CITATION: Brock University v. Gespro Ont. Inc. ONSC 2900

COURT FILE NO.: CV-04-268893

DATE: 2013/05/16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Brock University v. Gespro Ont. Inc.

BEFORE: MASTER WIEBE

HEARD: April 23, 2013

COUNSEL: Jillian Van Allen for the plaintiff, Brock University (moving party)

M. Gosia Bawolska for the defendant (responding party)

ENDORSEMENT
(Motion to set aside administrative dismissal order under Rule 48.14)

1. This is a motion by the plaintiff, Brock University ("Brock") to set aside a Registrar's order dated February 1, 2011 dismissing this action for delay, which order was issued pursuant to Rule 48.14(5). Brock also seeks an order setting a new timetable for this action and assigning this action to case management.

2. The motion was brought originally on January 31, 2011 for a returnable date of March 25, 2011. The original Brock Motion Record contained an affidavit of Taryn McCormick sworn January 31, 2011. The original Notice of Motion sought simply to amend an existing timetable order of Master Glustein. In her affidavit, Ms. McCormich did not identify herself or the source of much of the evidence she deposed to. It came out in later affidavits and in argument that Ms. McCormick is a lawyer who at the time was a junior counsel to counsel for Brock, Timothy Pinos.

3. The motion was adjourned to a date to be set by Master Glustein's registrar. On December 23, 2011 Brock served a Supplementary Motion Record containing the Supplementary Affidavit of Mr. Pinos sworn December 22, 2011. This Supplementary Motion Record contained an Amended Notice of Motion for a new return date of January 11, 2012, which Amended Notice of Motion added the request for an order setting aside the aforesaid Registrar's order and assigning the case to case management.

4. The motion was adjourned to April 11, 2012. Gespro served a two volume Responding Motion Record on or about April 3, 2012. In this Responding Motion Record was the affidavit of Yu Mai sworn April 2, 2012. Ms. Yu Mai is a lawyer for the firm representing Gespro. It also contained the affidavit of John Fry sworn April 3, 2012. Mr. Fry is the Director of Project Management (Central and Western Ontario) for Genivar LP, the successor company to Gespro.

5. The motion was adjourned again, this time to May 25, 2012. On April 26, 2012 Brock served a Second Supplementary Affidavit of Mr. Pinos sworn April 26, 2012.

6. The motion was adjourned again, this time to September 11, 2012. On July 26, 2012 Brock, having retained Jillian Van Allen of the firm of Brown & Korte Barristers for this motion, served a Third

Supplementary Motion Record containing the Third Supplementary Affidavit of Mr. Pinos. In this Third Supplementary Motion Record there was an Amended Supplementary Notice of Motion which added certain grounds for the motion.

7. The motion was adjourned yet again to allow cross-examinations to proceed. A cross-examination of Mr. Pinos took place on September 11, 2012. A cross-examination of Mr. Fry took place on the same day, September 11, 2012. Transcripts of these cross-examinations were produced at the motion.

8. After several further adjournments, the motion was eventually argued before me on April 23, 2013.

I. Factual context:

9. The underlying action is an action by Brock against Gespro for damages for breach of contract, negligence and breach of duty in excess of $6 million. There are other lesser claims. The essential allegations are that Gespro was hired by Brock to perform project management services in relation to the design and construction of the Arnie Lowenberger Residence for students at Brock University in 2002-4 ("the Project"), and that Gespro performed these services in breach of contract and negligently causing cost overruns, extras and delay. Gespro defends the action by denying these allegations, counterclaims for damages in excess of $3 million, and sues several consultants who worked on the Project by way of Third Party Claim for contribution and indemnity.

10. The following is the relevant chronology concerning this action that I gleaned from the filed affidavits and argument. These facts are largely undisputed. Where there is a dispute, I state the basis for my findings of fact:

February 15, 2002:	RFPs are submitted for the Project, which RFPs include the one from Gespro for the project management work. In the same month Brock hires Gespro.
April 8, 2004:	Brock terminates Gespro's contract.
April 28, 2004:	Brock puts Gespro on notice of its claim.
May 13, 2004:	Having retained Cassels Brock & Backwell LLP (and in particular Timothy Pinos of that firm), Brock gets its initial Statement of Claim issued. The claim at this point focuses on the delivery up of project documents alleged to be held by Gespro improperly, thereby impeding the completion of the Project.
August 11, 2004	Having retained Torkin Manes Cohen & Arbus LLP, Gespro delivers a Statement of Defence and Counterclaim. The Counterclaim raises claims totalling in excess of $3 million.
November 26, 2004	Shortly after delivering the Statement of Claim, Brock initiates a motion to retrieve the aforesaid project documents, which motion ends up in a mediation that is eventually scheduled to be heard on November 26, 2004. The motion is abandoned and the mediation is adjourned because the documents are delivered in advance of the mediation.
August 3, 2005	Brock serves a Fresh As Amended Statement of Claim. This claim includes a claim against Gespro for $6 million in damages for breach of contract, negligence and breach of duty.

February 23, 2006	Brock's lawyer delivers an unsworn affidavit of documents for Brock, which affidavit contains some 5,000 documents. Brock's lawyer demands an affidavit of documents from Gespro, and requests dates for examinations for discovery.
April 20, 2006	After seeking and getting several indulgences from Brock, Gespro delivers its Fresh As Amended Statement of Defence and Counterclaim.
May 23, 2006	Brock delivers its Defence to the Fresh As Amended Statement of Defence and Counterclaim.
May 30, 2006	Gespro delivers its affidavit of documents. It is suggested that this affidavit documents contains as many as 15,000 documents.
October 26, 2006	Brock's lawyer writes Gespro's lawyer seeking discovery dates.
November 8, 2006	Court serves a Status Notice under Rule 48.14. Brock's lawyer requests a Status Hearing returnable March 7, 2007.
November 13, 2006	Gespro changes lawyers by hiring Advocates LLP.
November 23, 2006	Gespro delivers a Third Party Claim claiming contribution and indemnity from five consultants on the Project.
March 7, 2007	Master Glustein makes a Status Hearing Order setting deadlines for the completion of the pleadings in the Third Party Claim (April 16, 2007), the exchange of affidavits of documents (May 31, 2007), the commencement of examinations for discovery in the main action (September 5 to 21, 2007), and the completion of all discoveries (December 3 to 7, 2007). The timetable requires that the action be set down for trial by March 7, 2008.
April 24, 2007	Third Party, Joseph T. K. Ha Engineering Inc., serves its Statement of Defence, Counterclaim and Crossclaim in the main action and its Statement of Defence, Counterclaim and Crossclaim in the Third Party Claim.
April 26, 2007	Third Party, Halcrow Yolles, serves its Statement of Defence in the main action and its Defence and Crossclaim in the Third Party Claim.
May 17, 2007	Third Party, Smith and Andersen Consulting Engineering, serves its Statement of Defence in the main action and its Defence and Crossclaim in the Third Party Claim.
December 3-5, 2007	The parties hold a two day settlement meeting on December 3 and 5, 2007. Counsel is present along with insurance adjusters. The meeting ends with no agreement on a future mediation, but with requests for further information. There is discussion about holding the "first round" of examinations for discovery in late January and early February, 2008.
January 4, 2008	Much of the summer and fall of 2007 is spent in completing the electronic productions. There are technical issues associated with the synchronization of the databases. There is also a marked increase in the number of the

