

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: WEI PING LIU and 2037812 ONTARIO INC. O/A WEI FUNG FRUIT CO.,
Plaintiffs

AND:

INTACT INSURANCE COMPANY, ANTHONY TSANG INSURANCE
BROKERS INC. and GEORGE LEUNG, Defendants

BEFORE: Associate Justice Mak

COUNSEL: James H. Chow, for the Plaintiffs

Deema Elshourfa, for the Defendants Anthony Tsang Insurance Company
Brokers Inc. and George Leung

Christopher P. Klinowski, for the Defendant Intact Insurance Company

HEARD: March 6, 2026, by videoconference

REASONS FOR DECISION

- [1] On September 27, 2013, a fire occurred at the plaintiffs’ premises in Toronto. As a result of the fire, the plaintiffs commenced this action for damages in the amount of \$4,000,000.
- [2] The defendant Intact Insurance Company is alleged to have insured the property. The defendant Anthony Tsang Insurance Brokers Inc. and its agent, the defendant George Leung (“these defendants”), are alleged to have sold the plaintiffs the policy of insurance.
- [3] These defendants bring this motion to dismiss the action due to the plaintiffs’ failure to comply with an interlocutory order. In the alternative, these defendants seek an order dismissing the action for delay.
- [4] The plaintiffs bring a cross-motion for an order restoring the action to the trial list and for an order resetting the timetable.
- [5] The issues before the court on these motions are as follows:
 - (a) Should the action be dismissed due to the plaintiffs’ failure to comply with the interlocutory order?
 - (b) Should the action be dismissed for delay?

- (c) Should the action be restored to the trial list and the timetable reset for the action?
- [6] For the following reasons, the court grants the relief sought by these defendants and dismisses the action due to the plaintiffs' failure to comply with the interlocutory order and due to delay. The court dismisses the plaintiff's cross-motion and declines to restore the action to the trial list.

Should the Action be Dismissed for the Plaintiffs' Failure to Comply with an Interlocutory Order?

- [7] These defendants bring this motion to dismiss the action due to the plaintiffs' failure to comply with an interlocutory order, pursuant to r. 60.12 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- [8] This order arises from a case conference held on July 30, 2024, where McCarthy J. ordered the following timetable:
- (a) By August 16, 2024, the plaintiffs are to comply with all outstanding costs orders;
 - (b) By September 16, 2024, the plaintiffs will obtain leave from an associate judge or judge under Rule 48.11 to restore the action to the Trial List;
 - (c) By September 30, 2024, the plaintiffs will schedule the matter for To Be Spoken to Court to schedule trial and pre-trial dates;
 - (d) The plaintiffs are required to serve their expert reports by no later than 90 days before the scheduled pre-trial; and
 - (e) The defendants are required to serve their responding expert reports by no later than 60 days before the scheduled pre-trial.
- [9] On July 30, 2024, the court provided a copy of the order and the related endorsement to counsel for all the parties, including plaintiffs' counsel.
- [10] Rule 60.12 of the *Rules* states that where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction, dismiss the party's proceeding. The onus is on the party who has failed to comply with the interlocutory order to establish an acceptable explanation for the delay, and that the opposing party will not suffer non-compensable prejudice if the action is permitted to proceed: *Van Aert v. Sweda Farms Ltd. (Best Choice Eggs)*, 2018 ONCA 831 at para. 7.
- [11] In considering the almost two-year delay between the order and the hearing of this motion on March 6, 2026, I find the plaintiffs have not established an acceptable explanation for this delay. On August 15 and 16, 2024, pursuant to the order, the plaintiffs paid to Intact two outstanding costs orders. Since paying the two costs orders, the plaintiffs have not provided an acceptable explanation for the delay in complying with the remainder of the timetable. The plaintiffs did not provide evidence to the court of any steps they took

between August 16, 2024 to March 6, 2026 to comply with the remaining steps in the ordered timetable, including evidence that their expert reports have been completed or are in the process of being completed. There is also no evidence before me that the defendants did anything to hinder the plaintiffs from complying with the order.

