

CITATION: VS International Inc. v. The Second Cup Ltd., 2026 ONSC 5729
COURT FILE NO.: CV-14-4009 (Brampton)
DATE: 2026-10-09

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

VS INTERNATIONAL INC., VIJAY SAHGAL and TARLIKA SEHGAL

Plaintiffs

– and –

THE SECOND CUP LTD., FLETCHERS CREEK VILLAGE PARTNERSHIP,
NORTHWEST ATLANTIC (CANADA) BROKERAGE INC. and IRA BOND

Defendants

Hugh Scher, for the plaintiffs
Ian Roher, for the defendant The Second Cup
Linda Galessiere, for the defendant Fletcher's Creek Village
Harry Perlis, for the defendants Northwest and Bond

Heard: March 25 and May 12, 2026, by video conference

REASONS FOR DECISION

Justice. R. Chown

[1] The plaintiffs entered into franchise and sub-lease agreements to operate a Second Cup franchise at a plaza on Fletcher's Creek Boulevard in Brampton. The defendants are:

- a. the franchisor (The Second Cup);
- b. the plaza landlord (Fletcher's Creek Village);

- c. the listing real estate broker (Northwest); and
- d. the listing real estate agent (Bond).

The plaintiffs say that the defendants falsely represented that other units in the plaza were being rented to tenants that would drive traffic to the Second Cup franchise.

[2] The plaintiffs issued the statement of claim on September 3, 2014. The action proceeded at a glacial pace. However, the plaintiffs retained new counsel and served a notice of change of lawyer and trial record, both dated May 13, 2024.

[3] The defendants brought a motion to strike the action off trial list. Their position is that the plaintiffs were not entitled to serve a trial record because they were in default under a timetabling order made by Richetti RSJ. Rule 48.01 says that a party “who is not in default under these rules or an order of the court and who is ready for trial may set down the action for trial.” The defendants say the plaintiffs were required to convene a status hearing and/or obtain a new timetabling order.

[4] At the motion hearing before me on March 25, 2026, the parties agreed that the issues in the motion and in any future status hearing would significantly overlap. In addition, the remedies available in the motion and a status hearing would significantly overlap. The defendants’ proposed approach of granting the motion striking the action from the list and then requiring the plaintiffs to convene a status hearing did not appear to make efficient use of court resources. On consent, the parties agreed I could treat the matter as both a motion and a status hearing. However, the defendants wanted to submit further evidence of prejudice arising from the delay. I adjourned the motion for that purpose and the joint motion hearing and status hearing was held before me on May 12, 2026.

TIMELINE

Date	Document/Event
2014-09-03	Statement of claim issued.
2014-10-09	Statement of defence of Northwest.
2014-11-03	Statement of defence of Fletcher's Creek Village.
2014-11-19	Statement of defence and counterclaim of The Second Cup.
2015-01-23	Plaintiffs' reply and defence to counterclaim.
2015-03-30	The Second Cup's reply to defence to counterclaim. Pleadings closed.
2015-10-02	Plaintiffs' notice of motion to amend claim, with the motion returnable June 1, 2016 (B-1-188).
	<i>The reason for the eight-month delay is not clear and not explained, although I am aware that at times there have been very long waits for motion dates caused by insufficient judicial resources in Brampton. However, there is no reason why the plaintiffs could not have served a discovery plan or at least a draft affidavit of documents at this time.</i>
2016-05-16	Plaintiffs ask to adjourn motion due to the unavailability of plaintiffs' counsel.
	<i>This adjournment resulted in a further long delay. Again, I am aware that at times there have been long delays in obtaining motions dates in Brampton but the reason for the ten-month delay is not clear and not explained.</i>
2017-03-17	Plaintiffs' motion to amend statement of claim proceeds, apparently unopposed.
2017-03-30	Statement of claim amended and served. The Second Cup served its amended defence and counterclaim. Pleadings closed for a second time.
	<i>The affidavit of Mr. Childs sworn May 23, 2025 asserts that, "The parties thereafter exchanged a proposed discovery plan" (A76). This statement is not supported in the evidence available to me.</i>

