IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kyle v. Zimmer,*
2024 BCSC 500

Date: 20240327
Docket: S54648
Registry: Vernon

Between:

Stuart James Kyle

Plaintiff

And

**Shelley Zimmer, Leila Vincent, Royal LePage Kelowna,
Travis Janes, Murray Klingbeil**

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	T.M. Young
Counsel for the Defendants, Shelley Zimmer and Leila Vincent:	M. Sidhu
No other appearances	
Place and Date of Hearing:	Kelowna, B.C. February 28, 2024
Place and Date of Judgment:	Kelowna, B.C. March 27, 2024

[1] This is an application brought by the defendants Shelley Zimmer and Leila Vincent to dismiss the plaintiff's claim for want of prosecution. The other defendants took no role in the application and I will therefore refer to the applicants as the "defendants".

Background

[2] This claim arises out of the plaintiff's purchase from the defendants of a residential property located in Kelowna. The plaintiff's claim is that the defendants misrepresented the property by way of an untrue vendor disclosure statement regarding known moisture, water problems and latent defects. The plaintiff asserts fraudulent or negligent misrepresentation and breach of contract.

[3] The chronology of events leading to this application is as follows:

- February 2016: plaintiff buys the property
- March 2016: the alleged problem is discovered
- March 2016 and following months: plaintiff remediates the problems
- October 4, 2016: plaintiff sells the property
- January 18, 2018: plaintiff files his notice of civil claim
- January 15, 2019: plaintiff renews his notice of civil claim for a period of six months
- January to March 2019: plaintiff serves the other defendants and they file responses to civil claim
- May 28, 2019: plaintiff serves Ms. Zimmer with a notice of civil claim
- June 18, 2019: Ms. Zimmer files a response to civil claim
- July 23, 2019: plaintiff's counsel files a notice of intention to withdraw, at which time plaintiff decides to represent himself

- June 2020: plaintiff's counsel formally withdraws

- September 29, 2022: the defendants apply to dismiss the claim for want of prosecution

- October 2022: plaintiff files a response to application to dismiss for want of prosecution, along with his Affidavit No. 1

- November 7, 2022: defendants' counsel adjourns the application to dismiss for want of prosecution generally on terms which are set out in a letter that provides as follows:

    1. The List of Documents of Plaintiff is to served on the parties within 45 days;
    2. Examinations for Discovery are to occur within six months; and
    3. The Notice of Trial is to be filed by the Plaintiff within 1 year.

- December 2022: a revised version of the consent order is provided to the plaintiff by counsel for the defendants which is endorsed and returned to defendants' counsel for filing

- January 23, 2023: consent order is entered ("Consent Order") and includes the following terms:

    1. The Plaintiff's List of Documents is to be provided to the parties by December 22, 2022.
    2. Examinations for Discovery of the Plaintiff and Defendants, Shelley Zimmer and Leila Vincent, are to occur by May 7, 2023; and
    3. The Notice of Trial must be filed by November 7, 2023.

- January 4, 2024: this application, which is the second notice of application to dismiss for want of prosecution, is filed.

[4] It is common ground that notwithstanding the terms of the Consent Order, the plaintiff has not prepared a list of documents, scheduled any examinations for discovery, nor filed a notice of trial.

[5] The applicant Ms. Vincent is the daughter of the other applicant, Ms. Zimmer. Ms. Vincent has not filed a response to civil claim, nor is there any evidence that she was ever actually served with the notice of civil claim.

Legal Framework

[6] An application to dismiss a claim for want of prosecution is brought pursuant to Rule 22-7(7) of the *Supreme Court Civil Rules*:

> (7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[7] The test to be applied on such applications was considered and revised by a five-member panel of the British Columbia Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*]. Prior to *Giacomini*, the long-standing test to dismiss a claim for want of prosecution was:

a) has there been inordinate delay;

b) is the delay inexcusable; and

c) has the delay caused or is it likely to cause, serious prejudice to the defendant: see e.g. *Wiegert v. Rogers,* 2019 BCCA 334 at para. 31.

[8] Even if all of the conditions were established, it would not necessarily follow that the claim would be dismissed because the court retained a residual discretion to decide whether or not the interests of justice demanded a dismissal.

[9] The Court of Appeal critiqued the previous test from paras. 51–58 of *Giacomini,* observing that prejudice to the defendant had been overemphasized as a factor in the jurisprudence. The effect was allowing ongoing inordinate and inexcusable delay so long as the delay did not result in a risk of serious prejudice to the defendant's ability to defend the action: para. 52. This reality contributed to a "culture of complacency" towards delay in the justice system: para. 53.

[10] With reference to the often-cited decision in *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52, the Court noted that the generally accepted test when considering the interests of justice was that a claim would generally not be dismissed if a fair trial was still possible notwithstanding delay. As such, the previous test focused unduly on litigation prejudice:

> [57] . . . However, the reality is that litigation frequently, perhaps invariably, negatively impacts the personal, professional, or business interests of defendants. Undue delay in the resolution of litigation prolongs, and may exacerbate, such negative impacts.

[11] The Court went on to determine that a new test ought to be applied, which starts with two questions:

a) First, has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?

b) Second, is the delay inexcusable?

[12] Only if both of those questions are answered in the affirmative does the analysis move to the third step. The third and final question is “is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?": paras. 69–70.

[13] As to the factors to be considered under the third part of the test, at para. 71 of *Giacomini,* the Court adopted the non-exhaustive factors set out by the Saskatchewan Court of Appeal in *International Capital Corp. v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45. Those factors are as follows:

a) the prejudice the defendant will suffer defending the case at trial;

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 occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed;

f) the reasons offered for the delay;

g) the role of counsel in causing delay; and

h) the public interest in having cases that are of genuine public importance heard on their merits.

