

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *HUB International Canada West ULC v.
Forgotten Treasures International Inc.*,
2026 BCCA 230

Date: 20260529
Dockets: CA50493 and CA50498

Docket: CA50493

Between:

**HUB International Canada West ULC, HUB International Limited,
and Mark Loewen**

Appellants
(Defendants)

And

Forgotten Treasures International Inc.

Respondent
(Plaintiff)

- and -

Docket CA50498

Between:

Lloyd's Underwriters and Endeavour Insurance Services Limited

Appellants
(Defendants)

And:

Forgotten Treasures International Inc.

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Abrioux
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated
January 31, 2025 (*Forgotten Treasures International Inc. v.
Lloyd's Underwriters*, 2025 BCSC 222, Vancouver Docket S186084).

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Place and Date of Hearing:

Vancouver, British Columbia
February 20, 2026

Place and Date of Judgment:

Vancouver, British Columbia
May 29, 2026

Written Reasons by:

The Honourable Justice Riley

Concurred in by:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Abrioux

Summary:

*The appellants challenge the decision of a judge in chambers, declining to dismiss an action for want of prosecution. The underlying action involved claims of breach of contract, negligence, and breach of fiduciary duty arising out of the denial of an insurance claim for allegedly stolen sculptures. Applying the analytical framework laid out in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473, the chambers judge found the total delay of six and one-half years to be inordinate, and that the first approximately five years of delay was inexcusable, but concluded that it was not in the interests of justice to dismiss the action, describing it as a “close call”. Held: Appeal dismissed. The chambers judge (i) made no palpable and overriding error of fact in assessing the extent to which the defendants pressured the plaintiff to proceed with the action, nor did she err in principle by (ii) placing undue weight on the failure of the defendants to put pressure on the plaintiff, or (iii) failing to place sufficient weight on other factors relevant to the interests of justice analysis. The fact the judge viewed the matter as a “close call” was no basis to interfere with her discretionary determination that dismissal of the claim was not in the interests of justice.*

Reasons for Judgment of the Honourable Justice Riley:**Introduction**

[1] This is an appeal from the decision of a justice of the Supreme Court of British Columbia declining to dismiss an action for want of prosecution. The underlying action involves claims for breach of contract, negligence, and breach of fiduciary duty. The claims arise out of a dispute over insurance coverage for a loss the respondent Forgotten Treasures International Inc. (“FTI”) suffered in an alleged robbery during which two valuable sculptures were stolen. The chambers judge found the total delay of six and one-half years from the commencement of the action to the date of the application inordinate, and the first approximately five years of delay inexcusable. However, the judge “somewhat reluctantly” concluded that it was in the interests of justice to allow the action to proceed, describing it as a “close call”.

[2] There are two groups of appellants. One consists of the insurance providers, Lloyd’s Underwriters and their affiliate Endeavour Insurance Services Limited (collectively “Lloyd’s”). The other consists of the insurance brokers, HUB International Canada West ULC, HUB International Limited, and their representative,

Mr. Loewen (collectively “HUB”). Together, these appellants advance three arguments in support of their challenge to the chambers judge’s determination that dismissal of the action was not in the interests of justice. First, the appellants say the judge treated eight of the nine enumerated interest of justice factors as either neutral or favouring dismissal, and committed a palpable and overriding error regarding the “ninth and decisive factor”, namely the extent to which the plaintiffs delayed in the face of pressure by the defendants to advance the proceedings. Second, the appellants contend the judge placed undue emphasis on this “decisive” factor. Third, the appellants argue the chambers judge erred in principle in treating the action’s lack of public importance as a neutral factor, when it ought to have favoured dismissal.

Facts

The Sculptures

[3] As part of a campaign to raise funds for cancer research, FTI organized a “treasure hunt” with prizes that included a gold eagle sculpture worth over \$1,000,000, and a silver eagle sculpture worth some \$50,000 (collectively, the “sculptures”).

The Insurance Policy

[4] FTI obtained insurance for the sculptures through Lloyd’s. The insurance policy was brokered through HUB.