Date	Document/Event
2017-09-14	The Second Cup sent a skeleton of a discovery plan to plaintiffs' counsel, but it contained no suggested dates for the steps in the action. <i>This may be the discovery plan Mr. Childs was referring to, but Mr. Childs does not refute the Ms. Cerminara's evidence (at B-1-45 para. 7) that there was no response to this plan from the plaintiff. Regardless, this "discovery plan" contains no suggested dates. It was a wholly incomplete plan.</i>
2018-07-03	Plaintiffs serve an unsworn affidavit of documents, request the defendants' affidavits of documents within 15 days, and propose September 24, 2018 for examinations for discovery. <i>I observe that this was a year and a half after the claim was amended. There is no explanation for the 15-month delay between March 2017 and July 2018.</i> Counsel for The Second Cup responded the next day and proposed a meeting among counsel to set the schedule. There is no evidence of a response to the proposed meeting.
2018-12	Defendants all served their affidavits of documents. <i>This five month delay by the defendants is not explained.</i>
2018-12-10	Plaintiffs attempt to secure discovery dates in January and February (A83).
2019-01-07	Plaintiffs followed up, seeking discovery dates in January and February (A83).
2019-??-??	The plaintiffs then brought a motion, returnable August 7, 2019, to set a timetable. <i>I could find no evidence as to the date this motion was prepared and served. Again, at the time, there likely were considerable delays in obtaining motion dates, but I do not have specifics for this seven-month delay. There is little evidence of the extent of effort put into securing discovery dates. It is surprising that bringing a motion would make more sense than making calls and sending emails to other counsel to</i>

Date	Document/Event
	<i>secure dates – even if multiple calls were necessary. In any event, the action stalled for a further seven months without any apparent effort by any party to schedule the discoveries.</i>
2019-07-24	The parties agreed to a timetable whereby the action would be set down by November 30, 2020 (B-1-139).
2019-08-07	Consent timetabling order (B-1-368) issued by Ricchetti J. This order required: 2019-11-30 – E/D's of all parties to be complete 2020-01-30 – All UTs to be answered 2020-04-30 – Discovery motions to be complete 2020-06-30 – Re-attendance, if necessary 2020-11-30 – Set action down <i>This is the only timetabling order made.</i>
2019-11-20 and 21	Examination of the plaintiff Vijay Sehgal was started but not completed (A83).
2019-12-04	Plaintiffs' continued examination scheduled for the following day was adjourned in part because counsel needed it to start ½ hour later than planned due to an unexpected court appearance and plaintiffs' counsel had booked an afternoon medical appointment for the same day (A218).
2019-12-09	Plaintiffs' counsel emailed defence counsel confirming the discussion among counsel that day, setting out March 2021 discovery dates that counsel had agreed upon (A110), subject to confirmation of client availability. Plaintiffs' counsel proposed a new timetable that would have the action set down by December 20, 2021 (A110).
2020-03-04	Plaintiffs' counsel sent an email trying to confirm that the examinations could proceed as scheduled (A84, A98). <i>Immediately after this, the pandemic intervened. I agree that because of the pandemic, it became impossible for the parties to comply with the timetabling order. However, except for a relatively brief period of time, the pandemic did not prevent the parties from completing discoveries by videoconference.</i>

Date	Document/Event
2021-03-08 to 10	Examination of the plaintiffs completed (A84).
2021-03-25	Email exchange indicating discoveries of the defendant were booked for May 3 through 6, 2021 (A116).
2021-04-30	Email from The Second Cup indicating its representative was not available for examination that week. Although the dates were booked subject to confirmation of availability of clients, The Second Cup did not respond earlier to say its representative was unavailable. Counsel for The Second Cup tried to deflect responsibility for this by blaming counsel for the plaintiffs for not following up (A113-A115, A119).
2021-05-06	Counsel met by Zoom and agreed to discovery dates in June 2021. Counsel had apparently agreed to a further Zoom meeting on May 17, 2021. <u>Plaintiffs proposed a new timetable that would have the action set down by May 20, 2023.</u>
2021-05-17	Counsel for the plaintiffs followed up by email asking defendants' counsel to "please send me the executed timetable."
2021-05-28	The Second Cup sends the plaintiffs an updated undertakings and refusals chart (B-1-47). <i>There is no evidence of further follow up for the undertakings. However, the undertakings were not answered until 2026.</i>
2021-05-31	The parties agree to June 2021 dates for discoveries of the defendants. Counsel for the plaintiffs again followed up for consents to the amended timetable.
2021-06-11	Plaintiffs' counsel again followed up seeking consent to the timetable so he could file it.
2021-06-14	Counsel for The Second Cup and for the landlord respond with wording changes for the timetable but appear to accept the dates set out in the timetable including the set-down deadline date of May 20, 2023. <i>There is apparently no further communication about this timetable, and no order is taken out.</i>

