SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Alexandra Johnstone and Shawn David Smith v. Vincor International Inc. and Owens-Brockway Glass Container Inc.

BEFORE: MASTER R.A. MUIR

COUNSEL: Jillian Van Allen, counsel for the lawyer for the plaintiffs
Amelia Leckey, for the defendant Vincor International Inc.
Natalie Schernitzki, for the defendant Owens-Brockway Glass Container Inc.

REASONS FOR DECISION

[1] The plaintiffs bring this motion pursuant to Rule 37.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") for an order setting aside the order of the registrar dated February 12, 2009 dismissing this action for delay. This action was dismissed by the registrar pursuant to Rule 48.14 following the issuance of a status notice. The status notice was issued by the court because this action had not been placed on a trial list, or terminated, within two years after the first defence was filed.

[2] The defendant Owens-Brockway Glass Container Inc. ("Owens") opposes this motion. The defendant Vincor International Inc. ("Vincor") takes no position as to whether the dismissal order should be set aside, but argues that it would be unjust if the dismissal order were to be set aside as against Vincor only.

GENERAL BACKGROUND AND LITIGATION HISTORY

[3] On August 26, 2004, the plaintiff Alexandra Johnstone ("Johnstone") cut her hand while opening a bottle of wine. She alleges that the neck of the wine bottle unexpectedly broke off, resulting in the cut to her hand. This injury apparently caused significant blood loss and necessitated emergency medical care and two surgical repairs. Johnstone alleges that, as a result of this injury, she has sustained severe and permanent disfigurement and impairment to her physical and psychological functions.

[4] Vincor was the producer and distributor of the wine. Johnstone has alleged that Owens manufactured the glass bottle in which the wine was sold.

[5] Johnstone's lawyer is Adam David Romain ("Romain"). He was retained by the plaintiffs on March 6, 2006. The statement of claim in this action was issued on August 25, 2006. In the statement of claim, Johnstone claims damages for negligence, nuisance and breach of contract in the amount of $2,400,000.00. The plaintiff Shawn David Smith is Johnstone's son and is claiming damages pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3. Johnstone alleges, among other things, that the bottle was negligently manufactured and designed and that Owens failed to have in place appropriate inspection and testing procedures. Johnstone alleges as against Vincor, that it knew, or ought to have known, that the bottle was defective, damaged and dangerous and that it should not have been sold to the public.

[6] On September 7, 2006, Romain instructed a process server to serve the statement of claim on both defendants. Vincor was served in September or October of 2006 and its lawyers served a notice of intent to defend on October 25, 2006. Its statement of defence and crossclaim was served on November 23, 2006.

[7] Owens is based in the state of Ohio. Consequently, Romain's memorandum to the process server requested that Owens be served outside Ontario pursuant to Rule 17. It appears that service pursuant to Rule 17 and the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on November 15, 1965* (the "Hague Convention") was effected on Owens on December 6, 2006. A copy of the statement of claim was left with Sue Gladieux, an employee of Owens. Although Owens has no record of receiving the statement of claim in this fashion, it does accept that it may have been properly served and, in any event, waives any impropriety with respect to service.

[8] However, the statement of claim did come to Owens' attention in another manner. On November 28, 2006, a copy of the statement of claim appears to have been faxed to Owens by Romain's process server, along with a United States Department of Justice request form for service abroad. Upon receipt of this fax, Owens retained an Ontario lawyer to provide it with advice concerning the service of the statement of claim by fax. On January 11, 2007, Owens' Ontario counsel advised that Owens had not been properly served with the statement of claim and that Owens need not take any steps to defend the action until it was properly served with the statement of claim. Unfortunately, Owens and its Ontario lawyer were unaware of the fact that Owens had in fact been served in accordance with Rule 17 and the Hague Convention on December 6, 2006. They were only aware of the fax transmission. As a result, Owens chose to do nothing in response to the statement of claim.

[9] At the same time, Romain was also doing nothing to advance the claim. Romain's evidence is that between December, 2006 and March, 2008, he "inadvertently failed to turn [his] attention to this file as [he] was awaiting receipt of the [Owens] statement of

defence and had failed to entry [sic] this matter into [his] diary system for follow-up". As a result, nothing was done to advance this claim for a period of 15 months. However, it appears that Johnstone contacted Romain's office approximately 12 times during those months, inquiring about the status of her case.