- [12] The plaintiffs have an evidentiary burden to demonstrate that the defendants will not suffer non-compensable prejudice if the action is permitted to proceed. The plaintiffs can establish this by demonstrating, for example, that key witnesses are available or documents have been preserved.
- [13] The plaintiffs' affidavit for these defendants' motion was sworn by the plaintiff Wei Ping Liu. The affidavit consists of 12 short paragraphs, double-spaced, over two pages. No exhibits were attached. The plaintiffs' motion record consisted solely of Mr. Liu's affidavit, the pleadings, the trial record and the interlocutory order.
- [14] On the record before me, I am unable to conclude that key documents have been preserved. Mr. Liu states in his affidavit that Intact sent its investigators to investigate the fire almost immediately after the fire took place, and these investigators examined the property and took many photographs. However, there is no evidence before the court that these documents have been preserved, and the record before me did not contain any documents or photographs arising from Intact's investigation.
- [15] Mr. Liu also states the plaintiffs gave Intact requested documents and information before and after this action was commenced, including all the documents from Schedule "A" of their Affidavit of Documents. However, the record before me does not include any of these documents and information, and therefore I am unable to comment on the documents' content and whether these documents include key documents that have been preserved. I also note that despite two court orders from 2021 ordering the plaintiffs to appoint an appraiser and ordering the appointment of an umpire pursuant to section 128 of the *Insurance Act*, R.S.O. 1990, c. 1.8, the record before me did not include any expert appraisal or evidence on the progress of any such appraisal by the plaintiffs.
- [16] In his affidavit, Mr. Liu stated he has complied with the plaintiffs' undertakings. At the cross-examination on his affidavit, Mr. Liu took a question under advisement to confirm the dates that each undertaking was answered and to provide the correspondence providing those answers. Mr. Liu did not provide to the defendants or to the court the answer to this question taken under advisement. I draw an adverse inference from Mr. Liu's failure to answer this question, and therefore reject Mr. Liu's statement in his affidavit regarding the plaintiffs' compliance with their undertakings.
- [17] The record before me does not include evidence that key witnesses are available. The plaintiffs have not established the issues do not depend on witnesses' recollection or that all necessary witnesses are available with a detailed recollection of the events: *Baranick v Counsel Trust Company*, 2007 CanLII 19256 (ON SC) at paras. 16 to 18.

- [18] The parties attended at examinations for discovery in January 2018. However, I was not presented with detailed affidavit evidence from the parties as to the events giving rise to this action, or transcripts from these discoveries. Therefore, I am unable to find that the necessary witnesses are available with a detailed recollection of the events giving rise to this action. Mr. Liu's affidavit contained only a brief and general description of the fire and the losses he claims the plaintiffs sustained as a result due to the fire. I also note that Mr. Liu answered many questions at his cross-examination on his affidavit by stating that he could not remember details about the action, including when the action was commenced, when the action was taken off the trial list, whether there was a pre-trial conference in this action, and when he first became aware of these defendants' motion to dismiss this action.
- [19] Mr. Liu's affidavit does not speak to any other issues relating to whether the defendants will or will not suffer non-compensable prejudice if the action is permitted to proceed.
- [20] Based on the foregoing, the court finds the defendants will suffer non-compensable prejudice if the action is permitted to proceed. The plaintiffs have not led sufficient evidence to establish otherwise. As the court has also found the plaintiffs have not satisfied their onus to establish an acceptable explanation for the delay, the court exercises its discretion and dismisses the action due to the plaintiffs' failure to comply with the order of McCarthy J., dated July 30, 2024.

Should the Action be Dismissed for Delay?

- [21] These defendants' alternative relief, for a dismissal of the action due to delay, is pursuant to r. 24.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 which states as follows:

Where Available

24.01 (1) A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,

(a) to serve the statement of claim on all the defendants within the prescribed time;

(b) to have noted in default any defendant who has failed to deliver a statement of defence, within thirty days after the default;

(c) to set the action down for trial within six months after the close of pleadings; or

(d) Revoked: R.R.O. 1990, Reg. 194, r. 24.01 (2).