Date	Document/Event
2021-06-21	Examination of the defendant landlord completed (B-1-46).
2021-06-27	Email from plaintiffs' counsel advising discovery of Northwest being rescheduled "to a convenient date for all in August" (A124). <i>This was apparently to accommodate the vacation schedule of counsel for the defendant Northwest.</i>
2021-12-13	Email from plaintiffs' counsel indicating that examinations were set for January 24 to February 2, 2022 (A127).
2022-01-25	Examination of The Second Cup completed (B-1-46). It is not fully accurate to suggest that all discoveries were completed (B-1-539), because the defendant Bond was never examined. However, no further examinations were requested, and none have taken place.
2024-05-13	Plaintiffs' notice of change of lawyer and trial record. <i>The defendants say they heard nothing from the plaintiffs from the completion of examinations in January 2022 until receiving the trial record (B-1-539). The plaintiffs did not refute this.</i>
2025-02-12	The Second Cup serves motion to strike action from trial list.
2025-04-15	Triage court appearance and timetable set for exchange of motion materials.
2025-11-18	Second triage court appearance and timetable set for motion hearing.
2026-03-25	Motion hearing before me where the parties agreed that the motion would be adjourned to a joint status hearing / motion hearing.
2026-05-12	Final hearing of motion and status hearing.

[5] As the timeline shows, before January 2022, the pace of this litigation was extremely slow. That is, for seven years and four months the action progressed very slowly, with long delays between each step. The blame for the slow pace does not rest entirely with the plaintiff. At some points, defence counsel were slow to respond or did not respond. At some points, the availability of defence counsel was limited.

[6] Starting in January 2022, the action appears to have been fully dormant for approximately two years and four months. That is, from the defendant's perspective, there was no observable activity in this action from January 2022 until May 2024. During that time, the plaintiffs found a new lawyer and their new lawyer set the action down for trial almost immediately.

THE TEST AT A STATUS HEARING

[7] At a status hearing, the plaintiffs must "show cause why the action should not be dismissed for delay": r. 48.14(7) [emphasis added]. The jurisprudence on r. 48.14 provides guidance on what the plaintiffs must do to show cause. In *Faris v. Eftimovski*, 2013 ONCA 360, at paras. 32 to 33, Tulloch J.A. (as he then was) succinctly and authoritatively set out the test:

[T]he onus is on the plaintiff to demonstrate why the action should not be dismissed for delay. The test ... requires the plaintiff to demonstrate that there was an acceptable explanation for the delay and establish that, if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice. ... [T]he responsibility to move the action along lies chiefly with the plaintiff. Accordingly, the plaintiff also bears the consequences of conducting its action in a dilatory manner [citations omitted, emphasis added].

[8] Ultimately, the court must "balance the plaintiff's interest in having a hearing on the merits and the defendant's interest in having the matter resolved in an expedient and time-efficient manner": *Faris*, at para. 23.

[9] Additional governing principles are set out in detail by Raikes J. in 1682558 *Ontario Limited v. Salman*, 2019 ONSC 4120, at paras. 5 and 6. I will not recite these principles here but adopt them as part of these reasons.