[5] The insurance policy included a two-person accompaniment term. This term excludes coverage for losses suffered when the insured property is “in transit”, unless the property is “in the close personal custody” of the insured party, together with an officer, independent contractor, designated employee or representative of the insured party.

The Loss

[6] On 29 May 2016, FTI's principal, Mr. Shore, had the sculptures in his possession. He alleges that he was attacked by robbers who stole the sculptures as he was placing them in his car. He further alleges that at the time, he was accompanied by another person, Ms. Merx, in compliance with the insurance policy's two-person accompaniment term.

The Insurance Claim

[7] On 12 Augst 2016, FTI submitted a claim for loss under the insurance policy.

[8] Lloyd's retained an independent adjuster, Mr. Mancuso, who investigated the claim. During his investigation, Mr. Mancuso obtained a statement from Ms. Merx, calling into question whether she fit within the definition of the two-person accompaniment term, and whether she was in fact accompanying Mr. Shore at the time of the robbery.

[9] On 12 October 2016, Lloyd's denied FTI's insurance claim.

Commencement of the Action

[10] On 25 May 2018, FTI filed a claim in the Supreme Court of British Columbia against Lloyd's and HUB. The claim against Lloyd's alleges breach of contract for denial of coverage under the insurance policy. The claim against HUB alleges negligence, breach of contract, and breach of fiduciary duty in failing to arrange for effective insurance on the sculptures.

Litigation History

[11] The steps taken in the litigation can be summarized as follows:

- a. As noted, FTI commenced the action by filing a notice of civil claim on 25 May 2018.
- b. On 27 July 2018, HUB filed a response to civil claim.

- c. On 6 December 2018, FTI obtained default judgment against Lloyd's. FTI pursued this step even though counsel for Lloyd's had communicated an intention to defend the claim.
- d. On 3 April 2019, a Supreme Court justice set aside the default judgment against Lloyd's. FTI subsequently appealed this decision.
- e. On 18 July 2019, Lloyd's filed its response to civil claim.
- f. On 30 November 2020, this Court dismissed FTI's appeal from the decision setting aside the default judgment against Lloyd's, in reasons indexed as 2020 BCCA 341.
- g. On 18 June 2021, FTI filed a notice of change of counsel, and served its list of documents.
- h. On 29 September 2022, after the litigation was dormant for more than one year, FTI filed a notice of intention to proceed.
- i. On 5 January 2023, FTI filed an amended notice of civil claim.
- j. Between 19 April 2023 and 28 April 2023 inclusive, there was an exchange of emails between counsel concerning FTI's intention to bring a summary trial application. In the course of this exchange, counsel for Lloyd's: (i) questioned LTI's counsel about the unexplained delay in advancing the claim, (ii) advised that he was not available for a summary trial application until November 2023, and (iii) asserted that the matter was not suitable for summary trial.
- k. On 5 August 2024, there was another email exchange between counsel, pertaining to FTI's stated intention to bring a summary trial application. Counsel for Lloyd's expressed concern about the delay in prosecuting the action. The parties did not reach agreement on a date for FTI's summary trial application.

- I. On 1 October 2024, counsel for FTI filed a second notice of intention to proceed.
- m. On 30 October 2024, Lloyd's and HUB confirmed their intention to bring an application to dismiss the action for want of prosecution. Lloyd's filed its notice of application on 10 December 2024, and HUB followed suit on 16 December 2024.
- n. The two dismissal for want of prosecution applications came on for hearing before the chambers judge on 27 January 2025.

[12] In her ruling (*Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2025 BCSC 222), the chambers judge summed up the procedural history of the case in the following terms:

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

Reasons for Judgment

[13] After reviewing the background of the action (paras. 2–8), and the litigation history (paras. 9–27), the judge summarized the applicable legal principles (paras. 28–31). She stated that the test governing dismissal of a claim for want of prosecution was revised by a five-member division of this Court in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473. The revised test has “three components”, under which the court must determine

whether the delay is: (i) inordinate, and (ii) inexcusable, and if so, (iii) whether it is in the interests of justice to allow the action to proceed (para. 28).

[14] The judge held that the total delay of six and one-half years, “during which the only steps taken to advance the case towards a resolution on the merits were a delivery of a list of documents and the filing of an amended pleading” was inordinate (para. 35).