(e) to move for leave to restore to a trial list an action that has been struck off the trial list, within thirty days after the action was struck

off. R.R.O. 1990, Reg. 194, r. 24.01; R.R.O. 1990, Reg. 194, r. 24.01 (2); O. Reg. 770/92, s. 7; O. Reg. 533/95, s. 4 (1).

(2) The court shall, subject to subrule 24.02 (2), dismiss an action for delay if either of the circumstances described in paragraphs 1 and 2 of subrule 48.14 (1) applies to the action, unless the plaintiff demonstrates that dismissal of the action would be unjust. O. Reg. 259/14, s. 6.

- [22] These defendants bring this motion to dismiss the action for delay pursuant to rr. 24.01(c) and (e), as the plaintiffs did not set the action down for trial within six months after the close of pleadings, and the plaintiffs did not move for leave to restore the action to the trial list.
- [23] An order dismissing an action for delay is a severe remedy, as the plaintiffs are denied an adjudication on the merits of their claim. However, sometimes an order dismissing an action for delay is the only order that can adequately protect the integrity of the civil justice process and prevent an adjudication on the merits that is unfair to a defendant: *Langenecker v. Sauve*, 2011 ONCA 803 at para. 3 (“*Langenecker*”).
- [24] The test for dismissing an action for delay under r. 24.01 is well-established (see *North Toronto Chinese Alliance Church v. Gartner Lee Ltd.*, 2012 ONCA 251, leave to appeal refused [2012] S.C.C.A. No. 248; *Armstrong v. McCall*, 2006 CanLII 17248 (ON CA), and *Woodheath Developments Ltd. v. Goldman*, (2003) 66 O.R. (3d) 731 (ON SCDC)). An action should not be dismissed unless:
- (a) The default is intentional and contumelious, or
 - (b) The plaintiffs or the plaintiffs’ lawyers are responsible for the inexcusable delay that gives rise to a substantial risk that a fair trial might not now be possible.
- [25] In considering the first branch of the test, the court will consider whether the delay is insolently abusive and humiliating and demonstrates a disdain or disrespect for the court’s process: *Carson v Scheuer*, 2015 ONSC 2593 at para. 37. The court will also consider whether the delay is at least reckless and perhaps wilful, and whether it is the sort of default for which there is no reasonable explanation: *Cardillo v. Willowdale Contracting et. al*, 2020 ONSC 2193 at para. 34. Motions under this branch are rare and are usually accompanied by a breach of one or more court orders: *Langenecker* at para. 6.
- [26] These defendants submit that they can succeed on either branch of the test.
- [27] In support of their position, these defendants point to the plaintiffs’ breach of the order of McCarthy J. While the court agrees that the plaintiffs breached the order, after considering the plaintiffs’ and their counsel’s conduct over the timeline of the action up to March 6, 2026, the delay does not rise to the level of being insolently abusive and humiliating and does not demonstrate a disdain or disrespect for the court’s process. The court also does not find the delay to be reckless and wilful.

[28] In considering the second branch of this test for a dismissal for delay, such an order will be justified where the delay is inordinate, inexcusable and prejudicial to the defendant in that it gives rise to a substantial risk that a fair trial of the issues will not be possible: *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1 at para. 12 (“*Ticchiarelli*”).

A. *Is the Delay Inordinate?*

[29] The inordinance of the delay is measured simply by reference to the length of time from the commencement of the proceeding to the motion to dismiss: *Langenecker* at para. 8. This proceeding was commenced by way of a Statement of Claim issued on September 26, 2014 and this motion was first heard over 11 years later, on March 6, 2026. The court finds this delay of over 11 years to be inordinate.

B. *Is the Delay Inexcusable?*

[30] A determination of whether the delay is inexcusable requires the court to examine the reasons for it and whether they present an adequate explanation. This examination looks for explanations that are “reasonable and cogent” or “sensible and persuasive”. The court will consider both the explanations offered for individual parts of the delay, and the overall delay and the effect of the explanations considered as a whole: *Ticchiarelli* at para. 16, citing *Langenecker* at paras. 9-10.

[31] After considering the parties’ motion materials, including the transcript of the plaintiff Wei Ping Liu’s cross-examination on his affidavit, the court finds the plaintiffs have not presented reasonable and cogent, or sensible and persuasive explanations for the majority of the period from September 26, 2014 to March 6, 2026, for the reasons detailed below.