[10] Romain turned his attention to this matter once again in the spring of 2008. He began the process of collecting the evidence necessary to advance the claim and began communicating with Vincor's lawyer with a view to scheduling examinations for discovery. Examinations for discovery were tentatively scheduled for October 21, 2008 but did not proceed due to the fact that Romain became involved in a 14 week criminal matter.

[11] On October 27, 2008, the court issued a status notice due to the fact that more than two years had passed since Vincor filed its notice of intent to defend. The status notice indicated that this action would be dismissed for delay unless, within 90 days, it was terminated, set down for trial or the court ordered otherwise at a status hearing. Romain's evidence is that he did not receive this notice from the court.

[12] The examinations for discovery were rescheduled for January 28, 2009. On January 15, 2009, Romain wrote to Owens to confirm service of the statement of claim on December 6, 2006 and to advise Owens that it would be noted in default if a defence was not served by January 23, 2009.

[13] On January 16, 2009, Johnstone's draft affidavit of documents and copies of Schedule "A" productions were delivered to Vincor's lawyer.

[14] On January 22, 2009, Romain prepared a requisition to have Owens noted in default and it was given to a process server with instructions that it be filed on Friday, January 23, 2009. This instruction was given despite the fact that Romain's letter to Owens had given Owens until January 23, 2009 to serve its defence. As it turned out, the court office did not note Owens in default until January 27, 2009.

[15] On January 23, 2009, Romain received a letter from Owens' lawyer advising Romain that Owens disputed service of the statement of claim and requesting a copy of the affidavit of service. Romain wrote back to Owens' lawyer on Monday, January 26, 2009 expressing regret that the letter from Owens' lawyer had not been received earlier as he had already requested that Owens be noted in default. It is odd that Romain took this position given the fact that the letter from Owens' lawyer had been received prior to the deadline Romain himself had set in his letter of January 15, 2009. Romain did not provide Owens' lawyer with a copy of the affidavit of service as requested and again failed to do so in response to a follow up request from Owens' lawyer on January 28, 2009. Owens' lawyer eventually obtained a copy of the affidavit of service from the court file.

[16] Romain and counsel for Vincor then agreed to postpone the January 28, 2009 examinations for discovery. This was done because it was anticipated that Owens would move to set aside the noting in default.

[17] On February 12, 2009, the registrar issued an order dismissing this action for delay, as the plaintiffs had taken no steps to comply with the status notice or Rule 48.14. Romain received a copy of the order dismissing this action for delay shortly after it was issued. On February 26, 2009, Romain wrote to Vincor's lawyer enclosing a copy of the dismissal order and seeking her consent to an order setting it aside. He did not seek consent from Owens as he assumed it was not necessary due to the fact that Owens had been noted in default.

[18] On March 11, 2009, Owens' lawyer wrote to Romain confirming that she had been retained by Owens and seeking the plaintiffs' consent to an order setting aside the noting in default. The plaintiffs' position is that after receiving this letter, Romain's attention turned to Owens' motion to set aside the noting in default, arranging examinations for discovery, answering production requests and dealing with a request by Owens to inspect the wine bottle. For those reasons, he did not pursue a motion to set aside the dismissal order.

[19] On May 15, 2009, the plaintiffs provided their consent to an order setting aside the noting in default. Owens' lawyer then served a statement of defence and crossclaim and attempted to file the pleading on May 27, 2009. The court would not accept the pleading, however, because the action had been dismissed.

[20] Throughout the early summer of 2009, counsel for all parties exchanged various communications regarding examinations for discovery, inspection of the wine bottle and issues relating to the parties' productions.

[21] It was not until August 11, 2009 that Owens' lawyer wrote to Romain advising that Owens would not agree to schedule examinations for discovery until the dismissal order had been set aside, the plaintiffs confirmed that they were in possession of the bottle and the plaintiffs had provided Owens' lawyer with their affidavit of documents. The letter does not explicitly state that Owens would oppose an order setting aside the dismissal but does make it clear to Romain that a motion needed to be brought.

[22] On September 3, 2009 Vincor's lawyer wrote to Romain asking for confirmation that the plaintiffs did not intend to move to set aside the dismissal order. Romain responded to this letter on October 1, 2009 stating that the plaintiffs intended to bring such a motion and once again asked for Vincor's consent. This letter was not copied to Owens' lawyer and no similar request was made of Owens.