THE RULE IN STOKKER

[10] The defendants rely on *Langenecker v. Sauvé*, 2011 ONCA 803, at para. 8, for the proposition that, “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” [emphasis added]. While that is the norm, the Court of Appeal has also held that there are cases where a portion of the delay has been addressed by an agreement or prior court order, in which case the focus should be on the delay that occurred after that time.

[11] In *Christie Corp. v. Lee*, [1999] O.J. No. 495, 29 CPC (4th) 181 (Ont. C.A.), the plaintiff started an action in 1991. He did not demand a defence. On January 29, 1997, the defendant consented to an amendment of the claim to increase the amount of damages. In January 1998, the defendant moved to dismiss the action for delay, and the motion judge granted the motion. The Court of Appeal held:

If it may be considered that there had been an unreasonable delay up to this time [January 1997], it was excused by the defendant when he consented to the amendment of the statement of claim. In our view, in these circumstances, at the earliest, the operative delay commenced on January 29, 1997. It follows, that the motions judge, in the exercise of his discretion, erred in principle in considering that the operative delay began when the action was commenced. [Emphasis added.]

The court held that in the circumstances of that case, the close of pleadings on April 1, 1997 was the starting point for the delay.

[12] In *Stokker v. Storoschuk*, 2018 ONCA 2, a master granted a motion under r. 48.11(b) to reinstate the action. The defendants appealed and a Superior Court judge allowed the appeal. In a further appeal, the Court of Appeal said:

[5] The appeal judge held that the master erred in applying the first leg of the test by not considering the overall delay from the inception of the litigation. In our view, the master was correct to

give focus to the period following the March 17, 2016 consent order and timetable. Where delay has been addressed in a prior court order, or consented to, it is any subsequent delay that requires explanation.

[6] For this reason, in *Christie Corp. v. Lee*, this court confined the relevant period of delay in a r. 24 motion to dismiss for delay to the period of delay that occurred after a consent amendment to the plaintiff's statement of claim. Prior delay was implicitly excused by the defendant when they consented to the amendment. The same principle applies to a motions under r. 48 to restore an action to the trial list.

[7] Thus, in *Gill v. Khindria*, it was held, correctly in our view, that in a r. 48.11 motion, the court should only consider delay subsequent to a consent order withdrawing a motion to dismiss.

[8] The master did not err, therefore, in focusing on the period after the r. 48.14(4) consent order was made. Indeed, in this case there was no delay subsequent to the order, as the appellant had met the imposed deadline of August 18, 2016. The master was therefore correct to reinstate the action to the trial list. [Emphasis added, citations omitted.]

[13] In *Gill v. Khindria*, 2016 ONSC 5057, which the Court of Appeal said was correctly decided, the plaintiff started the action in 2007. The defendant brought a motion to dismiss for delay in 2014. The parties settled that motion with a consent order removing one of two CPLs and no dismissal order. Trimble J. held that he should only consider delay subsequent to the consent order.

[14] This rule reflects the likelihood that if a defendant consents to an order that allows an action to proceed despite delay, there is no actual prejudice to its ability to defend the action at that point because of the delay. (*MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28, 124 O.R. (3d) 420, at para. 34, is an example of a

case where the court invoked this reasoning.) In fairness to defendants, however, there is often no bright line that delineates when non-compensable prejudice begins. Where a court orders or a defendant agrees that an action should proceed, but with conditions (such as a new timetable), it may be unfair to suggest that delay to that point becomes irrelevant in any subsequent delay analysis.

FOCUS OF ANALYSIS IN THIS CASE

[15] Applying *Stokker* in this case, I am required to “give focus” to the period after June 2021.

[16] In this case, pleadings were amended by way of a consent order in March 2017, two years and six months after the action was commenced. Ricchetti RSJ’s consent timetabling order was issued in April 2019, four years and 11 months after the action was commenced. Applying the rule described in *Stokker* is straightforward for these events. “The delay was addressed” by each of these consent orders.