productions. By the end of December, 2007 Gespro productions have increased from about 15,000 to about 35,000. In the first week of January, 2008, Gespro concludes the delivery of its productions.

February 7, 2008	Gespro changes its lawyers again by hiring McCague Borlack, and particularly Howard Borlack of that firm.
March 11, 2008	The Registrar dismisses the action for delay as the action had not been set down for trial by March 7, 2008 as required by Master Glustein's order of March 7, 2007.
Spring, 2008	Mr. Pinos deposed that about this time the parties agreed that the next step would be the production by Brock of a without prejudice detailed damages analysis in support of its claim leading to a mediation or abbreviated discovery. The stated reason for this was to avoid the potentially lengthy discoveries. Mr. Pinos also deposed that, as a result, Brock retained its damages expert, John Pearson, to perform this work and provided him with the entire documentary record. Ms. Bawolska, counsel for Gespro, argued that there was no such "change in gears" as Gespro had pressed for a damages analysis from the beginning, and that Pearson had been hired by Brock as early as January, 2004, as confirmed in the Statement of Claim. Nevertheless, there is no doubt that the revised timetable the parties discussed at this time for the first time mentions a damages analysis as one of the steps and as the next step, and that the Statement of Claim only refers to the initial retainer of Mr. Pearson in 2004 as being to investigate "the activities and conduct surrounding the Project," not to perform a detailed damages analysis concerning Gespro. I therefore conclude that Mr. Pinos is probably correct.
July 15, 2008	A consent order is obtained setting aside the Registrar's dismissal order, and putting in place a revised timetable that requires the delivery by Brock of its damages analysis by November 15, 2008 leading to an all-counsel meeting on or before December 5, 2008 to determine whether the next step is to mediate or have a partial discovery, and then the completion of the said mediation or discovery by March 31, 2009. The date agreed upon for setting the action down for trial is April 1, 2009, and this appears in the order.
August 22, 2008	Brock's lawyers sends a letter to Gespro's lawyer advising that Brock's experts want the Gespro monthly cost reporting documentation in native electronic format as opposed to the scanned or hardcopy version that appears in the Gespro productions.
November 7, 2008	Third Parties, Teeple Architects ("Teeple") and Tillman Ruth Mocelin Architects ("Tillman"), deliver their Defence and Counterclaim in the main action and their Statement of Defence and Crossclaim in the Third Party Claim.
End of 2008	It is not clear when pleadings are closed. Ms. Mai deposed that they closed on June 9, 2007, which is not the case given the late pleading from Teeple and Tillman in both the main action and Third Party Claim. Ms. Van Allen argued that it was November 7, 2008 when Teeple and Tillman delivered

their pleadings. This is also not the case as there is a counterclaim and a crossclaim in those pleadings to be responded to, and I do not know when that happened. The most I can say is that pleadings must have closed at some point in the few months following November 7, 2008.

November 12, 2008	Gespro's lawyer provides the requested electronic documentation for Brock's damages experts.
February 17, 2009	The damages analysis remains outstanding. Gespro's lawyer sends Brock's lawyer a letter threatening a motion for an order striking the claim or requiring the damages analysis in 30 days. This letter is not responded to.
March 30, 2009	Two days before the set down deadline of April 1, 2009, Brock's lawyer serves a case management motion form (returnable May 20, 2009) seeking a revision of the existing timetable. As a result, the Registrar does not issue an order dismissing the action. I notice that lawyer, Cara M. Shamess, is listed in the motion material as co-counsel with Mr. Pinos for Brock.
May 20, 2009	After some discussion with opposing counsel, Brock's lawyer obtains a consent order from Master Glustein simply changing the deadlines in the previous timetable of July 15, 2008 – the damages analysis is to be delivered by June 30, 2009, the all-counsel meeting to be held by July 31, 2009 and the mediation or partial discovery to be completed by December 31, 2009. The new deadline for setting the action down for trial is February 26, 2010.
June 30, 2009	The deadline for the damages analysis is again not met. The document remains outstanding for the remainder of the year and into 2010. As a result none of the steps in the existing timetable are completed. Mr. Pinos' explanation for this delay was that the damages experts were "unable to complete their work by June 2009." Ms. Van Allen argued that the experts needed additional information. There is nothing to corroborate these assertions. There is no affidavit from Mr. Pearson or from anyone at Brock in this regard.
January 6, 2010	Ms. Mai deposed that Mr. Borlack scheduled a motion returnable on this day (January 6, 2010) for an order dismissing the Brock claim, and that it was in exchange for Gespro abandoning this motion that Brock agreed to pay Gespro its costs of the motion and to have Gespro obtain a revised consent timetable order. Mr. Pinos stated in his affidavit that he simply negotiated a new timetable. I find Ms. Mai's version more credible.
January 12, 2010	Gespro obtains a consent order from Master Glustein revising the previous timetable. The outlined steps remain the same, with the only change being the deadlines – damages analysis by February 12, 2010, the all-counsel meeting by April 30, 2010, the mediation or partial discovery by September 30, 2010. The new set down deadline is January 31, 2011.
February 17, 2010	The damages analysis remains outstanding. Gespro's lawyer writes Brock's lawyer a letter asking for dates for a motion by Gespro to dismiss the Brock action for delay and breach of court orders.

