

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CanafriC Inc. (o/a Mortimer's Fine Food), Plaintiff

AND:

Economical Mutual Insurance Company, Utter-Morris Insurance Brokers Limited
and Greg Meyer, Defendants

BEFORE: Associate Justice B. McAfee

COUNSEL: M. Makki, Counsel, for the Plaintiff

A. Luthra, Counsel, and H. Benyamin, Articling Student, for Plaintiff's Counsel

A. Valova, Counsel, for the Defendants

HEARD: March 10, 2026

REASONS FOR DECISION

- [1] This is a motion brought by the plaintiff CanafriC Inc. (o/a Mortimer's Fine Food) (CanafriC) for an order setting aside the order of the registrar dismissing the action for delay dated September 18, 2024. The defendants oppose the motion.
- [2] For the reasons that follow, the order of the registrar dismissing the action for delay shall be set aside.
- [3] The dismissal order was not before me. On the motion, counsel confirmed that a copy of a dismissal order was not received.
- [4] CanafriC operates a food processing facility in Burlington, Ontario. This action concerns a loss arising from an equipment failure that occurred in October 2014, and the denial of coverage for same under an insurance policy issued by the defendant Economical Mutual Insurance Company (Economical). The defendant Utter-Morris Insurance Brokers Limited (Utter-Morris) is an insurance brokerage. The defendant Greg Meyer (Meyer) is an insurance adjuster employed by Economical.
- [5] This action was commenced by notice of action issued on October 1, 2015. The statement of claim was filed on October 29, 2015. The statement of claim was amended on December 1, 2015.
- [6] The defendants delivered a statement of defence on or about April 21, 2017.

- [7] On July 24, 2017, defendants' counsel, C. Alfonso, wrote to Canafrić's counsel at the time, J. McLaughlin, requesting input regarding a discovery plan and, in particular, requesting dates for service of an affidavit of documents and discoveries. A follow up letter was sent on October 30, 2017, from T. Lampropoulos, who was assisting C. Alfonso, enclosing a proposed discovery plan and requesting a response by November 17, 2017.
- [8] On November 13, 2017, J. McLaughlin telephoned T. Lampropoulos. During the telephone call, J. McLaughlin advised that he would review the proposed discovery plan with Canafrić by mid-December and advise whether Canafrić was agreeable.
- [9] On February 6, 2018, T. Lampropoulos wrote to J. McLaughlin stating that he had not heard from him and requested a signed copy of the proposed discovery plan or available dates for a motion in the next three days failing which he would schedule a motion unilaterally.
- [10] On February 6, 2018, J. McLaughlin and T. Lampropoulos spoke. After the telephone call, T. Lampropoulos confirmed that based on the representation of J. McLaughlin that a position regarding the discovery plan would be provided early the following week, he would not schedule a motion until February 14, 2018.
- [11] On April 26, 2018, the defendants brought a motion for a discovery plan. The motion proceeded on consent.
- [12] On June 26, 2018, the defendants served their draft affidavits of documents.
- [13] Canafrić did not serve their affidavit of documents or pay the costs by the deadlines ordered on April 26, 2018.
- [14] On July 24, 2018, C. Alfonso wrote to J. McLaughlin advising that a motion to dismiss would be brought if the April 26, 2018 order was not complied with.
- [15] On November 5, 2018, Canafrić served a draft affidavit of documents, without Schedule A productions.
- [16] On November 6, 2018, the defendants brought a further motion. On that date, on consent, an amended discovery plan was ordered, and costs were ordered payable by Canafrić.
- [17] Sometime after the motion, Canafrić served their Schedule A productions.
- [18] On February 11, 2019, C. Alfonso wrote seeking Canafrić's availability for examinations for discovery. Between April 4, 2019 and November 13, 2019, T. Lampropoulos wrote to J. McLaughlin ten times seeking to schedule examinations for discovery.
- [19] On March 5, 2020, the defendants brought a third motion. On consent, the plaintiff was ordered to be examined on April 8, 2020, failing which the defendants would be entitled to a dismissal of the action with costs.