[17] It is somewhat less straightforward to apply *Stokker* to a timetable the parties discussed in May and June 2021. At that time, the plaintiffs proposed a timetable under which the action would be set down by May 20, 2023 (B-1-467). Then-counsel for the plaintiffs followed up in several emails. On June 11 and 14, 2021, the defendants suggested a change to the wording of the timetable and asked that the order include a term that it could be varied by agreement among counsel (B-1-504). However, the defendants did not take issue with the proposed deadline dates in the timetable, including the proposed May 20, 2023 set-down date. The defendants’ aide memoire acknowledges that a new timetable was discussed and agreed upon in principle (B-1-539).

[18] Ms. Cerminara’s affidavits indicate that: (1) the plaintiffs never mentioned the timetable again after the May and June 2021 email exchange; and (2) no further timetabling order was obtained (B-1-110). These two assertions are not refuted, although the affidavit of Mr. Childs points out that plaintiffs’ counsel had sent follow up

emails on May 17, May 31, and June 11, 2021 (A78). In any event, the consent timetable in the order of Ricchetti RSJ was never adjusted.

[19] Did the May and June 2021 exchange of communication amount to an agreement that addressed the prior delay within the principle expressed in *Stokker*? In my view, it did. The parties agreed to the dates in a new timetable. No one suggested that the irremediable prejudice had occurred. The order was not taken out, and should have been, but there is no evidence that anyone followed up with plaintiffs' counsel to obtain the order, whereas plaintiffs' counsel had to follow up multiple times with defence counsel to obtain their comments. The parties were operating under the new timetable even though it was never formalized through a consent order. It follows that "the delay was addressed" by this agreement in June 2021. On this basis, under *Stokker*, I am required to "give focus" to the period following the agreement, that is, after June 2021.

THERE IS AN ACCEPTABLE EXPLANATION FOR THE DELAY

[20] What amounts to an "acceptable explanation for the delay" has been the subject of considerable jurisprudence. In *Super A Hotels Investment and Management Group (Canada) Inc. v. 1205723 Ontario Inc.*, 2020 ONSC 6785, at para. 23, Master McGraw summarized some of the jurisprudence:

Whether an explanation for delay is "acceptable" depends on the circumstances of each case. "Acceptable" does not mean that the explanation must be "good", only "adequate" or "passable" and "cogent" and the terms "acceptable", "satisfactory" and "reasonable" are interchangeable in this regard. The progress of an action does not have to be ideal and the court should not conduct a week by week or month by month analysis. A plaintiff may have to give a more a robust explanation to explain delay after five years than was the case after two years under the previous rule. [Citations omitted.]

[21] Under the June 2021 timetable, all steps would have been completed and the action set down for trial by May 20, 2023.

[22] As the timeline above shows, the last examination for discovery was completed in January 2022. The six-month delay from June 2021 to January 2022 was governed by the availability of all counsel, and was reasonable. The defendant Bond was never examined, but by later filing a trial record, the plaintiffs signalled that they do not intend to examine Bond.

[23] The plaintiffs filed a trial record on May 13, 2024. The record contains no evidence about any activity or developments in the action in the two-year and four-month period (28 months) between January 2022 and May 2024.

[24] The plaintiffs' undertakings were not answered until after the first hearing in the motion before me – that is, after March 2026. There is no evidence that, apart from providing an undertakings chart, the defendants ever followed up for the answers to the undertakings. Nevertheless, there is no explanation for the delay in answering the undertakings.

[25] The defendants submit that the failure to provide an affidavit from the plaintiffs' former lawyer is "conspicuous." They rely on *Ferreira v. Cardenas*, 2014 ONSC 7119, at para. 15, to say that the best evidence would be an affidavit from the former lawyer setting out an explanation for the delay. I agree that counsel often have the best personal knowledge about why an action may not have progressed for a period of time. However, for the period of time that is the focus of the analysis here, I doubt that is true because there was simply no exchange of communication among counsel. At the same time, the plaintiffs do not suggest, for instance, that they had difficulty communicating with their prior lawyer or had difficulty securing a new lawyer or securing answers to undertakings. I can infer that these tasks would have taken some time, but there is no specific explanation.