February 19, 2010	Mr. Pinos responds with a letter advising that this most recent delay in the delivery of the damages analysis after February 12, 2010 was due to a medical condition of his, as the expert's analysis was completed prior to the deadline. This assertion about the completion of the expert's analysis is not corroborated. In his letter, Mr. Pinos asks for a one week forbearance from Gespro in bringing the threatened motion to dismiss. In his Third Supplementary Affidavit, Mr. Pinos stated that his condition was a heart condition that required emergency treatment.
March 5, 2010	The long-awaited damages analysis is delivered by Brock's lawyer.
November 12, 2010	Gespro's lawyer writes Brock's lawyer advising that he has tried on several occasions to set up a settlement meeting by phone and in writing, all without success. Mr. Pinos does not address this point in his affidavits, and therefore I conclude that this is probably what happened. The letter goes on to threaten a motion to dismiss the Brock claim due to breaches of court orders and delay unless the settlement meeting is scheduled within 30 days.
December 3, 2010	A meeting is held between counsel for Gespro and Brock on this date. Ms. Van Allen argued that Gespro made an offer to settle at this meeting, that other matters were discussed, and that the meeting adjourned with Mr. Pinos having to get instructions on settlement. As to the making of the offer to settle, there is scant evidence of this. Neither Ms. McCormick nor Mr. Pinos state that an offer was made by Gespro (or by anyone) at this meeting. However, in a letter to third party counsel dated December 21, 2010, Mr. Borlack does state that the meeting was "productive" and that Mr. Pinos "undertook to obtain instructions" as to his settlement authority. I am therefore prepared to find that Gespro did make some form of a settlement proposal at this meeting.
December 21, 2010	Gespro's lawyer writes third party counsel advising that the December 3, 2010 meeting was "productive." He goes on to state that he recently talked with Mr. Pinos and that Mr. Pinos stated that he was waiting for settlement instructions.
January 31, 2011	Mr. Pinos emails Mr. Borlack advising that Brock is still considering "your indication of the basis on which this matter might settle." The email goes on to state that, as the "current timetable expires today," he, Mr. Pinos, will be serving a notice of motion that day to extend the timetable, which motion will be returnable on a day that will give Brock sufficient time to respond and for any further discussions.
January 31, 2011	Brock's lawyer serves Gespro's lawyer with a Notice of Motion for a motion returnable March 25, 2011 for an order amending the existing timetable. The supporting affidavit of Ms. McCormick is also served at this time. In his affidavits Mr. Pinos does not state as to when the motion was actually "booked." He implies that it was booked by the time he served the Notice of Motion on January 31, 2011.
February 1, 2011	The entire Brock Motion Record is served on Gespro's lawyer on this date. Gespro initially takes the position that its lawyer was not served with this material, but it did not take that position in argument.

February 1, 2011	The Registrar issues an order dismissing the action for delay. The inference that may be drawn from this is that Brock's lawyer did not schedule its motion before the dismissal order was issued. As there was no clear evidence as to when the motion was in fact scheduled and as in the past the Registrar had not dismissed the action after the motion to amend the timetable was scheduled, I draw that inference.
February 3, 2011	Brock's lawyer receives the Registrar's dismissal order. Other counsel receive the order at or about the same time.
March 1, 2011	Gespro's lawyer sends Brock's lawyer a letter advising that Gespro's patience is at an end and that, unless the matter is resolved forthwith, he has instructions to "bring a motion to have the action dismissed for delay." This letter is copied to third party counsel.
March 8, 2011	Mr. Borlack sends a follow up letter to Brock's lawyer enclosing a letter Mr. Borlack received on March 4, 2011 from Smith and Andersen's lawyer, John Aikins, stating that a motion to dismiss the action was not necessary as the action was already dismissed, that he, Mr. Aikins, was shocked that he had not heard anything from Brock's lawyer in over a month since the dismissal order, and that he, Mr. Aikin, was closing his file.
March 21, 2011	Brock's lawyer writes Gespro's lawyer a letter rejecting the Gespro offer to settle made at the December 3, 2010 meeting.
March 21, 2011	Brock's lawyer writes Gespro's lawyer (copying third party counsel) a separate letter on the same day proposing a new timetable for the action to be made into an order on March 25, 2011. The proposed new timetable has a new set down date for trial of March 30, 2012. No effort is made at this time (or for another 9 months) to amend the motion material to add a request for an order setting aside the Registrar's order. In his Third Supplementary Affidavit, Mr. Pinos states that this was "inadvertence" on his part as he believed that the existing motion to vary the timetable was sufficient.
March 22, 2011	Brock's lawyer faxes a Motion Confirmation Form to Gespro's lawyer.
March 25, 2011	Brock's lawyer emails Gespro's lawyer at 9:32 a.m. this day proposing to adjourn the motion for a month to see if "we can resolve things." He also states that he expects to get instructions on a "settlement number from my client early next week."
March 25, 2011	Mr. Pinos attends before Master Glustein. No one appears for Gespro or the third parties. As a result, Mr. Pinos has the motion adjourned to a date to be fixed by Master Glustein's registrar, and advises Mr. Borlack of this by email that day.
March 25, 2011	Mr. Borlack sends an email response advising that he did not attend at the motion because he had been calling Mr. Pinos concerning the motion and had not received a response, and therefore had concluded that the motion was not proceeding.

April 1, 2011	Gespro's lawyer sends Brock's lawyer a letter suggesting that Brock's lawyer convene a conference call with all counsel to advise as to the steps Brock proposes to take in this action. This letter is not responded to.
June 2, 2011	Gespro's lawyer sends Brock's lawyer another letter advising that he, Mr. Borlack, is closing his file.
October, 2011	In his Third Supplementary Affidavit, Mr. Pinos explained the delay in moving the action forward in 2011 as relating to his own professional and personal circumstances, including the departure of his associate, Taryn McCormick, from his firm and "a contentious and acrimonious marital dispute which resolved in August 2011 and included terms of a custody arrangement." He added that this was an especially difficult and emotional time for him.
October 28, 2011	Cara Shamess, Mr. Pinos' associate, emails Mr. Borlack advising that she is assisting Mr. Pinos and that Mr. Pinos has asked her to reschedule the pending motion to set a new timetable "and now also set aside the order dismissing the action." She proposes dates in December, 2011 for the return of the motion, and threatens to schedule the motion unilaterally if Mr. Borlack does not respond by October 31, 2011, namely the next business day. There is apparently no response to this letter.
December 23, 2011	Ms. Shamess delivers a Supplementary Motion Record for a motion returnable January 11, 2012. In this material there is a Supplementary Notice of Motion which now adds a request for an order setting aside the dismissal order and assigning the case to case management.
January 10, 2012	The motion is rescheduled to April, 2012. It is subsequently rescheduled on several occasions. As stated above, Brock delivers several affidavits sworn by Mr. Pinos and Gespro delivers two affidavits in response. There are cross-examinations on affidavits.