- [20] On April 9, 2020 and September 30, 2020, Canafrić's representative was examined for discovery. Canafrić gave fifty-two undertakings and took three questions under advisement.
- [21] On October 5, 2020, Meyer was examined for discovery personally and on behalf of Economical. Utter-Morris has not been examined for discovery. Canafrić's counsel confirmed on the motion that Canafrić is not pursuing an examination of Utter-Morris.
- [22] On March 25, 2021, J. McLaughlin sent a letter to the court concerning the deadline to set this action down for trial and advising of a new agreed timetable including a set down date of July 15, 2021. J. McLaughlin's evidence is that the same day he spoke to a Registrar who assured him that the action would not be subject to the automatic 5 year dismissal. Steps were not taken to obtain a court order for the timetable noted in the letter.
- [23] On September 29, 2021, N. Eklove provided J. McLaughlin with an undertakings chart and requested answers within 30 days. Defendants' counsel follow up with J. McLaughlin on six occasions between October 29, 2021, and May 18, 2022.
- [24] On June 28, 2022, Canafrić provided answers to twenty-five undertakings and one question taken under advisement.
- [25] On July 7, 2022, N. Eklove wrote to J. McLaughlin requesting further information with respect to the answers to undertakings. On July 18, 2022, N. Eklove wrote to J. McLaughlin confirming that his firm can accept delivery of a proof of loss and following up regarding answers to the undertakings and answers to follow up questions.
- [26] On July 27, 2022, J. McLaughlin responded that he is working on answering the further queries.
- [27] In or about 2022, Canafrić engaged an expert to calculate the alleged losses payable in the context of the policy wording. The expert report is dated October 17, 2022.
- [28] On January 26, 2023, J. McLaughlin sent an email to N. Eklove providing further information regarding undertakings. According to the affidavit evidence of J. McLaughlin, he left a phone message with N. Eklove on March 27, 2023, seeking either a resolution or preparations for a trial date, that was not responded to. N. Eklove is no longer with the firm of defendants' counsel. Defendants' counsel was unable to locate a record of the voice mail.
- [29] On or about September 1, 2023, J. McLaughlin ceased legal representation of Canafrić following an administrative suspension by the Law Society of Ontario.
- [30] On February 28, 2024, a notice to the public and profession advised that effective May 13, 2024, administrative dismissals would be resumed.
- [31] In or about mid-September 2024, Canafrić retained new counsel, their current counsel, Mahyar Makki. On September 27, 2024, Canafrić served a notice of change of lawyer.

- [32] On October 10, 2024, M. Makki wrote to N. Eklove, requesting to move the matter forward and schedule mediation. On November 1, 2024, M. Makki sent a follow up letter to N. Eklove.
- [33] Sometime in the fall of 2024, defendants' counsel checked the status of the action on the JSO website where it was indicated that the action had been dismissed.
- [34] On November 18, 2024, N. Eklove advised that another lawyer, C. Alfonso, now had carriage of this matter. On the same day C. Alfonso sent an email to M. Makki advising that the action had been dismissed for delay on September 18, 2024.
- [35] On December 23, 2024, M. Makki advised C. Alfonso that a motion would be brought to set aside the dismissal order. A draft notice of motion was served.
- [36] On March 5, 2025, counsel attended before Associate Justice Brott in Status Hearing Assignment Court. Canafrić was directed to requisition a long motion. On March 6, 2025, Associate Justice Brott assigned the long motion to me.
- [37] On May 14, 2025, a case conference took place before me. The within long motion was timetabled and scheduled.
- [38] On the motion, Canafrić's counsel advised that should the dismissal order be set aside, no other steps need to be completed by Canafrić before the action can set the action down for trial, save for mandatory mediation.
- [39] The court will apply a contextual approach and consider all relevant factors in determining whether it is just to set aside the dismissal order in the circumstances of the particular case (*Scaini v. Prochnicki*, 2007 ONCA 68 at paras. 21-27, *Marché d'Alimentation Denis Thériault Ltée. v. Giant Tiger Stores Ltd.*, 2007 ONCA 695 (Ont. C.A.) at paras. 12, 20-21; *MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28 at paras. 11-12; *Prescott v Barbon*, 2018 ONCA 504 (Ont. C.A.) at paras. 13-15; *Piedrahita v. Costin*, 2023 ONCA 404 at paras. 8-9).
- [40] In *Prescott*, as cited in *Piedrahita*, Justice Pepall states as follows with respect to the contextual approach for applying the relevant factors at paras. 14-15):