[15] She went on to hold that, of the six and one-half years of delay, approximately the first five years, “up to the spring of 2023”, was inexcusable. She found the delay after that point in time was excusable, due to the “combination of” a lack of diligence by FTI’s counsel, and the fact counsel for Lloyd’s was unavailable for FTI’s proposed summary trial application (paras. 36–40).

[16] The judge went on to consider whether, despite the inordinate delay, five years of which was inexcusable, it was nonetheless in the interests of justice to permit the action to proceed. The judge reasoned as follows:

- a. Prejudice, in the form of impairment of the ability to defend the claim, is no longer a “prerequisite” to dismissal for want of prosecution but remains an important consideration (para. 44, citing *Giacomini* at para. 72). The judge presumed “some prejudice” to the defendants given that “key components” of the case arise from oral dealings between the individuals involved. However, the following considerations served to diminish this prejudice: (i) even if the case had been prosecuted more expeditiously, the witnesses would not likely have had distinct recollections of their verbal dealings; (ii) there was some contemporaneous documentation of the matters in issue; (iii) quite independent of FTI’s delay, the defendants made no effort to conduct timely examination for discovery of Mr. Shore; and (iv) Mr. Shore’s efforts to “dissuade” Ms. Merx from communicating with the defence occurred in 2019, and had no connection to the subsequent delay. The judge concluded that

- prejudice to the defendants weighed “in favour of dismissal but not heavily” (paras. 44–53).
- b. With respect to the length of the delay and the stage of the litigation, the matter had not progressed beyond the early stages, despite its lack of complexity (para. 54). Thus, the unexplained delay of about five years weighed in favour of dismissal (para. 55).
 - c. The allegations in the pleadings had some impact on the professional interests of the defendants, although the evidence on this issue was “lacking in concrete detail”, and there was “no evidence that their careers or professional prospects have been injured in any way” (para. 56). Thus, this factor weighed “in favour of dismissal but not heavily” (para. 57).
 - d. The context in which the delay occurred weighed against dismissal, because there was “no evidence that the defendants took issue with the pace of the litigation”, or “put any pressure on the plaintiff to proceed”, until the summer of 2024. Furthermore, there were no attempts by the defendants to schedule discovery, or to compel examination of Ms. Merx as a non-party, and the defendants had not delivered a list of documents (para. 59).
 - e. With respect to the reasons for the delay, approximately the first five years of delay was “inexcusable”. Much of it was attributable to a “misguided” attempt to preserve the default judgment against Lloyd’s (paras. 60–61). FTI’s suggestion that some of the delay could be attributed to Mr. Shore’s financial and health challenges was not convincing, given the vagueness of these assertions and the absence of corroborating objective evidence (para. 62). Thus, the reasons for the delay did “not weigh in favour of allowing the claim to proceed” (para. 63).
 - f. Under the rubric of “other factors”, the judge considered three further points. First, she did not find it appropriate to attach any significance to the role of counsel, which was the principal cause of the final approximately two years of

delay. Second, the case was “not one of genuine public importance”. Third, the claim was not “bound to fail”. On balance, these “other factors” were “neutral” in the interests of justice analysis (paras. 65–66).

[17] The judge acknowledged that it was in the public interest to have a system that delivers “timely and affordable justice” (para. 67). The approximately five years of unexplained delay, and the fact that the litigation “remains at an early stage” weighed in favour of dismissal (para. 67). The prejudice to the defendants in defending the case, and the impact of the litigation on their professional interests favoured dismissal. However, the judge gave these factors little weight, and found they were “largely offset” by the “inaction” of the defendants in the face of delay (para. 68). Other factors were neutral (para. 69).

[18] In the chambers judge’s view, the “fundamental question” was whether it was in the interests of justice to deprive FTI of its “presumptive entitlement to adjudication on the merits” (para. 70, citing *Giacomini* at para. 75). The judge’s conclusion was as follows (para. 70):

... Recognizing the importance of a plaintiff’s interest in a trial on the merits, I have decided that there is not enough to tip the balance in favour of dismissal, although this was a close call. I have somewhat reluctantly concluded that it is in the interests of justice to allow the claim to proceed.