[26] The question of whether the plaintiffs have provided an adequate explanation for the delay in this case is a close call. I am particularly concerned by the absence of evidence about the events between January 2022 and May 2024. While not the focus of the analysis, it is not irrelevant that before then the proceeding was plagued with delay, much of which is attributable to the plaintiffs' inactivity. The pre-May 2021 history

provides a backdrop for the timeframe that is the focus. However, although concerned by the delays and the lack of explanation for some of the periods of delay, I am satisfied that the plaintiffs have provided an adequate explanation for the delay. In saying this, in addition to the foregoing discussion, I take note of the following factors:

- a. An important value of the justice system is that cases should be decided on their merits when possible. The competing value is that cases should be resolved in a timely and efficient manner. However, “the court’s bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds”: *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONSC 1803, at para. 31, aff’d 2010 ONCA 887, 104 O.R. (3d) 689, at para. 21.
- b. The period that is the focus of consideration, from June 2021 to the date the plaintiffs served their trial record (or even the date they answered their undertakings), is simply not that long relative to cases in the jurisprudence that have been dismissed at a status hearing.
- c. In *American Environmental Container v. Kennedy*, 2022 ONSC 1353, at para. 36, the Divisional Court held that it was wrong to “fixate unduly” on a 30-month period of unexplained delay. Rather, the status hearing judge must “step back and consider the full context and overall justice of the case.
- d. The evidence demonstrates that the plaintiffs have consistently intended to pursue this action. They sat for examinations in 2019 and 2021. They hired a new lawyer in 2024. They have filed a trial record and answered all their undertakings. These factors all suggest that the plaintiffs have not wavered in their wish to pursue this case over the last 12 years. This is not a case where the plaintiffs were waiting to see what might happen with parallel litigation or for waiting for reasons not connected to this case.
- e. Of course, the primary responsibility to advance an action lies with the plaintiff: *Wellwood v. Ontario (Provincial Police)* 2010 ONCA 386, 102

O.R. (3d) 555, at para. 48. At the same time, all parties have an obligation to move an action along: *Hamilton* (ONCA), at para. 27; *Carioca's Import & Export Inc. v. Canadian Pacific Railway Ltd.*, 2015 ONCA 592, 128 O.R. (3d) 143, at para. 53. Between June 2021 and May 2024, the defendants did not take any steps either. I do not suggest they were obligated to do so, but in the face of inaction, their current indignation at the delay is unpersuasive. This is not a case where plaintiffs' counsel ignored communications from defence counsel.

- f. An important consideration is that the plaintiffs are now ready for trial: *Carioca*, at para. 51.

[27] I acknowledge that these six factors do not explain the 28 months of apparent inactivity, but under the jurisprudence, they do inform the analysis.

THERE IS NO NON-COMPENSABLE PREJUDICE

[28] As already observed, the test on a status hearing requires the plaintiffs to demonstrate that, if the action is allowed to proceed, the defendant will suffer no non-compensable prejudice.

[29] Long delays create a risk that a fair trial will not be possible. As a result, "inordinate delay generates a presumption of prejudice": *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1, at para. 28. Per Doherty J.A., in *Langenecker v. Sauvé*, 2011 ONCA 803, at para. 11:

Prejudice is inherent in long delays. Memories fade and fail, witnesses become unavailable, and documents and other potential exhibits are lost. The longer the delay, the stronger the inference of prejudice to the defence case flowing from that delay.

[30] However, "[t]he mere passage of time cannot be an insurmountable hurdle in determining prejudice, otherwise timelines would become inflexible and explanations futile": *Carioca*, at para. 49. "The prejudice at issue is to the respondent's ability to

defend the action as a result of the appellant's delay, not as a result of the sheer passage of time”: *Carioca*, at para. 57; *MDM Plastics*, at paras. 25 and 33.

[31] On the issue of prejudice, The Second Cup relies on an affidavit of Janice Ceita dated April 30, 2026. Ms. Ceita is an assistant to Mr. Roher. Ms. Ceita indicates that the assets of The Second Cup were sold on April 26, 2021. She does not provide any information to indicate how this might prejudice the defendants, but I am asked to infer that the loss of institutional knowledge that would be expected to go along with such an asset sale is likely prejudicial.