II. Test for setting an administrative dismissal order under Rule 48.14(5):

11. The test for setting aside such an administrative dismissal order has been addressed by the Court of Appeal on four occasions in 2007 and 2010: *Scaini v. Prochnicki*, 2007 ONCA 63, *Marche' d'Alimentation Denis Theriault Ltee v. Giant Tiger Stores Ltd.* 2007 ONCA 695, *Finlay v. Van Paassen* 2010 ONCA 204, and *Wellwood v. Ontario Provincial Police,* 2010 ONCA 386. The Court of Appeal has endorsed the four factors to be considered as described in the case of *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365, 11 C.P.C.(5th) 80 (Ont. Master), which are as follows:

    1) *Explanation for the Litigation Delay:* The plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why. . . . If either the solicitor or the client made a deliberate decision not to advance the litigation toward trial then the motion to set aside the dismissal will fail.

    2) *Inadvertence in Missing the Deadline:* The plaintiff or her solicitor must lead evidence to explain that they always intended to set the action down with the time limit set out in the status notice, or request a

status hearing, but failed to do so through inadvertence. In other words the penultimate dismissal order was made as a result of inadvertence.

3) *The Motion is Brought Promptly:* The plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.

4) *No Prejudice to the Defendant:* The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action.

12. The Court of Appeal in *Scaini* at paragraph 24 made it clear that these four factors are not be rigidly adhered to, but must be weighed within the overall context of the case to determine what "is just in the circumstances of the particular case." What this means is that, even though the plaintiff may not meet any one or several of the *Reid* factors, the court should nevertheless still consider whether it would be in the interests of justice to uphold the dismissal order.

13. Master MacLeod gave a very useful summary of the Court of Appeal decisions in this area in the case of *K. Laboratories v. Highland Export Inc.* 2010 ONSC 4032. I reproduce his discussion, and will use it as a guide in my judgment:

The law on the subject may be summarized as follows:

a. An order dismissing as action for delay made the Registrar is an order of the court. A party having notice of the order must treat it as valid and move promptly to set it aside. Technical deficiencies do not render the order a nullity.

b. The objective of the court reviewing the Registrar's order is not to punish a party for technical non-compliance with the rules but to determine whether or not it is just to set aside the dismissal order under all of the circumstances.

c. The court should consider the four Reid factors which may be summarized as:
   i. explanation of the litigation delay which led to the dismissal notice and order in the first place;
   ii. inadvertence in missing the deadline set out in the notice;
   iii. promptly moving to set aside the order once it comes to the attention of the moving party; and
   iv. prejudice or lack of prejudice to the defendant.

d. All of these factors will be important but prejudice will be the key consideration. Prejudice to the defendant may be presumed if time has passed since the order was granted and a limitation period has passed. In the latter case the defendant need not prove prejudice and the onus is on the plaintiff to rebut the presumption.

e. Prejudice to the defendant is not the prejudice inherent in facing the action in the first place but prejudice in reviving the action after it has been dismissed. This could be prejudice caused by delay in the conduct of the action that would itself support dismissal under Rule 24 or it could be prejudice that has arisen because of reliance on the finality of the order.

f. In conducting the analysis as to whether or not it is just to relieve against the consequences of the registrar's order, the court should be mindful that the party who commences litigation bears the primary responsibility under our rules for the progress of the action. Thus the burden is on the plaintiff to explain delay.

g. In weighing the relevant factors, the court should not engage in speculation concerning rights of action against a lawyer or former lawyer and should focus on the rights of the parties rather than on the conduct of counsel.

14. Master Dash made another important point in the case of *Vivace Tavern v. Ontario* 2011 ONSC 11 at paragraph 13 concerning the issue of delay. He indicated that, where the dismissal order is the result of a breached status hearing order as opposed to a failure to abide by an initial status notice, the court should be mindful that the motion is essentially a "second kick at the can," and should scrutinize the litigation delay in two parts, first, the litigation delay leading to the status hearing, and, second, the litigation delay after the status hearing leading to the dismissal. The second delay period, he stated, should be examined "most carefully and in some detail" since it is taking place during the court's indulgence.

III. Explanation for the litigation delay:

15. The first *Reid* factor concerns the litigation delay. Has the plaintiff consistently taken steps to move the litigation forward, and, if not, has it provided a satisfactory explanation for not doing so? Furthermore, has the plaintiff or its lawyer ever deliberately decided not to advance the litigation?

16. Using Master Dash's point, the case before me can be examined in three parts as there has already been not only a status hearing order, but a previous dismissal order that was set aside on consent. In short, two reprieves have been given to the plaintiff. The three periods are as follows: (1) the period leading up to Master Glustein's March 7, 2007 status hearing order; (2) the period between that order and the administrative dismissal order of March 11, 2008 and the order of July 15, 2008 setting it aside; and (3) the period since the March 11, 2008 dismissal order and the consent order setting it aside on July 15, 2008. I should add that within this third period there have been two additional timetable changes, one by way of the consent order of March 20, 2009 and the other by way of the consent order of January 12, 2010. It is the breach of this last timetable that led to the dismissal order in question.

17. Counsel for Gespro, Ms. Bawolska, did not take serious issue with any delays during the period prior to January, 2008, which are in effect periods (1) and (2) above. Therefore, I will only state that the evidence shows that, at worst, the delays during this early period, if any, were the fault of both parties. Brock did amend its Statement of Claim to add a substantial claim for damages. Yet this could be viewed as a by-product of the fact that the project was not entirely done when the initial Statement of Claim was issued. The initial Statement of Claim focused on retrieving key documents to finish the project, and this effort is what seems to have dominated the events of 2004, with a motion and mediation scheduled in this regard. When the Fresh As Amended Statement of Claim was served in August, 2005, it took Gespro some 9 months to deliver its Fresh As Amended Statement of Defence and Counterclaim.

18. Other steps were taken to move the action forward during this early period. In 2005 and 2006 both sides completed and served what apparently were substantial affidavits of documents. The initial affidavits of documents appear to have listed some 20,000 documents in total. There was correspondence between counsel in 2006 concerning the scheduling of examinations for discovery. Then in November, 2006, Gespro decided to change lawyers, and with these new lawyers decided to commence third party proceedings against five consultants on the project claiming contribution and indemnity from them. It took three of these five consultants some 5 months (until April, 2007) to deliver their pleadings, all of which were both in the main action and in the Third Party Claim. It took the other two consultants 24 months to deliver their pleadings, which were also in the main action and the Third Party Claim. Therefore, pleadings were not closed during the entirety of this early period. The time it took to complete these third party pleadings contravened the consent status

hearing order of Master Glustein dated March 7, 2007 and no doubt contributed in a significant way to the failure of the parties to commence and complete discoveries in 2007 as Master Glustein had ordered on March 7, 2007. Furthermore, Gespro's productions appear to have ballooned significantly during this time (increasing to some 35,000 documents) and there were difficulties in getting the electronic productions synchronized. Finally, the parties held a two day settlement meeting in December, 2007 before examinations for discovery were to commence. For all these reasons, Brock had no difficulty getting all parties to consent to an order setting aside the first administrative dismissal order of March 11, 2008 and installing a new timetable in the consent order of July 15, 2008.