On Appeal

[19] The appellants argue that the trial judge erred in three respects.

[20] First, the appellants say the judge made a palpable and overriding factual error in finding there was “no evidence that the defendants took issue with the pace of the litigation until the summer of 2024”.

[21] Second, the appellants contend that, by placing “singular” reliance on the absence of any defence pressure, the chambers judge gave “inadequate weight” to other factors she was required to consider in assessing the interests of justice.

[22] Third, the appellants say the chambers judge erred in principle by treating the absence of public importance in the litigation as a neutral factor in the interests of justice analysis.

Legal Principles

Principles Governing Dismissal for Want of Prosecution

[23] Rule 22-7(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, expressly recognizes the court's discretion to dismiss a proceeding for want of prosecution. Although the text of R. 22-7(7) does not spell out any prerequisites or conditions for the exercise of this discretion, some guidance can be taken from the general object of securing the "just, speedy and inexpensive determination of every proceeding on its merits", as stated in R. 1-3(1). Beyond this, the contours of the court's discretion to dismiss an action for want of prosecution have been shaped by the common law.

[24] In *Giacomini*, a five-member division of the Court revisited the applicable analytical framework. In doing so, Justice Horsman, for the Court, identified the tension between the competing interests at play. The party seeking dismissal will invariably emphasize the objective of a "just" and "speedy" resolution, whereas the party seeking to prosecute the case will stress the objective of securing a "just" determination "on the merits": *Giacomini* at para. 29.

[25] Justice Horsman also noted increasing concern about the effect of delay on public confidence in the justice system: *Giacomini* at paras. 30–31. This was one of the reasons why the Court found it appropriate to modify the conventional test for dismissal, which was "unduly focused on litigation prejudice to the defendant", thus failing to give due consideration to the "broader impacts of delay" on the defendant and the justice system as a whole: *Giacomini* at para. 58.

[26] Drawing heavily on the "modified test" formulated by Justice Richards in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48, Justice Horsman concluded the question of prejudice to the defence should not be

treated as a “stand-alone criterion”, but should rather be considered in the final assessment of the interests of justice: *Giacomini* at paras. 65, 72. Thus, under the reformulated analytical framework, a court considering an application to dismiss an action for want of prosecution must first ask whether the delay is: (i) inordinate, and (ii) inexcusable. If both of these questions are answered in the affirmative, the court must then consider whether it is in the interests of justice to allow the action to proceed despite “the existence of inordinate and inexcusable delay”: *Giacomini* at paras. 69–70.

[27] Justice Horsman went on to endorse a list of interests of justice factors set out by Justice Richards in *International Capital Corporation* at paras. 45(a) through (h), adding one further factor of her own. The resulting “non-exhaustive” list of relevant considerations can be summarized as follows: (a) the prejudice the defendant will suffer in defending the case on its merits; (b) the length of the delay; (c) the stage of the litigation; (d) the impact of the delay on the defendant’s professional, business, or personal interests; (e) the context in which the delay unfolded, and in particular whether the plaintiff delayed despite pressure from the defence to proceed; (f) the reasons offered for the delay; (g) the role of counsel in causing the delay; (h) the societal interest in deciding cases of genuine public importance; and (i) the merits of the action: *Giacomini* at paras. 66, 71.

Standard of Review

[28] A judge’s decision on an application to dismiss an action for want of prosecution is discretionary. The appeal court will not revisit a discretionary decision in the absence of misdirection or a result that is so clearly wrong that it amounts to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27. Misdirection occurs where the judge errs in principle, fails to weigh or gives insufficient weight to a relevant consideration, or makes a palpable and overriding factual error: *Giacomini* at para. 25, citing *British Columbia (Superintendent of Motor Vehicles) v. Chahal*, 2022 BCCA 416 at para. 9.

[29] This is a deferential standard of review. The appeal court cannot interfere merely because it might have decided the matter differently: *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, 2024 BCCA 288 at para. 37. Appellate intervention in a discretionary matter is only warranted where the outcome is “so clearly wrong as to amount to an injustice” or a misdirection of the kind described above is “manifest from the judge’s reasons”: *Dhillon v. Pannu*, 2008 BCCA 514, leave to appeal ref’d, 33003 (30 April 2009) at paras. 27–28.