[23] Romain's evidence is that between October 1, 2009 and March 5, 2010, he was busy dealing with criminal matters and did not turn his attention to this matter. In March and April, 2010, Romain made requests for documentation from various non-parties, including Johnstone's health care providers, employers and the Canada Revenue Agency.

[24] On May 19, 2010, Romain once again requested Vincor's consent to an order setting aside the dismissal. Again, this letter was not copied to Owens' lawyer.

[25] In response to this request, Vincor's lawyer sent an email to Romain on May 20, 2010 advising him that Owens' lawyer would not seek instructions to consent to setting aside the dismissal until her client had an opportunity to inspect the bottle (which was in the possession of the plaintiffs) and that Vincor would not provide its consent until Owens was in a position to do so.

[26] On June 16, 2010, Romain finally made a request for Owens' consent to an order setting aside the dismissal. This request came more than 16 months after the action had been dismissed and was made despite previous advice from Owens' lawyer that a motion would be necessary (August, 2009) and having received information regarding Owens' position from Vincor's lawyer on May 20, 2009.

[27] In the summer of 2010, Romain continued to request and collect medical and other evidence in support of his clients' claims and forwarded that evidence to counsel for the defendants. He did not, however, bring a motion to set aside the dismissal.

[28] On September 27, 2010, Owens' lawyer wrote to Romain and clearly indicated that she had no instructions to set aside the dismissal order and asked whether the plaintiffs intended to move to set it aside. Romain's evidence is that only upon receipt of that letter did he realize that it would be necessary to proceed with this motion. On October 4, 2010, counsel for Romain wrote to the defendants' counsel enclosing the plaintiffs' motion record, first returnable October 14, 2010, seeking an order setting aside the registrar's dismissal order. This motion was then adjourned several times, on consent, before being heard by me on September 7, 2011.

THE INSPECTION AND TESTING OF THE BOTTLE

[29] Vincor was made aware of the plaintiffs' potential claim shortly after the event giving rise to the claim took place. In October, 2004, Vincor made arrangements for the bottle to be inspected by Canadian Glass Services. A report was prepared by Canadian Glass Services on November 19, 2004 and has been included as part of Vincor's Schedule "A" productions. On February 14, 2005, Johnstone contacted Vincor and requested that the bottle be returned to her which Vincor did shortly thereafter.

[30] Although Vincor believes that Owens was put on notice of the plaintiffs' claim in early 2005, Owens has no record of this and there is no documentary evidence to support Vincor's belief. It appears, therefore, that Owens first became aware of this claim when it received the fax copy of the statement of claim on November 28, 2006 and took advice as to whether service was proper.

[31] Owens' general practice when it receives a consumer complaint or a claim of this nature is to send a standard form letter requesting that the customer send the container in question to its laboratory in Toledo, Ohio for inspection and testing. The letter states that the purpose of this testing is to determine the identity of the manufacturer of the bottle and to determine whether the breakage was due to a manufacturing defect for which Owens might be responsible. It is only after inspecting the bottle that Owens is able to determine what documents may need to be preserved.

[32] Owens did not follow this policy with respect to this claim. It made a deliberate decision to take no steps to respond to the claim after it had received the legal opinion that it had not been properly served. It did not send its usual letter to the plaintiffs or their counsel and it did not make any other request to inspect the bottle until May 15, 2009.

[33] When Owens did make its request to inspect the bottle, Romain was not responsive. He initially resisted the request, suggesting it should wait until after examinations for discovery had taken place so as not to delay the examinations any further. It was not until June 16, 2010, that Romain advised Owens' lawyer that the bottle was available for inspection. Even after this motion was brought, the parties continued to have difficulty agreeing on the terms of the inspection. It was not until February 1, 2011, that the parties were able to consent to an order permitting the inspection Owens required.

[34] The bottle was finally inspected by Owens on March 14, 2011. That inspection revealed that the bottle had not been manufactured by Owens but rather by a related corporation known as O-I Canada Corp. at its plant in Montréal. The bottle had been made on January 14, 2004 at 10:32 a.m.

[35] Once Owens obtained this information it immediately conducted a search for relevant documents, including documents relating to the production and quality control of the wine bottle and determined that all but a few documents had been purged in accordance with O-I Canada Corp.'s record retention policy. Owens is unable to determine when the records would have been purged, but based on the record retention policy it is assumed that most, if not all, would have been destroyed in 2007 and 2008.