19. It is on period (3), the period since the first administrative dismissal order of March 11, 2008 and the timetable order of July 15, 2008, that I have to focus. The key delay was the delay in the production of the Brock expert's damages analysis. Ms. Van Allen argued that in the spring of 2008 the parties in effect agreed to "change gears" and have the plaintiff produce its detailed damages analysis on a without prejudice basis leading to an all-counsel meeting that would shape the litigation going forward, either with an agreement to mediate the case or conduct truncated discoveries. The reason for this was the avoidance of what appeared to be quite lengthy and complex discoveries. Ms. Bawolska argued that there was no such "change in gears," as the defendants had been demanding a damages analysis prior to this time. As stated above, I do not accept that position, particularly as the consent timetables from this point forward significantly changed, and reflected the scheme Ms. Van Allen described.

20. The consent timetable in the order dated July 15, 2008 did require the production of the Brock damages analysis by November 15, 2008. This did not happen, and as a result the all-counsel meeting, mediation and truncated discovery also did not take place as ordered. Having said that, there was a "concurrent" delay in the litigation throughout 2008 that can be blamed more on the defendant and third parties than on the plaintiff. The pleadings of the final two third party consultants did not take place until November, 2008 in blatant contravention of Master Glustein's order of March 7, 2007. These pleadings were both in the main action and the Third Party Claim. As a result, pleadings in the main action and Third Party Claim did not close until the end of 2008.

21. Ms. Van Allen raised an additional issue concerning the disclosure of the electronic version of Gespro's monthly cost reporting to Brock's expert. Mr. Pinos made a demand for this documentation by letter dated August 22, 2008 and it was delivered eventually by Gespro's third lawyer, Mr. Borlack, later that year on November 12, 2008. If this had been the only alleged "concurrent" delay, I would not have given the "concurrent delay" argument much weight during this period, as this electronic documentation appears to have been more a convenience for the Brock expert than a necessity. However, because of the third party pleadings delay, I do not require as much of an explanation for the delay in the damages analysis in 2008 as I do for its later delay. Had the damages analysis been completed and delivered by the end of 2008, which seems reasonable, the pleadings would have closed at the same time and the parties would have been able to meet and, at a minimum, plan concretely the remainder of the litigation.

22. The delays in 2009 and 2010 are, however, more troubling. In the absence of the damages analysis, the parties did come together again and agree on another timetable in the consent order of May 20, 2009. This order required that the damages analysis be delivered by June 30, 2009 leading to the all-counsel meeting and the mediation or truncated discoveries, all to be completed by the end of that year. The damages analysis was not delivered by this deadline, or at all in 2009. This led directly to a motion by Gespro in January, 2010 to dismiss the action for delay. The only way Brock avoided this motion was by agreeing to pay for Gespro's costs of the motion, and by agreeing to another timetable with quite short deadlines including a deadline for the damages analysis of February 12,

2010. Even then, the damages analysis was not produced until about three weeks after the February 12, 2010 deadline, namely on March 5, 2010.

23. Mr. Pinos explained the delay in the damages analysis in 2009 as being a result of the inability of the Brock experts to complete their work by the June, 2009 deadline. Ms. Van Allen also argued that the experts needed more information. Unfortunately, there is no evidence to support these assertions. There is no affidavit from anyone at Pearson Consulting, the Brock expert, or from Brock itself concerning this issue. Such an affidavit might have dealt with obvious questions, such as whether the expert provided Mr. Pinos with the deadlines for the damages analysis that appeared in the July 15, 2008, May 20, 2009 and January 12, 2010 consent timetable orders, and, if so, why these deadlines were chosen, and then why those deadlines were not met. If the information flow was the reason, what was the reason for that and why was it not being dealt with faster, particularly in light of the fact that the case had already been much delayed? By this time, plaintiff should have had a better command of its evidence, particularly since Pearson Consulting had been retained in early 2004. Therefore, I find that the plaintiff has not given a satisfactory explanation for the delay in the litigation during 2009 and up to the deadline of February 12, 2010.

24. Mr. Pinos explained the three week delay in the delivery of the damages analysis after February 12, 2010 on his personal health issues. He stated that this delayed his review of the experts' analysis, which had to be done before it was released. He explained this in a letter he wrote to counsel on February 19, 2010. Although there is again nothing to corroborate Mr. Pinos' assertion that the experts had completed their work before the February 12, 2010 deadline, I am prepared to give Mr. Pinos the benefit of this doubt. It usually takes a week or two for counsel to review an expert's work of this importance before it is released, and the analysis was released on March 5, 2010.

25. This leads to the final period of delay, the delay in 2010 after the delivery of the damages analysis. The consent timetable order of January 12, 2010 had required that the all-counsel meeting happen by April 30, 2010 and that the mediation or truncated discovery be completed by September 30, 2010. Neither of these deadlines were met. The only evidence before the court as to what happened during this time was a letter from Mr. Borlach to Mr. Pinos dated November 12, 2010 wherein Mr. Borlach advised that he had written to Mr. Pinos and left voicemail messages, all without answers. In this letter, Mr. Borlach threatened a motion if a settlement meeting was not scheduled in 30 days. It was only then that a settlement meeting took place in early December, 2010. Mr. Pinos did not even try to explain this 8 month delay from the delivery of the damages analysis to Mr. Borlach's letter of November 12, 2010. I therefore accept what Mr. Borlach stated in his letter, and conclude that the plaintiff has no explanation for the delay in the litigation for at least the bulk of the time from April 30, 2010 (the deadline for the all-counsel meeting) to December, 2010 when a settlement meeting between the plaintiff and the defendant in fact took place.

26. A settlement meeting did take place between counsel for Gespro and Brock on December 3, 2010. It appears that Gespro made some form of settlement proposal at this meeting, and that the meeting was adjourned to allow Mr. Pinos to obtain settlement instructions. Although rather belatedly, these events are consistent with the timetable order then in effect. I therefore find that the litigation delay in December, 2010 and January, 2011 is adequately explained.