[32] Based on information and belief from Mr. Roher, Ms. Ceita identifies 13 former employees of Second Cup who “were, to varying degrees, involved in the events in issue in this action and therefore, would be possible witnesses at trial” (B-1-566). She states that each of their names “appear more than once” in the schedule A productions of The Second Cup, and none of them are currently employed with the defendant. Of those thirteen persons, two were contacted and indicated they may not remember much. One of the thirteen, Wayne Vanderhorst (Vice President of Franchise Develop at the relevant time) died on March 20, 2024. Ms. Ceita details how many times Mr. Vanderhorst’s name is mentioned in the documents. However, Ms. Ceita does not articulate any specific information that Mr. Vanderhorst might have been able to provide. Indeed, the evidence does not contain details of any relevant specifics that these 13 people might have provided, but I am asked to I infer that with so many mentions of these names in the documents, they likely could have provided relevant information. I am not prepared to make that leap.

[33] The defendant landlord relies on an affidavit of Domenic Gesualdi dated April 27, 2026. Mr. Gesualdi points out that the some of relevant circumstances are ancient. The representations that form the basis of the claim here reach back to 2006 and 2007 when the landlord was marketing space for lease in the plaza. Mr. Gesualdi indicates that his 50% partner in the project, Pat Pillitteri, died in July 2017. Mr. Gesualdi says that Mr. Pillitteri was “an active hands-on partner and a key person involved in all discussions regarding the development and leasing of the shopping plaza” (B-2-45). The plaintiffs respond, correctly, that Mr. Pillitteri’s death in 2017 pre-dates the court

ordered timeline. It also pre-dates a realistic earliest possible trial date. His death does not represent prejudice due to delay by the plaintiffs in advancing the action. The plaintiff Vijay Sehgal also states that he had no dealing whatsoever directly with Mr. Pillitteri.

[34] Secondly, Mr. Gesualdi also states that Dennis Owen “was responsible for all matters related to the rent and finances of the shopping plaza, including requests for rent relief – which the Plaintiffs claim was improperly denied by the Landlord.” Mr. Owen died in November 2024. Mr. Sehgal acknowledges that Mr. Owen collected rent cheques but denies having any communications with him regarding rent relief.

[35] Thirdly, Mr. Gesualdi says that the landlord’s senior property manager, Jack Balkhiyan, left the landlord’s employment in 2016 and may be difficult to locate. However, Mr. Gesualdi does not describe any specific information that Mr. Balkhiyan might provide and does not even state that efforts to locate him have been unsuccessful.

[36] Indeed, there is no evidence that anyone interviewed any of these people at the outset of this action with regard to the issues raised. On the evidence before me, some of which is contested, I am unable to find actual prejudice. The trial judge will be in a better position to assess the value of any lost evidence. Trial judges’ evaluation of facts almost always includes a consideration of a party’s ability or inability to bring forward evidence that bears on the issues. Where a witness who might have had evidence that is helpful one a party is dead, or does not recall something because of the passage of time, it does not follow that the trial judge will hold that lack of evidence against the party whose case the witness’s evidence might have benefited. On the available record, there is no specific or adequate basis to think the trial judge will be unable to achieve a just result on the merits.

[37] Finally, there is little evidence in the record that the defendants have displayed any urgency to advance this case to trial. A lack of display of any sense of urgency on the part of defendants will undercut a claim of actual prejudice: *Aguas v. Rivard Estate*, 2011 ONCA 494, at para. 19.

[38] On the record available to me, the plaintiffs have shown that the defendants have not suffered non-compensable prejudice.

RESULT

[39] At the conclusion of the hearing on May 12, 2026, there was apparent consensus among counsel that my endorsement simply needed to indicate whether the proceeding was dismissed or not dismissed, and if not dismissed the parties will have to proceed to organize the pre-trial and trial dates. The action is not dismissed.

[40] If the parties cannot agree on costs, they shall deliver written costs submissions consisting of not more than three pages in length plus any offers to settle or dockets. The plaintiffs shall deliver their submissions by October 22, 2026. The defendants shall deliver their submissions by November 10, 2026.