more robust explanation which is required (*Erland* v. *Ontario,* 2019 ONSC 462 at para. 10).

[26] While there is some authority for the proposition that the Defendants' non-opposition to the Brott Order vitiates the delay up until that point, I am inclined to consider the entirety of this action on the basis that there has been a second dismissal (*Gill* v. *Khindra,* 2016 ONSC 5057 at para. 25; *1196158 Ontario Inc.* at para. 25). However, even taking into account the delay prior to the Brott Order, I remain satisfied that the Plaintiff has provided a reasonable explanation.

[27] In considering the totality of the delay, the progress of this action has not been ideal or expeditious. However, there have not been any significant or material gaps of unexplained inactivity, most steps were completed and the action progressed, albeit slowly, from its commencement in 2013 until the Brott Order in 2018. Pleadings including Demands For Particulars were completed in 2013, documentary discovery consumed much of 2014 including efforts to obtain documents from non-parties. Examinations for discovery took place in 2015-2016 with delays resulting from the initial rescheduling of discoveries while answers to undertakings including non-party records were provided and mediation was completed in 2017. The Empire Action was set down for trial in March 2018 and joined with this action on consent in May 2018.

…

[32] With respect to the second *Reid* factor, I am satisfied that the failure to set this action down for trial by May 31, 2019 was due to the inadvertence of Plaintiff's counsel. Inadvertence is distinguished from counsel putting a file into abeyance or forming a deliberate intention not to proceed (*Cornell* v. *Tuck,* 2018 ONSC 7085 at paras. 81-87). As set out above, the record demonstrates that the Plaintiff intended to set this action down for trial by May 31, 2019 and was taking active steps and cooperating with the Defendants to do so including scheduling HSC's examination for May 16, 2019 for the stated purpose of having it completed prior to the set down date. The fact that the Empire Action had already been set down for trial and trial scheduling had been adjourned to September 2019 to allow this action to be scheduled at the same time is further evidence of this intention. It was ultimately due to the failure of Mr. Lebowitz's junior associate (who left the firm) and clerks charged with this matter to follow up with HSC's

counsel to take out a consent order extending the set down date after the cancellation of HSC's discovery that the action was dismissed a second time. Overall, considering the explanation for what happened after the Brott Order, I am satisfied that Plaintiff's counsel has provided articulated reasons and not bald claims of inadvertence as the Defendants claim. I also disagree with the Defendants' argument that a lack of interest in pursuing this action can be inferred from what they characterize as repeated inadvertence by Mr. Lebowitz. The Defendants have provided me with no authority or evidentiary basis for doing so.

…

[34] Turning to the third *Reid* factor, I am satisfied that the Plaintiff brought this motion in a timely manner. Even before the Second Dismissal Order was issued, after realizing in Fall 2019 that the action was not set down in time, Plaintiff's counsel canvassed dates for a motion but did not receive a response from all parties, discovering later that Mr. Khari's counsel had submitted a requisition to have the action dismissed. After Mr. Lebowitz became aware of the Second Dismissal Order in mid-January 2020, this motion was scheduled shortly after for April 2, 2020 but adjourned *sine die* due to the suspension of regular court operations resulting from the COVID-19 pandemic. Plaintiff's counsel canvassed a new date in September 2020 once motions were being rescheduled.

[35] With respect to the fourth *Reid* factor, the Plaintiff bears the onus of demonstrating that the Defendants would not suffer any actual prejudice if the Second Dismissal Order is set aside meaning any prejudice which would impair the Defendants' ability to defend this action resulting from the Plaintiff's delay, not due to the sheer passage of time (*Carioca's* at para. 57; *H.B. Fuller Company et al.* v. *Rogers (Rogers Law Office),* 2015 ONCA 173 at para. 37; *1196158 Ontario Inc.* at para. 32). The plaintiff should identify the important witnesses and indicate whether or not they remain available to give evidence or whether their evidence and important documentary evidence has been preserved (*Martin* v. *John Doe,* 2017 ONSC 6955 at para. 33). The plaintiff is not required to adduce affirmative evidence rebutting the presumption of prejudice rather the court must consider all of the circumstances in evaluating the strength of the presumption (*DK Manufacturing Group Ltd.* v. *MDF Mechanical Ltd.,* 2019 ONSC at para. 29).