ANALYSIS

[36] In the last five years, the law relating to the setting aside of registrar's dismissal orders has been the subject of seven decisions of the Court of Appeal for Ontario.[1]

[1] *Scaini v. Prochnicki*, [2007] O.J. No. 299 (C.A.); *Marché D'Alimentation Denis Thériault Lteé v. Giant Tiger Stores Ltd.*, [2007] O.J. No. 3872 (C.A.); *Finlay v. Van Paassen*, [2010] O.J. No. 1097 (C.A.); *Wellwood v. Ontario (Provincial Police)*, [2010] O.J. No. 2225 (C.A.); *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, [2010] O.J. No. 5572 (C.A.); *Machacek v. Ontario Cycling Assn.*, [2011] O.J. No. 2379 (C.A.); *Aguas v. Rivard Estate*, [2011] O.J. No. 3108 (C.A.).

Although each of these decisions brings a slightly different approach to the decision making process, the general approach first set out by the Court of Appeal in *Scaini* has been followed consistently. The principles that emerge from these decisions can be summarized as follows:

> • the court must consider and weigh all relevant factors, including the four *Reid*[2] factors which are likely to be of central importance in most cases;[3]
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> • the *Reid* factors, as cited by the Court of Appeal in *Giant Tiger*, are as follows:
>
> > (1) *Explanation of 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 satisfactory evidence to explain that they always intended to set the action down within 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;[4]
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> • a plaintiff need not satisfy all four of the *Reid* factors but rather a contextual approach is required;[5]
>
> • the key point is that the court is to consider and weigh all relevant factors to determine the order that is just in the circumstances of each particular case;[6]

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[2] *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365 (S.C.J. – Master), reversed on other grounds [2002] O.J. No. 3414 (Div. Ct.).
[3] *Scaini* at paragraphs 23 and 24.
[4] *Giant Tiger* at paragraph 12.
[5] *Scaini* at paragraphs 23 and 24.

- all factors are important but prejudice is the key consideration;[7]

- prejudice to a defendant may be presumed, particularly if a lengthy period of time has passed since the order was made or a limitation period has expired, in which case the plaintiff must lead evidence to rebut the presumption;[8]

- once a plaintiff has rebutted the presumption of prejudice, the onus shifts to the defendant to establish actual prejudice;[9]

- prejudice to a defendant is not prejudice inherent in facing the action in the first place but prejudice in reviving the action after it has been dismissed;[10]

- the party who commences the litigation bears the primary responsibility under the Rules for the progress of the action;[11]

- in weighing the relevant factors, the court should not ordinarily engage in speculation concerning the rights of action a plaintiff may have against his or her lawyer but it may be a factor in certain circumstances, particularly where a lawyer's conduct has been deliberate. The primary focus should be on the rights of the litigants and not with the conduct of their counsel.[12]

[37] These are the principles I have considered and applied in determining the issues on this motion.

MOTION BROUGHT PROMPTLY

[38] I am not satisfied that the plaintiffs have brought this motion within an acceptable time period after becoming aware of the dismissal order. The relevant authorities and Rule 37.14(1) require that motions of this nature be brought forthwith after the order comes to the attention of a plaintiff or her lawyer. Here, Romain waited for nearly 20 months before this motion was brought. That kind of a time period cannot be characterized as forthwith under any reasonable interpretation of the word. The plaintiffs argued that it was not until September 27, 2010, when Owens' lawyer advised Romain that Owens would not be consenting to an order setting aside the dismissal, that it first became clear that this motion was necessary. I disagree with this interpretation. It should have been clear to Romain that this motion was necessary when he received a copy of the dismissal order in February, 2009. I agree that it is prudent to canvas with defendants' counsel the possibility of such a motion proceeding on consent or on an unopposed basis.

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[6] *Scaini* at paragraph 24.
[7] *Finlay* at paragraph 28.
[8] *Wellwood* at paragraph 60.
[9] *Wellwood* at paragraph 60.
[10] *Wellwood* at paragraph 74.
[11] *Wellwood* at paragraph 48.
[12] *Finlay* at paragraphs 32 and 33 and *Giant Tiger* at paragraph 28.

Such an approach would certainly save time and money. However, when such consent is not immediately forthcoming, it is incumbent on a plaintiff to move quickly to bring a motion to set aside the dismissal. Romain did not do that here. He simply waited far too long for the defendants to clearly state their position, when instead he should have been pursuing the relief now being sought on this motion.