[14] The legal test for setting aside a registrar's order dismissing an action for delay was originally described by Master Dash in *Reid* and adopted by this court in *Scaini v. Prochnicki*, 2007 ONCA 63, 85 O.R. (3d) 179:

- (i) Have the plaintiffs provided a satisfactory explanation for the litigation delay?
- (ii) Have the plaintiffs led satisfactory evidence to explain that they always intended to prosecute this action within the time limit set out in the rules or a court order but failed to do so through inadvertence?

(iii) Have the plaintiffs demonstrated that they moved forthwith to set aside the dismissal order as soon as the order came to their attention, and

(iv) Have the plaintiffs convinced the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiffs' delay or as a result of steps taken following the dismissal of the action?

[15] This is not a rigid, one-size fits all test. Rather, a contextual approach is required: *Scaini*, at paras. 23-25. Prior to *Scaini*, a plaintiff had to satisfy each of the four elements. Thereafter, courts were to consider and weigh all relevant factors to determine the order that is just. See also *Marché d'Alimentation Denis Thériault Ltée. v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660. In *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, 104 O.R. (3d) 689, at para. 23, Laskin J.A. observed that the overriding objective is to achieve a result that balances the interests of the parties and takes account of the public's interest in the timely resolution of disputes. The four *Reid* factors provide a structured approach to achieving this result.

[41] In *Barbiero v. Pollack*, 2024 ONCA 904, in the context of a Rule 24 motion, Justice Brown states at para. 22 that if an action has not been set down for trial in accordance with Rule 48.14(1) by the fifth anniversary of the commencement of an action, "... the action crosses the line and begins to move into the realm of "inordinate" delay."

[42] In determining whether the order of the Registrar ought to be set aside, I am mindful of the provisions of Rule 1.04(1) of the *Rules of Civil Procedure*:

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[43] In determining this motion, I am also mindful of the tension between two principles of our civil justice system: the preference to have civil actions decided on their merits and the promotion of timely resolution of actions.

[44] As stated by Justice Weiler in *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173 at para. 27: "The court's preference for deciding matters on their merits is all the more pronounced where delay results from an error committed by counsel." In *Marché* at para. 28, Justice Sharpe states: "The law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor" (see also *Debela v. Ives*, 2025 ONSC 3992 (Ont. S.C.J.) at para. 10).

[45] I am also mindful of the importance of finality of litigation (*Marché* at paras. 37-38).

[46] With respect to a satisfactory explanation for the delay, there was an initial period of delay until the statement of defence was served in April 2017. I am not satisfied that this delay is attributable to Canafriac.