Analysis

Issue (1): Whether the Judge Made a Palpable and Overriding Error in Finding the Defendants Took No Issue with the Pace of the Litigation Until August 2024

[30] The appellants argue that the chambers judge made a palpable and overriding error of fact in finding there was “no evidence that the defendants took issue with the pace of the litigation until the summer of 2024” (reasons at para. 59). In the appellants’ submission, this finding is palpably wrong in light of email correspondence placed in evidence in which counsel for Lloyd’s repeatedly expressed concern about delay. The appellants further submit this factual error is overriding because it was a key feature of the judge’s reasoning on the “singular” factor she found to weigh against dismissal of the action. Finally, the appellants point to the judge’s observation that this was a “close call”, making her reliance on this point pivotal.

[31] For the reasons explained below, I would not give effect to this ground of appeal. I do not agree with the appellants’ position on either branch of the palpable and overriding error analysis. I am not convinced the judge made a palpable factual error. Further, the point of fact raised by the appellants is not significant enough to qualify as overriding.

No Palpable Error

[32] The appellants rely on an email exchange between counsel for Lloyd’s and counsel for FTI, over a nine-day interval in April of 2023. The emails involve a

dialogue in which FTI's counsel sought to schedule a summary trial application for hearing in July, in response to which counsel for Lloyd's (i) indicated he was not available until November, (ii) took the position that the matter was not suitable for summary trial, and (iii) expressed dismay about FTI's unexplained delay in moving the action forward. This email exchange did not go anywhere, in the sense that no summary trial application was ever scheduled. It is also noteworthy that nowhere in the exchange of emails did counsel for Lloyd's set any deadlines after which he would take a concrete step in response to FTI's inaction.

[33] Relying on this email exchange, the appellants say it was palpably wrong for the chambers judge to find "no evidence that the defendants took issue with the pace of the litigation until the summer of 2024". In my view, this argument invites an impermissible parsing of the judge's reasons, and rests on a myopic interpretation of a single sentence in the reasons, read in isolation and out of context.

[34] The impugned sentence must be understood in the context of the judge's findings on the issue of whether the FTI "delayed in the face of pressure on the part of the defendant to proceed", as set out in her reasons:

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

[35] Read together, the first two sentences in this passage make the point that prior to the summer of 2024, the defendants did not manifest any concern about the pace of the litigation by putting pressure on FTI to proceed. It was open to the trial judge to reach this factual conclusion on the whole of the record before her, including the April 2023 email exchange.

[36] The emails do not show that Lloyd's put any pressure on FTI to move the matter forward. The entire thrust of the exchange was that FTI sought to schedule a

summary trial application, and counsel for Lloyd's resisted those efforts. Indeed, in one of the emails, counsel for Lloyd's expressed concern that after several periods of unexplained inactivity, FTI was "stepping on the gas" by bringing a summary trial application before discoveries had taken place. This could hardly be taken as evidence of the defendants pressing the plaintiff to advance the action.

No Overriding Error

[37] Even if one were to accept that it was palpably wrong for the judge to say there was "no evidence" of the defendants taking issue with the pace of the litigation until the summer of 2024, I would not view such an error as overriding, for three reasons.

[38] First, even if the emails afforded some evidence that the defendants "took issue with the pace of the litigation", the extent to which they did so was marginal at best. There is no evidence that counsel for Lloyd's raised any concern about delay until almost five years into the litigation. When counsel did bring up the topic of delay, his concern appeared to be that after several periods of unexplained delay, FTI was "stepping on the gas" before Lloyd's had conducted any discoveries. This is not compelling evidence of the defendants taking issue with the pace of the litigation.

[39] Second, the emails in which counsel raised the topic of delay do not detract from the more significant point, reflected in the chambers judge's reasons, that the defendants put no pressure on FTI to proceed with the action. It is one thing to passively express concern about delay. It is quite another to put pressure on the opposing party to move the matter forward.