[39] In my view, the plaintiffs have not satisfied this element of the *Reid* test.

INADVERTENCE

[40] I have concluded that the plaintiffs' failure to meet, or seek an extension of, the deadline for setting this action down for trial was a result of inadvertence. I accept that Romain did not receive the status notice issued October 27, 2008 and was therefore not put on notice of the impending dismissal date. No other explanation makes sense as at the same time he was actively advancing the action by rescheduling examinations for discovery and attempting to regularize the situation with Owens. Of course, Romain should have known about the dismissal date by virtue of the operation of Rule 48.14. However, that Rule clearly contemplates the issuance of a status notice and Romain did not receive one. It was not unreasonable for him to assume, therefore, that no dismissal was on the horizon. In my view, all of these factors point to inadvertence and not to a deliberate decision to ignore the Rule 48.14 deadline.

[41] The plaintiffs have therefore satisfied this element of the *Reid* test.

LITIGATION DELAY

[42] The court is generally not concerned with pre-litigation delay. The first *Reid* factor, as adopted by the Court of Appeal, only references delay in the progress of the litigation after the action has been commenced. During the course of its argument, Owens stressed the fact that the plaintiffs issued their statement of claim in this action one day before the applicable limitation period would have expired. I do not view such delay as a factor in considering whether the plaintiffs have satisfied this element of the *Reid* test, although it may be a factor when considering prejudice to the defendants.

[43] This action moved ahead with appropriate speed from the date the statement of claim was issued to the date of service on Owens (August 25, 2006 to December 6, 2006). However, Romain took no steps to advance the litigation between December, 2006 and March, 2008. As stated above, Romain's evidence is that he "inadvertently failed to turn [his] attention to this file as [he] was awaiting receipt of the [Owens] statement of defence and had failed to entry [sic] this matter into [his] diary system for follow-up". This is not a satisfactory explanation. There is no evidence of any steps being taken during this time period to follow up with Owens to obtain its defence or to have Owens noted in default. Romain simply appears to have overlooked this file for more than 15 months despite being repeatedly contacted by Johnstone. This period of litigation delay has not been adequately explained.

[44] I am satisfied, however, that the plaintiffs have adequately explained the delay in advancing this action from March, 2008 to the date of the dismissal of the action on February 12, 2009. In March, 2008, Romain began collecting the evidence necessary to advance the claim and began communicating with Vincor's lawyer with respect to scheduling examinations for discovery. That process was interrupted by the fact that Romain became involved in a lengthy criminal matter in the fall of 2008, but by early

2009, Romain was once again actively pursuing this claim by rescheduling examinations for discovery and finally following up with Owens. It is true that Romain could have done more to pursue Owens during this time period, but it is also true that Owens had failed to respond to this action when it had, in fact, been served with the statement of claim in accordance with the Rules and the Hague Convention.

[45] The lack of an adequate explanation for the litigation delay between December, 2006 and March, 2008 is troubling. However, it is not necessary to account for every moment of time from the commencement of the action forward. There are going to be occasional gaps in time with any litigation. This is not a situation where there have been multiple prolonged and unexplained periods of delay and certainly there were none after March, 2008. Johnstone has given evidence that she and her son always intended to proceed with the claim. I am satisfied that given the serious efforts to advance the litigation after March, 2008, that the overall progress of this action has been adequately explained in the circumstances. This element of the *Reid* test has been met, despite the initial period of unexplained delay.

PREJUDICE

[46] I am satisfied that the plaintiffs have met the onus placed upon them to rebut the presumption of prejudice. Where a limitation period has passed, as it has here under the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B, there is a presumption of prejudice and the onus rests with the plaintiff to rebut that presumption. The strength of this presumptive prejudice increases with the passage of time.[13] In my view, the strength of the presumptive prejudice is quite strong in this case as a result of the seven years that have passed since the event that gave rise to this action took place and the 20 month delay in bringing this motion. However, it is also clear from the evidence that all of the plaintiffs' medical and other damages documentation is readily available and has been preserved and provided to the defendants. All of Vincor's records are available and have been preserved. There is no evidence that important witnesses are unavailable to give evidence. The physical evidence has been preserved and was subjected to an early inspection and testing by Vincor, the results of which are available and have been produced. Owens has now had an opportunity to inspect the bottle as well. In my view, the plaintiffs have rebutted any presumption of prejudice.