- [47] A period of delay relating to the discovery plan and timetabling followed. As noted above, there were three motions brought by the defendants in an effort to move the matter forward. It should not have been necessary for the defendants to bring motions to move the matter forward and obtain compliance with court orders. This period of delay has not been adequately explained.
- [48] Between 2018 and 2020 draft affidavits of documents were served and examinations for discovery took place. During this time there was unexplained delay between April and November 2018 when J. McLaughlin failed to respond to numerous requests for dates for examinations for discovery.
- [49] Between 2021 and 2022, counsel had reached agreement with respect to a new timetable, Canafric answered certain undertakings and a question taken under advisement and counsel communicated with respect to answers to Canafric's undertakings. In 2022, Canafric also retained an expert.
- [50] Canafric did not provide answers to their undertakings within the time set out in the court ordered discovery plan. Delay with respect to providing answers to undertakings, some of which were only provided shortly before the return of this motion, has not been adequately explained.
- [51] The delay between September 2023, and September 2024, has been adequately explained due to J. McLaughlin ceasing legal representation of Canafric and Canafric having to retain a new lawyer.
- [52] While there are periods of delay that have not been adequately explained, the action has progressed. By the time the action was dismissed, draft affidavits of documents had been served, examinations for discovery had taken place, Canafric answered some, but not all of its undertakings/under advisements, and Canafric had retained an expert. Canafric is ready to set the action down for trial as soon as mandatory mediation is conducted.
- [53] While there are periods of delay have not been adequately explained, I am of the view, applying a contextual approach, that it is just that the dismissal order be set aside.
- [54] I am satisfied that the dismissal of the action was not intentional on the part of the Canafric. At the time of the dismissal, J. McLaughlin had been suspended, and M. Makki had not yet been formally retained.
- [55] I am also satisfied that Canafric moved promptly to set aside the dismissal as soon as the order came to Canafric's attention. As noted above, no one has received the dismissal order. M. Makki learned of the dismissal order on November 18, 2024, from C. Alfonso who learned of the dismissal order following a JSO website search. On December 23, 2024, M. Makki served a draft notice of motion. M. Makki thereafter communicated with the court office resulting in the above-noted attendance before Associate Justice Brott on March 5, 2025.

- [56] Any presumption of prejudice has been rebutted. Draft affidavits of documents having been exchanged. The parties have conducted the examinations for discovery they intend to conduct, and transcripts would be available for those examinations.
- [57] I am not satisfied of actual prejudice to the defendants in presenting their case at trial.
- [58] Although Meyer deposes that his memory has faded and he cannot recall attending his examination for discovery, the transcript of his discovery would be available. In addition, he would have available to him his adjuster notes listed in his draft affidavit of documents.
- [59] Neil Howard, an insurance broker with Utter-Morris, deposes in part that he has no independent recollection of this claim. However, he has been involved in this matter from the outset. The draft affidavit of documents of Utter-Morris is in Howard's name. The documents listed therein include various communications from Howard as early as 2014. These documents listed in his affidavit of documents, together with documents listed in the other affidavits of documents and other documents produced to date are available to him.
- [60] As noted above, the defendants confirm that further answers to undertakings were provided shortly before the motion and defendants' counsel has not had an opportunity to fully review those answers. It is unclear which documents and missing information the defendants are relying on at this time. To the extent that relevant documents and information have not been produced, I am not satisfied how this is prejudicial to the defendants, as opposed to prejudicial to Canafrić in proving Canafrić's case.
- [61] For these reasons, having regard to all the circumstances and applying a contextual approach, I am satisfied that it is just that the dismissal order is set aside.
- [62] In the event that the dismissal order is set aside, Canafrić's counsel submits that they are ready to take immediate steps to proceed with mandatory mediation, being their only remaining step before setting the action down for trial. Defendants' counsel submits that, having regard to scheduling issues, additional time of up to one year is more realistic. I am ordering that mandatory mediation take place on or before December 18, 2026, and that the action be set down for trial on or before January 15, 2027, which are reasonable deadlines in all the circumstances.
- [63] With respect to costs of the motion, I agree with the submissions of defendants, that if the motion is successful there should be no costs of the motion. Although Canafrić is successful, Canafrić is seeking an indulgence. I decline to exercise my discretion to award costs of this motion in all the circumstances of this motion. The parties shall bear their own costs.
- [64] Order to go as follows:
1. The order of the Registrar dismissing the action for delay dated September 18, 2024, is set aside;
 2. Mandatory mediation shall take place on or before December 18, 2026;

3. The deadline to set the action down for trial shall be on or before January 15, 2027;
4. There shall be no costs of this motion.

Associate Justice B. McAfee

Date: June 15, 2026