[40] The appellants stress that they had no obligation to put pressure on FTI, because they were entitled to rely on FTI's burden to prosecute the action. In oral submissions on the appeal, counsel for Lloyd's cited a passage from *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229, in which Lord Diplock made the

following comments about a defendant's right to rely on the plaintiff's ultimate burden to prosecute the case:

It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the Court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

[Emphasis added.]

These comments speak to the very nature of the remedy of dismissal for want of prosecution, based in the notion that the plaintiff bears the ultimate burden to move the action forward. Indeed, in *Giacomini*, Justice Horsman affirmed at para. 76 that, “[T]here is, of course, no obligation on the defendant, who has involuntarily been brought into a lawsuit, to take any steps to move the plaintiff’s case forward.”

[41] Be that as it may, a defendant's conduct is also relevant in assessing whether it is in the interests of justice to dismiss an action for want of prosecution. All litigants are expected to guard against a “culture of complacency” that can produce delay and undermine confidence in the justice system. This is why the court considers “whether the plaintiff delayed in the face of pressure by the defendant to proceed”, as part of the “context in which the delay occurred”: *Giacomini* at para. 66; *International Capital Corporation* at para. 45(e). As Justice Horsman explained in *Giacomini* at para. 76, “the plaintiff’s delay does not tie the hands of a defendant who is motivated to bring the case to its conclusion”, such that “the defendant’s inaction in the face of lengthy delay by the plaintiff may weigh against dismissal of the action at the interests of justice stage of the analysis.”

[42] The court may therefore look beyond passive expressions of concern about delay, to assess whether the defendant actually put pressure on the plaintiff to proceed. One way for a defendant to do so is to set out deadlines after which remedies will be sought for the plaintiff’s inaction: *Giacomini* at para. 82. The

chambers judge fairly noted that the defendants did not put any such pressure on the plaintiff in this case. The chambers judge was entitled to consider this in her assessment of the “context in which the delay occurred”.

[43] Third, taking a step back to examine the reasons as a whole, I do not agree with the appellants’ submission that, in assessing whether dismissal was warranted in the interests of justice, the judge placed “singular” reliance on the failure of the defendants to take issue with the delay. On my reading of the reasons, the judge’s finding on this point was not determinative. Even if the judge had not made this finding, there was ample evidence to support her broader conclusion that the defendants put no pressure on FTI, and took no independent steps to move the action forward. Moreover, this was merely one consideration amongst many taken into account by the judge in reaching the conclusion that, despite the inordinate and inexcusable delay, the interests of justice did not support dismissal of the action.

[44] The judge’s comment that this case was a “close call” does not alter my conclusion in this regard. The judge found this to be a “close call” based on her qualitative assessment of all the relevant factors, not just one feature of the single factor that is the focus of the argument on appeal. To draw upon a well-worn analogy, merely pulling at leaves and branches is very unlikely to bring down an entire tree: *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38, citing *Her Majesty the Queen v. South Yukon Forest Corp.*, 2012 FCA 165 at para. 46, leave to appeal ref’d, 34946 (6 December 2012).

**Issue (2): Whether the Judge Erred by Placing Undue Reliance on
Absence of Defence Pressure, thereby Giving “Inadequate Weight” to
Other Relevant Considerations**

[45] The appellants’ factum recounts the chambers judge’s conclusion on each of the nine enumerated interests of justice factors. On the appellants’ assessment of the reasons, the judge found eight of the nine factors were either “neutral” or weighed in favour of dismissing the action, such that her decision turned on the one remaining factor, namely the “absence of defence pressure”. The appellants say the

judge erred by “allowing the *absence* of continuous defence cajoling to trump every other factor” [emphasis in original]. In other words, by relying on this “singular” and “decisive” factor to conclude it was not in the interests of justice to dismiss the action, the judge failed to give proper weight to the other eight considerations.

[46] In my view, this argument rests on the faulty premise that the chambers judge simply tallied up the non-exhaustive list of interest of justice factors described in *Giacomini* as if conducting an exercise in arithmetic. I agree with the respondent that the judge’s reasons reflect a more nuanced, qualitative assessment and balancing of the relevant considerations.

[47] The judge viewed some of the considerations as “neutral” and found others to weigh in favour of dismissing the action. However, the judge’s reasons also demonstrate that she assessed the weight of each of the factors she discussed.