[47] As a result, the onus now shifts to Owens to demonstrate actual prejudice. Owens argued that it has suffered actual prejudice arising from the destruction of relevant and important documents in accordance with its record retention policy. Owens takes the position that those documents are necessary in order for it to defend itself in this action. Certainly it appears that relevant documents were destroyed, most likely in 2007 and 2008. However, the onus on Owens on this motion is to demonstrate "significant

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[13] *Wellwood* at paragraph 60.

prejudice in presenting [its] case at trial *as a result of the plaintiffs' delay*" [emphasis added].[14] In my view, any prejudice to Owens as a result of the loss of the documents is not a result of the plaintiffs' delay but rather a result of a deliberate decision by Owens to ignore the plaintiffs' claim and its own internal policies. Even if the court accepts that Owens was under the mistaken impression that it had not been properly served with the statement of claim, it remains perplexing why it chose to ignore the claim. Its evidence on cross-examination (and the answers to undertakings given on its cross-examination) was that part of its usual practice upon the receipt of a consumer complaint or statement of claim was to make arrangements to inspect the container in question and then make a decision about what documents needed to be retained. Owens had received much more than a consumer complaint from Johnstone. A legal action had been started and Owens knew it. Nevertheless, Owens chose to rely on a technicality regarding service and failed to follow its own policies in place to deal with situations of this nature when it knew that it had record retention policies in place that would possibly lead to the loss of important and relevant documents.

[48] In addition, there was no obligation on the plaintiffs to prompt Owens to serve a statement of defence, or to provide further notice of any kind to Owens, after service of the statement of claim on December 6, 2006. Romain could have (and probably should have) noted Owens in default much sooner than he did, without allowing Owens any further opportunity to defend. In my view, any prejudice to Owens from the destruction of the documents was a result of its own decision to ignore the plaintiffs' claim and not a result of any delay on the part of the plaintiffs.

[49] I have therefore concluded that this element of the *Reid* test has been met.

CONCLUSION

[50] In deciding motions of this nature the court is to apply a contextual approach in which the court weighs all relevant factors to determine the result that is just in the circumstances. It is not necessary for the moving party to rigidly satisfy all of the *Reid* factors and any other relevant factors. Of the factors the court is to consider on motions such as this, prejudice is the key consideration. I have weighed and considered all of the relevant factors as set out above. It is my conclusion that it is just in the circumstances of this action that the registrar's order of February 12, 2009 dismissing the plaintiffs' action be set aside. This is not a conclusion I have arrived at lightly or easily. The plaintiffs have failed to explain a significant initial delay in the progress of this action. They have also failed to demonstrate that this motion was brought in a timely manner after learning of the dismissal order.

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[14] *Giant Tiger* at paragraph 12.

[51] However, I am satisfied that Romain's failure to set this action down in a timely manner, or seek an extension of time, was a result of inadvertence and that the litigation delay with this action has been adequately explained overall. Finally, and most importantly, the plaintiffs have rebutted the presumption of prejudice and Owens has not demonstrated any actual prejudice caused by the plaintiffs' delay.

SEALING ORDER

[52] Owens has filed certain documents with the court containing proprietary and confidential information belonging to Owens. The parties entered into an agreement as to how that information would be used as part of this motion. I have reviewed that agreement and the documents in question. I am satisfied that the information in those documents contains important proprietary and confidential information and that it is appropriate that a sealing order be made in respect of those documents.

COSTS

[53] At the conclusion of the argument of this motion, the parties agreed that if the plaintiffs were successful, there would be no order with respect to the costs of this motion.

ORDER

[54] I therefore order as follows:

(a) the order of the registrar dated February 12, 2009 is hereby set aside;

(b) the parties shall confer and attempt to agree on an appropriate timetable order for the completion of the remaining steps in this action;

(c) any such consent timetable shall be provided to the court for its consideration and approval by no later than November 4, 2011;

(d) if the parties are unable to agree on such a timetable, the parties shall provide the court with written submissions by no later than November 4, 2011;

(e) Owens' documents containing proprietary and confidential information and the summary of agreement among counsel regarding a confidentiality

and sealing order shall be treated as confidential, sealed and not form part of the public record; and,

(f) there shall be no order with respect to the costs of this motion.

Master R.A. Muir

DATE: October 13, 2011