[32] With respect to the period between the issuance of the Statement of Claim on September 26, 2014 and September 25, 2015, no reasons were given for this part of the delay. The court finds that as the pleadings were being exchanged up to on or about September 25, 2015, the delay during this time can be excused.

[33] For the period of September 26, 2015 to October 13, 2017, the court finds the reasons for this part of the delay do not present an adequate explanation. No reasons were given for this part of the delay and there is no evidence before the court of any steps taken by either party during this period, including any steps by the plaintiffs to advance their claim.

[34] With respect to the period between October 14, 2017 and January 22, 2018, the court finds the delay during this time can be excused. Intact brought a motion on October 14, 2017 for a timetable. The plaintiffs did not attend at the motion and did not participate in this motion. However, examinations for discovery for all parties took place on January 15, 19 and 22, 2018.

[35] Of note, at the motion on October 14, 2017, Master Brott, as she was then, ordered the following timetable:

- (a) Delivery of affidavit of documents by November 15, 2017;
- (b) Examinations for discovery to take place by January 31, 2018;
- (c) Answers to undertakings to be provided by March 28, 2018;
- (d) Motions for answers to undertakings and refusals to be returnable by May 30, 2018;
- (e) Mediation to take place by July 31, 2018; and
- (f) Action to be set down for trial by August 31, 2018.

[36] For the period starting January 23, 2018 to October 30, 2020, the record before the court indicates only two events occurred:

- (a) The plaintiffs delivered their trial record on September 25, 2019, consisting solely of the pleadings and a solicitor's certificate of trial record; and
- (b) The parties attended at a pre-trial conference on October 30, 2020. At the pre-trial conference, Edwards J. ordered another timetable that required various steps to be taken by the plaintiffs, which culminated in a trial scheduled for November 21, 2021.

No other events or reasons were given for this part of the delay. Therefore, the court finds the reasons for this part of the delay do not present an adequate explanation for most of this period, save for a total of, at most, two weeks for the plaintiffs' preparation of the trial record and the plaintiffs' preparation for their attendance at the pre-trial conference.

[37] With respect to the time between October 31, 2020 and November 15, 2023, the court finds the reasons for this part of the delay do not present an adequate explanation. During this period Intact initiated all the activity in this action due to the failure of the plaintiffs to appoint an appraiser pursuant to section 128 of the *Insurance Act*, R.S.O. 1990, c. 1.8, and the subsequent failure of the plaintiffs' appraiser to appoint an umpire pursuant to section 128. There is no evidence before the court that the plaintiffs did anything to advance their claim during this period.

[38] Specifically, in 2021, Intact brought three motions for relief against the plaintiffs. One of these motions settled before its return date. These motions resulted in orders for the plaintiffs to appoint an appraiser and to appoint an umpire for the purposes of the plaintiffs' appraisal underway, and orders that the plaintiffs pay Intact costs on these motions.

[39] On November 2, 2021, plaintiffs' counsel advised the defendants that this matter would not proceed to trial in November 2021 and that it should be rescheduled. The action was then removed from the trial list on the consent of all parties. The plaintiffs did not provide an explanation to the court as to why this matter could not proceed to trial in November 2021.