27. On balance, out of a total of approximately 80 months from the launching of the action in May, 2004 to the date of the subject dismissal order of February 1, 2011, Brock is responsible for a litigation delay of about 20 months for which it has provided no satisfactory explanation, namely the delay in 2009 and the bulk of the delay in 2010. This is 25% of that time.

28. Having said that, and placing this matter in context, I am not convinced that the plaintiff or its counsel decided at any time not to advance the litigation. Steps were being taken to advance the

litigation in the manner the parties had agreed upon – it was just taking much longer than expected. During 2009, it is clear that Mr. Pinos and Brock were waiting for the damages analysis from the Brock expert along with the other parties, something all had agreed upon. Work on the damages analysis was taking place in 2009; correspondence between Brock's lawyers and the expert in April, 2009 was a part of the motion material. The damages analysis itself was eventually delivered on March 5, 210. There is just no satisfactory explanation for the time it took to get that analysis and why the court timetable orders in that regard kept being breached.

29. The delay in 2010 is harder to accept. Given Mr. Pinos' lack of response to Mr. Borlack's several correspondences and the delays that had already taken place, it almost seems that the plaintiff had abandoned the action. Yet the settlement meeting eventually did take place on December 3, 2010, and a serious offer was apparently presented by Gespro and this offer was under consideration when the dismissal order occurred.

30. The spirit of the arrangement that was reached by the parties in early 2008 to "change gears," get a damages analysis, try to settle the action and, if not, structure the litigation in a cost effective manner going forward, seems to have been carried out to some extent, albeit in a much more plodding and time consuming manner than anyone had initially anticipated. I am therefore, on balance, unable to conclude that the plaintiff has failed to meet the first *Reid* test. At a minimum, I conclude that I would not dismiss the action due to this factor alone.

IV. Inadvertence in missing the set down deadline:

31. The second *Reid* factor also bears careful consideration in this case. Did the plaintiff lead evidence to show that it always intended to avoid the administrative dismissal order by seeking a status hearing, and that the administrative dismissal was issued through inadvertence?

32. Mr. Pinos deposed that he did nothing to book a motion to amend the existing timetable order until January 31, 2011, the deadline for the set down of the action for trial. It appears to be the practice in the court not to dismiss when a motion is pending. In his affidavits, Mr. Pinos does not explain why he waited until January 31, 2011 to do anything about the existing timetable order. He deposed that he was waiting for settlement instructions from his client. But this does not explain why he and his firm waited this late. Previously, at the end of March, 2007, Mr. Pinos had been careful to avoid the administrative dismissal order by booking the motion to amend the timetable a few days in advance of the set down deadline.

33. There is some suggestion from Mr. Pinos in his affidavits that his office booked the motion to amend the existing timetable on January 31, 2011, the set down deadline date, and that the court made a "mistake" when it dismissed the action the next day, February 1, 2011. Mr. Pinos served his Notice of Motion and supporting affidavit on Mr. Borlach on January 31, 2011. But there is no evidence from Mr. Pinos as to when he or his office in fact booked the motion. Furthermore, the practice of the court is just a convention, not a requirement of any rule. Therefore, I conclude that there was no mistake by the court and that Mr. Pinos simply did not book the motion in time before the administrative dismissal order was issued.

34. Counsel agreed that the standard to be applied here is one of intention or recklessness, namely whether the evidence shows that the plaintiff or its lawyer had deliberately decided not to move to set aside the administrative dismissal order or were reckless in doing so; see *Marche* at paragraphs 30 and 31. If the evidence shows such a decision or recklessness, the plaintiff fails to meet this part of the *Reid* test. If there was inadvertence or sloppiness, the test is met.

35. I am satisfied that the plaintiff has met this part of the *Reid* test. Mr. Pinos' actions in failing to book the motion to amend the timetable order in time were inadvertent, perhaps even sloppy, but they were not intentional or reckless, particularly as the parties were in the middle of settlement discussions.

V. Promptness in bringing the motion:

36. This part of the *Reid* test also bears careful examination. Did the plaintiff move forthwith after becoming aware of the dismissal order to set it aside?

37. Mr. Pinos received the dismissal order on February 3, 2011. By that time, he had launched the Brock motion to amend the existing timetable with a returnable date of March 25, 2011. Ms. Van Allen's first argument was that, while it was not explicitly stated that the plaintiff was moving on March 25, 2011 to set aside the dismissal order, such was implicitly the case since everyone was aware of the dismissal order, and the Notice of Motion contained the usual general prayer for relief, "such further and other relief as this Honourable Court may deem just."

38. I do not accept that submission. By this time, particularly with the delay that had already taken place, the existence of a previous dismissal order and the numerous timetables that had been breached, the plaintiff should have known that this might well be a contentious matter, and should not have relied upon the argument that the necessary relief was implicitly being sought in the existing motion. The motion as it existed was moot. The defendants should have been put on firm and clear notice as soon as possible that the necessary motion to set aside the dismissal order was being brought. The plaintiff should have amended the Notice of Motion forthwith to add the necessary prayer for relief to the motion that was returnable March 25, 2011, and this did not happen. The plaintiff eventually did do this, but not before December, 2011, over 10 months later.

39. For the same reason, I do not accept Ms. Van Allen's further argument that Gespro was in some way responsible for the delay in bringing the motion due to their lawyer's failure to attend at the motion on March 25, 2011. Firstly, the blame for Gespro's failure to attend appears to be a shared one, as Mr. Borlach appears to have tried to get in contact with Mr. Pinos in advance of the motion date without success (a recurring theme in this matter). Secondly, as stated above, the motion as then constituted was moot given the dismissal order. The action was dismissed, and there was no timetable to amend. Gespro can be excused for not appearing.

40. Without anyone in attendance for the defendant, Mr. Pinos had the motion adjourned on March 25, 2011 to a date to be set by Master Glustein's registrar. Brock then did nothing for over 7 months. Mr. Borlach, in the meantime, sent Mr. Pinos correspondence that should have sent off alarm bells with Brock's lawyers. On March 8, 2011, Mr. Borlach sent Mr. Pinos a letter enclosing a letter from counsel for one of the third parties stating that he was closing his file due to the failure by the plaintiff to move to set aside the dismissal order. On April 1, 2011 Mr. Borlach sent Mr. Pinos a letter suggesting that Brock convene a telephone conference with counsel to advise as to what Brock planned to do with the litigation. On June 2, 2011 Mr. Borlach sent a letter stating that he was closing his file. Mr. Pinos responded to none of these letters.