[36] In my view, the Plaintiff has rebutted the presumption of prejudice and the Defendants would not suffer any actual prejudice if the Second Dismissal Order is set aside. The Plaintiff's evidence

demonstrates that relevant documents including medical records have been preserved, the discovery transcripts of the Plaintiff and Mr. Khari are available, relevant witnesses are available and nothing has been lost due to the Plaintiff's delay. The Defendants submit that the Plaintiff has failed to rebut the presumption of prejudice caused by fading memories inherent in the passage of time since the commencement of this action. Without more, this is insufficient to establish prejudice. As the Court of Appeal held in *Carioca's*:

" I do not accept that speculation that a case *may* depend in part on oral evidence, coupled with the assumption that witnesses' memories generally fade over time will, without more, prevent a plaintiff from satisfying the prejudice prong of the test. Counsel routinely address the reality of the passage of time in the litigation process by collecting and producing documents, undertaking oral examinations for discovery and taking witness statements. There are other methods under the rules to preserve evidence that may disappear or be lost before trial." (*Carioca's* at para. 76)

Heslop v. Flynn
2022 ONSC 3217 (Ont. S.C.J.)

Here there was an almost 5 year delay between the close of pleadings and the plaintiff taking further steps. Should the claim be dismissed?

MacNeil J.:

The Law

[19] Rule 48.14(5) of the *Rules* provides that, if the parties do not consent to a timetable to set an action down for trial, any party may, before the expiry of the applicable period by which the registrar shall dismiss the action for delay under r. 48.14(1), bring a motion for a status hearing.

[20] Rule 48.14(7) provides that, at a status hearing, the plaintiff shall show cause why the action should not be dismissed for delay. Courts have held that the plaintiff bears the onus of demonstrating both that there was an acceptable explanation for the delay and that, if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice; this is a conjunctive test: see *Kara v. Arnold*, 2014 ONCA 871, at para. 8. The parties agree that this is the test to be applied.

[21] The court is to take a "contextual approach" when considering the explanation for the delay and any prejudice. The

main goal is to balance the right of the plaintiff to have the matter determined on the merits and the right of the defendant to have a fair trial: *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173, at para. 28.

[22] In considering the issue of delay, the court should assess whether the plaintiff's explanation for the delay is reasonable in light of the overall conduct of the action as a whole, without requiring the plaintiff to justify its carriage of the case at each incremental stage of the action: *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592, at para. 46.

[23] Courts have held that it is unfair to ignore a defendant's passivity with respect to the progress of an action: see *Manulife Financial Corporation v. Portland Holdings Inc. et al.*, 2021 ONSC 3767, at paras. 34-35.

[24] When reviewing a dismissal for delay under r. 48.14, "the weight of authority favours the determination of civil actions on their merits": *CWH Distribution Services Inc. v. Imperial Chilled Juice Inc.*, 2020 ONSC 7006, at para. 65.

[25] The Ontario Court of Appeal has also held that, on a motion like this, the court should be primarily concerned with the rights of the client who, if innocent, should not ordinarily lose the right to proceed due to their lawyer's inadvertence: *Finlay v. Van Paassen*, 2010 ONCA 204, at para. 33; *Kamalie v. Khari*, 2021 ONSC 7395, at paras. 21-22.

…

[31] The uncontroverted evidence provided on behalf of the Plaintiff establishes that he believed the litigation was advancing. There is no evidence to support a finding that the action had been abandoned or put in abeyance or intentionally delayed by the Plaintiff. The litigation's progress was clearly impacted by the change in carriage through four lawyers and the impact of COVID-19, none of which was the fault of the Plaintiff.

[The Court considered and rejected the defendant's argument that there was actual prejudice to the ability to defend.]