- [40] With respect to the period between November 16, 2023 and February 29, 2024, the court finds the delay during this time can be excused. The plaintiffs and Intact were engaged in discussions regarding the lawsuit, including what appears to be settlement discussions and the scheduling of these continued discussions.
- [41] For the period of March 1 to August 14, 2024, the court finds the reasons for this part of the delay do not present an adequate explanation. During this period, these defendants initiated all the activity in this action, which consisted of scheduling a case conference, drafting a timetable and attending at a case conference wherein a new timetable was obtained. There is no evidence before the court that the plaintiffs did anything during this period, including responding to communications from the defendants or taking any steps to advance this matter. Indeed, the plaintiffs did not even attend at the case conference.
- [42] For August 15 to September 24, 2024, the court finds the reasons for this part of the delay present an adequate explanation. The plaintiffs communicated with the defendants to obtain the outstanding costs orders, and wrote a cheque payable to Intact for two of the three costs orders arising from Intact's three motions in 2021. Plaintiffs' counsel stated he thought this was the full amount owing pursuant to the orders, and asked Intact's counsel to tell him immediately if he was wrong. Plaintiffs' counsel also advised the defendants he wanted to prepare the motion materials to restore the action to the trial list, and had communications with the defendants in this regard.
- [43] From September 25, 2024 to December 1, 2025, the court finds the reasons for this part of the delay do not present an adequate explanation. The defendants communicated with the plaintiffs that they had not received motion materials from the plaintiffs to restore the action to the trial list. These defendants then advised the plaintiffs they would be scheduling this motion to dismiss the action. The court provided a motion date to these defendants, and these defendants advised the parties of this date. These defendants then served their Notice of Motion on February 11, 2025, and their Motion Record on October 20, 2025. The court was not presented with any evidence that the plaintiffs did anything during this period, including responding to communications from the defendants or taking any steps to advance this matter such as bringing a motion to restore the action to the trial list.
- [44] The plaintiff Wei Ping Liu states in his affidavit that his counsel advised him that due to inadvertence, he had not yet brought a motion to restore the action to the trial list. I find the communications from these defendants to the plaintiffs regarding their motion to dismiss, together with the service of their Notice of Motion and Motion Record, served as multiple reminders to the plaintiffs of the relief these defendants sought in this motion, and the implications of this relief. Therefore, inadvertence is not an adequate explanation for the plaintiffs' or their counsel's failure between September 25, 2024 and December 1, 2025 to obtain a date for their motion to restore the action, and to serve and file their motion record for their motion.
- [45] From December 2, 2025 to March 6, 2026, the court finds the reasons for this part of the delay present an adequate explanation. On December 2, 2025, the plaintiff Wei Ping Liu swore an affidavit in support of the plaintiffs' motion to restore this action to the trial list.

On December 5, 2025, the plaintiffs served their motion record for their motion. However, they did not properly schedule their motion before the court. Instead, they attempted to shoehorn their motion into the same motion slot booked by these defendants back in or around January 2025. The plaintiffs' motion was therefore adjourned to March 6, 2026, to be heard at the same time as these defendants' motion.

- [46] Approximately just under 27 months have reasons for the delay that present an adequate explanation. The remaining time period – from September 26, 2014 to March 6, 2026 less these 26 to 27 months – consists of approximately 110 to 111 months or over 9 years where the court has found no adequate explanation for the delay.
- [47] On an overall assessment of the steps taken in relation to the claim, the plaintiffs took some steps to advance their claim that were interspersed with months and sometimes years of inaction by the plaintiffs, with no adequate explanation provided for these gaps. I make this finding based on the evidence before me of the plaintiffs' actions since the pleadings closed in late 2017:
- (a) Attending at examinations for discovery in January 2018;
 - (b) Attending at a pre-trial conference in October 2020;
 - (c) Consenting to remove this matter from the trial list in November 2021;
 - (d) Engaging with Intact in what appears to be settlement discussions from November 2023 to February 2024;
 - (e) Paying two out of three outstanding costs orders in August 2024;
 - (f) Attempting to obtain the parties' position on the plaintiffs' motion to restore the action to the trial list in September 2024; and
 - (g) Bringing their motion to restore the action to the trial list in March 2026.
- [48] I also make this finding based on the lack of evidence before me that the defendants in any way hindered the plaintiffs from taking steps to advance the action. In fact, the opposite is true – over the years, the defendants took steps in an attempt to move the action along. In 2017, Intact obtained an order for a timetable. In 2021, when the plaintiffs failed to appoint an appraiser pursuant to section 128 of the *Insurance Act*, Intact brought three motions that resulted in orders for the plaintiffs to appoint an appraiser and an order for an umpire to be appointed for the appraisal. In 2024, these defendants scheduled a case conference, drafted a timetable and attended at a case conference wherein a new timetable was obtained.
- [49] In considering the explanations, or lack thereof, offered for the individual parts of the delay, the overall delay and the effect of the explanations considered as a whole, the court finds the delay is inexcusable.