41. On October 28, 2011 Cara Shamess, Mr. Pinos' associate counsel, delivered a letter to Mr. Borlach advising that she had been instructed by Mr. Pinos to "reschedule" the existing motion and add a motion to set aside the dismissal order. She asked for available dates in December, 2011. Again, nothing happened until December 23, 2011, two days before Christmas, when Brock's counsel delivered a Supplementary Motion Record containing a Supplementary Notice of Motion containing the claim for the order setting aside the dismissal order. The motion was returnable January 11, 2012.

42. Mr. Pinos deposed in his affidavits that there were essentially two reasons for this delay on his part: his associate, Taryn McCormick, departed his firm at this time; and during this time he was undergoing "a contentious and acrimonious marital dispute which resolved in August 2011 and included terms of a custody arrangement." He stated that this was a particularly difficult and emotional time for him. In cross-examination, he stated that he did not think about instructing Ms. Shamess to bring the necessary motion until August, 2011.

43. Ms. Bawolska argued essentially one thing. Ms. Shamess was involved as co-counsel with Mr. Pinos in this case as early as March, 2009, judging from the motion record that Mr. Pinos delivered at that time. There is no explanation as to why Ms. Shamess was not instructed as soon as possible to bring the necessary motion, particularly given the gravity of this matter. Much of the evidence she could have herself gleaned from the file. I agree. Despite his personal difficulties, Mr. Pinos should have done at least that. There is also no explanation as to why it took Ms. Shamess two months from October 28, 2011 to serve her motion material on December 23, 2011.

44. Mr. Pinos also described his failure to amend his motion in a timely way to include the necessary claim for an order setting aside the dismissal order as inadvertence, as he believed that the existing motion material was sufficient. I do not accept this explanation. As early as March 8, 2011, Mr. Pinos was receiving correspondence from Mr. Borlach indicating that the defendant and third parties were taking the position that Brock was doing nothing to set aside the dismissal order, and that they indeed were closing their files.

45. The delay in bringing the motion, which was almost 11 months in duration from February 3, 2011 to December 23, 2011, was essentially due to neglect on the part of Brock's lawyers. They did not even alert other counsel to Mr. Pinos' personal difficulties, something I would have thought they would have done in light of the letters they were receiving from other counsel.

46. I therefore find that Brock has not satisfied the third *Reid* test.

VI. Prejudice:

47. This is the last of the *Reid* factors to be considered, and, according to the case authority, the most important one. Have the defendants and the third parties been prejudiced in the presentation of their defences by the plaintiff's delay in the case?

48. I am mindful of the case law in this area. If the relevant limitation period passes during the course of the litigation, there is a presumption of prejudice in favour of the defendant that the plaintiff must rebut; see *Wellwood v. Ontario Provincial Police,* 2010 ONCA 386 (O.C.A.).

49. In writing this decision, I have concluded that the question of which limitation period applies is not a clear one. Under the *Limitations Act, 2002,* S.O. 2002, c.24, Schedule B the limitation period on all claims is 2 years running from when the claims are discovered. If the discovery of the claims occurred before January 1, 2004, the date the new act came into effect, the relevant limitation periods would be those under the previous regime, which I understand were 6 years for the pleaded causes of action. Discovery is an objective test as well as a subjective one.

50. The Fresh As Amended Statement of Claim suggests that the plaintiff may have "discovered" its claims against Gespro before January 1, 2004. In paragraphs 25 to 28, it is pleaded that the project delay which formed the basis for the eventual action was well underway in the fall of 2003. Brock hired its delay expert in January, 2004 to investigate the project. As a result, requests were made by Brock or its expert to Gespro for certain documents, which Gespro did not comply with. The Gespro contract was terminated on April 8, 2004 and the action was commenced on May 13, 2004.

51. If the pleaded claims were discovered (or ought to have been discovered) before January 1, 2004, the relevant limitation period would run as late as the end of 2009. If the pleaded claims were discovered after January 1, 2004, the limitation period would have run out in early 2006. Counsel did not address this point in argument as there is no doubt that whatever the limitation period was, it has passed. I make this point only because I am aware of the cases that stand for the proposition that the presumption of prejudice arising from delay increases with the passage of time following the expiration of the limitation period. There would obviously be a much smaller passage of time if the relevant limitation period was 6 years and not 2 years. Because there is ambiguity on this issue, I will resolve the ambiguity in favour of the plaintiff and assume that the limitation period is 6 years. This means that just over 1 year passed after the 6 year limitation period expired before the subject dismissal order was issued, namely not that long a period of time.

52. Nevertheless, the plaintiff must rebut this presumption. In *Vivace* at paragraph 66 and 67, Master Dash outlined some of the things the plaintiff can do to rebut the presumption, "for example by evidence that relevant documents have been preserved, key witnesses are available, certain elements of the claim may not be in issue." He went on to point out that many things are well within the power of the plaintiff to adduce to rebut the presumption. It can present evidence that its own documents are preserved, and that its own witnesses are available and have a sufficient recollection of the facts.

53. What has the plaintiff adduced in this motion? Curiously, Brock did not even address the issue of prejudice in its evidence until the subject was addressed by Gespro in its Responding Motion Record. Gespro produced an affidavit of one John Fry, the Director of Project Management (Central and Western Ontario) for Genivar LP, the company that purchased Gespro in 2005. Mr. Fry deposed that he was the Gespro project manager for the subject project and that, because of the passage of time, his recollection of the details of the project delay had faded. He also deposed that the persons at Gespro with knowledge of the case, other than himself, had left Gespro (and later Genivar) some time ago. He gave a list of 13 names (including himself) and went through this list advising as to what he knew about when these people had left the company, where they were and what relevant evidence they may have. He added that his company has gone through numerous changes over the years, including a change in ownership and turnover of employees, all of which made the delay in the case quite prejudicial to the defendant.

54. In his Second Supplementary Affidavit, sworn April 26, 2012, Mr. Pinos responded to the Fry affidavit. In his affidavit Mr. Pinos pointed out that Mr. Fry had in his affidavit conceded that 3 of the 9 witnesses on his list, including himself, were still at Genivar. Of the ones that Mr. Fry indicated had left the company, all of the departures except one occurred in or before 2006. The one exception occurred in 2008. Mr. Pinos' point was that all of the departures occurred before the close of pleadings at the end of 2008, and therefore it would have been a burden on the defendant to locate these witnesses even if the trial had happened in a timely way. The only positive evidence that Mr. Pinos gave on the issue of prejudice in his Second Supplementary Affidavit was his statement in paragraph 42 that, "the story of this case is largely told in the documentary productions, and not as a consequence of oral statements."