[48] For example, while the judge presumed the passage of time occasioned some prejudice in defending the claim, she found this prejudice to be minimal given the nature of the dispute and the evidence the defendants would be expected to rely upon in support of their positions at trial. Thus, although on balance this factor tended to support dismissal of the action, the chambers judge was not inclined to give it much weight.

[49] The judge approached the question of prejudice to the professional interests of the defendants in much the same manner. After acknowledging that the litigation had some impact on the defendants, she did not give this factor much weight given the lack of case-specific evidence about reputational harm arising from the delay.

[50] The judge also undertook a nuanced assessment of a number of other considerations, including the role of counsel, the apparent lack of public importance to the litigation, and the fact that FTI’s claim was not bound to fail. She reasoned that some of these considerations supported dismissal and others did not, and concluded that “on balance” they were neutral.

[51] The judge was clearly satisfied that the manner in which the defendants responded to the delay was a factor weighing against dismissal of the claim. However, the appellants' submission that the outcome was justified solely on the basis of this factor fails to give sufficient credit to the judge's weighing and balancing of all the considerations at play. Even the factors that the judge found to favour dismissal were assessed qualitatively.

[52] The weighing and balancing reflected in the judge's reasons was a nuanced exercise that cannot be reduced to a mere tallying up of the enumerated factors to arrive a final score that determined the result. It is not "manifest from the judge's reasons" that she misdirected herself by failing to give due consideration to any of the factors bearing on her assessment of the interests of justice.

Issue (3): Whether the Judge Erred by Treating the Absence of Public Importance in the Litigation as a Neutral Factor in the Interests of Justice Analysis

[53] The appellants argue the chambers judge treated the absence of "genuine public importance" as a neutral factor in the interests of justice analysis. They characterize this as an error in principle, submitting that under the *Giacomini* framework, absence of public importance is a factor weighing in favour of dismissal.

[54] The judge dealt with both the absence of public importance in this matter, and the merits of FTL's claim, in a single paragraph, as follows:

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

[55] The appellants agree that because the Court in *Giacomini* described "the public interest in having cases that are of genuine public importance heard on their merits" as a factor weighing against dismissal of an action for want of prosecution, the logical corollary is that that absence of public importance must favour dismissal. I do not agree.

[56] In *Giacomini*, the Court endorsed the reasoning in *International Capital Corporation* on this point. In the latter case, Richards J.A. explained that in a case of “genuine public importance”, the court may place “the larger public interest” on the scales “when balancing the pros and cons” of dismissing the matter for want of prosecution: *International Capital Corporation* at para. 45(h).

[57] The court’s discretion to treat the presence of “genuine public importance” as a factor weighing against dismissal does not imply that the absence of any such public importance must be treated as a factor weighing in favour of dismissal. In my view, where broader issues of “genuine public importance” do not arise in a particular action, it would be open for the court to conclude that this consideration simply has no bearing on the interests of justice analysis.

[58] I therefore do not agree with the appellants that the chambers judge erred in principle in failing to treat the absence of any broader public importance as a factor favouring dismissal of FTI’s claim. I would not give effect to this ground of appeal.

Conclusion and Disposition

[59] The appellants argue that if the chambers judge’s decision is “upheld”, the Court will effectively be “hollowing out” the reform *Giacomini* sought to make in response to concerns about delay in civil proceedings. With respect, I do not view the matter this way. Rather, I view this as a case where the appellants have failed to demonstrate the chambers judge made any reviewable error in reaching a discretionary decision declining to dismiss the action for want of prosecution.

[60] The chambers judge found inordinate delay, a significant portion of which was inexcusable. However, after conducting a nuanced weighing of the relevant considerations, she concluded it was not in the interests of justice to dismiss the action, noting this was a “close call”. In the absence of a reviewable error in the chambers judge’s exercise of discretion, there is no basis for this Court to interfere with that conclusion.

[61] I would dismiss the appeal.

“The Honourable Justice Riley”

I AGREE:

“The Honourable Chief Justice Marchand”

I AGREE:

“The Honourable Mr. Justice Abrioux”