C. *Is the Delay Prejudicial to the Defendants?*

- [50] For the court to consider whether the delay is prejudicial to the defendants, the test is whether the delay creates a substantial risk that a fair trial of the issues will not be possible. Inordinate delay generates a presumption of prejudice. Memories fade and fail, witnesses can become unavailable, and documents can be lost. The longer the delay, the stronger the inference of prejudice to the defence case flowing from that delay: *Ticchiarelli* at para. 28, citing *Langenecker* at para. 11.
- [51] In addition to relying on the inference of prejudice arising from the inordinate delay, it is open to the defendants to lead evidence of actual prejudice: *Ticchiarelli* at para. 29. However, the defendants are not required to lead any evidence of prejudice: *Gutcher v. Welland Retirement Suites Ltd.*, 2026 ONCA 273 at para. 13 (“*Gutcher*”).
- [52] The Court of Appeal has found that the passage of time can, on its own, constitute prejudice: *Gutcher* at para. 12, citing *Barbiero v. Pollack*, 2024 ONCA 904 at para. 15.
- [53] For the reasons outlined above in paragraphs 12 to 20, I find this delay of over 11 years to be prejudicial to the defendants because it gives rise to a substantial risk that a fair trial of the issues will not be possible. The plaintiffs have not led sufficient evidence to disprove prejudice. I also find that this delay of 11 years is of such length that it can, on its own, constitute prejudice.
- [54] The plaintiffs have not led any evidence that would suggest dismissal of this action would be unjust. The plaintiffs have had plenty of time and opportunities to move this matter forward to trial in over 11 years since the action was commenced, but have failed to do so. I find the plaintiffs have not demonstrated that dismissal of the action would be unjust.
- [55] The motion judge’s order dismissing this action for delay is a discretionary order: *Ticchiarelli* at para. 14. For the foregoing reasons, the court exercises its discretion and dismisses this action for delay under r. 24.01.

Should the action be restored to the trial list and the timetable reset for the action?

- [56] The plaintiffs bring a cross-motion to restore the action to the trial list under r. 48.11 of the *Rules* and to reset the timetable for this action.
- [57] Where a refusal to restore an action to the trial list would result in its dismissal, the test in considering whether to restore the action to the trial list is whether the plaintiffs have shown, on a balance of probabilities, that there was a reasonable explanation for the delay, and that if the action were allowed to proceed, the defendants would not suffer non-compensable prejudice: *Carioca’s Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592 at para. 3 (“*Carioca’s*”). This test is similar to the tests I have outlined above for a dismissal for delay under r. 24.01 and a dismissal for failure to comply with an interlocutory order under r. 60.12.

- [58] In assessing whether the plaintiffs' explanation for delay is reasonable, the court should consider the overall conduct of the litigation, in the context of local practices, which can vary quite widely between jurisdictions: *Carioca's* at para. 46. In considering the local practices, I note that the pre-trial took place in October 2020, the parties consented to the removal of the action from the trial list in November 2021, and there is no evidence before me that local practices played any role in the delay.
- [59] For the foregoing reasons, and for the reasons outlined above at paragraphs 12 to 20 and paragraphs 30 to 53, the court finds the plaintiffs have not shown, on a balance of probabilities, that there is a reasonable explanation for the delay and that if the action were allowed to proceed, the defendants would not suffer non-compensable prejudice. The court dismisses the plaintiff's cross-motion.

Disposition

- [60] For the foregoing reasons, the court orders as follows:
- (a) The action is dismissed pursuant to r. 60.12 and r. 24.01 of the *Rules*.
 - (b) The plaintiffs' cross-motion to restore the action to the trial list and to reset the timetable for this action is dismissed.

Costs

- [61] These defendants provided a costs outline at the motion hearing. The plaintiffs and Intact did not.
- [62] If the parties cannot agree to the disposition of the costs of the motion and the action, they may each make submissions in writing, not exceeding three single-sided pages, double-spaced with 12-point Times New Roman or Arial font – the defendants within 20 days and the plaintiffs within 10 days thereafter – to the attention of the Trial Coordinator.

Associate Justice C. Mak

Release Date: May 26, 2026