55. In his Third Supplementary Affidavit sworn July 18, 2012, Mr. Pinos deposed that Gespro has had notice of this claim since April 28, 2004, that the case is document driven, that all of the documents have been preserved and produced in physical and electronic form, and that "all necessary witnesses are available for Trial." There is nothing really to substantiate this statement other than the statement about the productions, as the productions were exchanged before 2008 and number some 50,000 documents.

56. Ms. Bawolska rightly pointed out that there are glaring absences in the plaintiff's evidence on prejudice. There is no evidence from Mr. Pinos or Brock as to what witnesses the plaintiff intends to call, whether they can be tendered at trial and what the state of their recollection is. According to *Vivace* this is the kind of evidence the plaintiff should have addressed.

57. Cross-examinations on these affidavits took place on September 11, 2012. In argument, Ms. Van Allen pointed out that at his cross-examination, Mr. Fry acknowledged that the documents concerning the project delay had been preserved and produced, that the other potential Gespro witnesses had either left Gespro by 2006 and/or did not have any knowledge of the issues, and that Gespro had not taken any steps to obtain personal diaries, records or witness statements to help their witnesses refresh their memories. Ms. Bawolska pointed out that Mr. Fry also stated at his cross-examination that the documents could not do everything at the trial, as the witnesses will have to remember what transpired between persons at meetings and on the site, all of which has be compromised by the passage of time.

58. While I agree with Ms. Bawolska's criticism of the poor state of the plaintiff's evidence on this issue, I am not able to conclude that the plaintiff has not met the onus of showing that the defendant has not been prejudiced by the plaintiff's delay. Delay claims, of which this is one, are complex, factually intense, cases. They challenge the ability of any witness to recall in detail the relevant events without the benefit of documents. I therefore accept that the large number of documents in this case, which were produced over 5 years ago, will be the driver of the trial.

59. The plaintiff has also shown that the defendant has not, on balance, been unduly prejudiced by the litigation delay for which Brock is responsible, namely the delays in 2009-10. The Gespro witnesses that may have relevant evidence left the company by 2006. Therefore, it would have been a challenge for Gespro to find them and to preserve their recollection even if the trial had happened before the Brock created delay occurred. There is also no evidence that Gespro cannot locate these witnesses if necessary for trial, even though they have left the company. Furthermore, it appears that the evidence of many of these witnesses is marginal at best. Also the key witness for Gespro, Mr. Fry, is still with the company and can be called without difficulty. Finally, I agree with Ms. Van Allen that the defendant bears some responsibility for preparing its defence and preserving evidence, and the fact that Gespro has not done so is not entirely the plaintiff's fault.

60. It would have been better if Brock has adduced more evidence on the issue of prejudice, given the importance of this factor to my decision. It would have been preferable if Brock had disclosed evidence as to its witnesses and documentation. But not doing so is not determinative of my decision on this factor.

61. Therefore, I find that Brock has met the onus of showing that Gespro has not been prejudiced by litigation delay caused by Brock, and that Gespro has not proven that it is in fact prejudiced by that delay. I find that Brock has met the fourth *Reid* test.

VII. Contextual analysis:

62. Having concluded that Brock failed to prove one of the four *Reid* factors, the failure to move promptly, it is incumbent on me to determine whether the interests of justice would be served by allowing the dismissal order to stand as a result. I have determined that it would not and that the dismissal order should be set aside.

63. I take guidance in this regard from the case of *Finlay v. Van Paassen,* [2010] O.J. No. 1097 (O.C.A.), paragraph 29. In this case, the motions judge had refused to set aside a dismissal order on account of a failure by the plaintiff to move to set aside the dismissal for over two years. The Court of Appeal

held that a contextual analysis, properly applied, would have produced a different result. Other factors had to be considered, such as the lack of any evidence that the plaintiff or its counsel had at any time deliberately decided not to proceed with the action, and relevant speed with which the case had proceeded prior to the dismissal order. Uppermost, according to the Court of Appeal, was the issue of prejudice – there was no convincing evidence from the defendants in that case that they would be prejudiced if the dismissal order was set aside.

64. Applying the same analysis to this case, I find the failure by the plaintiff to bring the motion for 11 months after learning of the dismissal order would not justify upholding the dismissal order. As stated above, there is no evidence that Brock or its lawyers deliberating decided at any time to stop proceeding with the action. Most importantly, as stated above, there is not sufficient evidence that Gespro would be prejudiced by having the dismissal order set aside.

65. I make a final comment about the submission Ms. Bawolska made about the general insufficiency of the evidence from the plaintiff. She argued well that in *Reid* Master Dash found that the lack of an affidavit from the plaintiff was a critical factor in determining whether the plaintiff had ever decided not to pursue the litigation. She argued that there should have been such an affidavit from Brock on the issues of the litigation delay, inadvertence in avoiding the dismissal order and the promptness of the motion. She argued that there should have such an affidavit from Brock's expert on the issue of prejudice since Brock was relying heavily on the argument that the case was document driven. I agree that such evidence would have made my decision much easier, and it was not there. But I also note that no other authority was put before me which stands for the proposition that the failure to put such evidence was determinative of the outcome. Therefore, I do not so find.

VIII. Ruling:

66. As a result, I make the following ruling:

    a) The Registrar's dismissal order of February 1, 2011 is hereby set aside.

    b) The parties shall within 30 days of the date of this order reach an agreement on the timetable for the remaining steps in this action, including a deadline for the case to be set down for trial, and present same by way of a consent order to Master Glustein for execution.

    c) If the parties cannot reach such an agreement, they must within 45 days of the date of this order schedule an appointment with Master Glustein on the first date that is available to him regardless of the schedules of the parties or their counsel, to have Master Glustein set a timetable for the remaining steps in this action, including a deadline for the case to be set down for trial.

67. The Brock Notice of Motion also asked for an order to have the case referred to case management. It appears that the case has already been referred to Master Glustein. In any event, this issue was not addressed in argument, and I make no order in that regard as a result.

IX. Costs:

68. Ms. Van Allen advised that her client is not seeking costs of this motion. If Gespro seeks costs of this motion and if costs cannot be agreed upon, Gespro shall serve and file a brief written submission of 3 pages or less in length on or before May 31, 2013. Any responding submissions shall also be 3 pages or less, and must be served and filed on or before June 14, 2013. Any reply submissions shall be 1 page or less, and must be served on or before June 21, 2013. The submissions must be filed with the Cost Outlines that have been exchanged. The material shall be filed directly

with my Assistant Trial Coordinator, Al Noronha, at the 6th Floor, 393 University Avenue, Toronto, and shall be accompanied with an affidavit of service.

_____

MASTER C. WIEBE