[14] Finally, the Court added a ninth factor, which is the merits of the plaintiff's claim: para. 71.

Discussion

[15] I will now review the circumstances of this case with regard to the test as outlined in *Giacomini*.

1. Has there been inordinate delay?

[16] The first question is whether there has been inordinate delay in the matter.

[17] The notice of civil claim was filed in January 2018, over six years ago. The plaintiff has not taken steps to move the matter forward. As such, if the claim is allowed to proceed, it essentially remains at the very beginning of the litigation process.

[18] While not formally admitting that the delay has been inordinate, the plaintiff concedes that this is not a live issue in the circumstances.

2. Is the plaintiff's delay inexcusable?

[19] The focus of this application is therefore whether the plaintiff's delay is inexcusable. Only if it is found to be inexcusable is it necessary to go on to consider whether it is nonetheless in the interests of justice to allow the claim to proceed.

[20] The plaintiff's explanation for the delay is set out in his Affidavit No. 2 filed on February 9, 2024. He filed the affidavit in response to this application and upon having retained counsel. The plaintiff identifies two main reasons for his delay:

a) his reliance on his initial lawyer who was retained to bring the claim on his behalf; and

b) his misunderstanding of the procedural requirements for a Supreme Court proceeding.

[21] I will start with the former. The plaintiff's former lawyer, Mr. Schaefer, practises in Vernon. The plaintiff deposes that following his discovery of the alleged mould issue that gives rise to the claim, he had discussions with Mr. Schaefer wherein they agreed to an exchange of services. The plaintiff would provide plumbing materials and services (the plaintiff has a plumbing business) and Mr. Schaefer would represent him in this action.

[22] According to the plaintiff, he received little if any communication from his former counsel. He was not aware of the identity of the associate at Mr. Schaefer's firm who was on record for him and had filed the notice of civil claim—and subsequently renewed it by way of court application—until he saw the associate's notice of intention to withdraw as counsel. He says he has only been able to piece together the history of the matter from his review of the court file and that his efforts to contact former counsel at the time went unanswered.

[23] The plaintiff says that he thereafter decided to represent himself. As such, to the extent that blame may be laid at the feet of former counsel, it would be explanatory until only just after his former counsel filed notice of intention to withdraw in July 2019, even though former counsel did not formally withdraw until the following year.

[24] Because the plaintiff has only recently retained his new counsel, she has not been able to secure a copy of former counsel's file. While the reasons for former counsel's withdrawal may not be relevant and in many cases may not be properly

before the court, where the suggestion is that former counsel failed to take steps to advance the claim it is common to include some evidence of what unfolded. In some cases, one sees *mea culpa* evidence from the solicitor. In other cases, there is at least some particularized evidence, such as emails or letters, where the plaintiff is vainly attempting to contact counsel.

[25] Here there is no such evidence. As such, it is not apparent on the face of the record as to what former counsel was actually retained to do, beyond the plaintiff's own evidence that the defendants are not in a position to contradict. It is possible that former counsel withdrew for reasons that could be the responsibility of the plaintiff, such as a failure to provide instructions, for example.

[26] While better evidence with regard to the inactivity of former counsel might be helpful, I find that it is not determinative here. The time that elapsed between the filing of the notice of civil claim in January 2018 and the lawyer's withdrawal of services in July 2019 is—in the overall scheme of things in this case—a period of relatively insignificant duration. It represents approximately only one-quarter of the elapsed time since the filing of the notice of civil claim.

[27] Thereafter, the plaintiff did not further advance his claim until the defendants filed the first notice of application to dismiss for want of prosecution on September 29, 2022. This apparently had the effect of nudging the plaintiff to action because he filed a response to the application and a substantive affidavit.

[28] Following a conversation, counsel for the defendants sent a letter to the plaintiff, as noted above, with a version of the Consent Order attached. I refer to a "version of the Consent Order" because it is apparent that the Consent Order that was actually entered on January 27, 2023, required amendment before it could be accepted for filing. The same is evidenced by subsequent communications from defence counsel's office.

[29] Aside from the Consent Order discussion, there were other email communications between the plaintiff—or someone from the plaintiff's office—and counsel for the defendants.

[30] On the plaintiff's evidence, it appears that he was assuming that others, whether counsel for the defendants or the court registry, would be doing things to move the matter forward and that he was waiting to hear from them.

[31] On December 15, 2022, the plaintiff wrote to Ms. Hoyte, a legal assistant with counsel for the defendant. The email reads as follows:

> This case has not been moved to Kelowna? We are trying to set a trial date.
>
> Please advise. Thank you.

[32] Ms. Hoyte responded promptly thereafter as follows:

> The case itself has not moved to Kelowna, only our application was to be heard in Kelowna.
>
> I believe we may be able to transfer the proceeding to Kelowna by way of consent of all parties. I'll have a chat with Terry [Mr. McCaffery, counsel for the defendants] about that shortly.

[33] On December 21, 2022, Ms. Hoyte forwarded what appears to have been a new version of the Consent Order, presumably the one that was ultimately accepted for filing:

> Can you please sign the attached consent order and return it to my via email as soon as possible?

[34] The plaintiff responded promptly on same date:

> Please see the attached. Thanks!

[35] On January 9, 2023, the plaintiff's assistant sent the following email to Ms. Hoyte:

> This is Christy [Ms. Lee, who works for the plaintiff's business], has there been any update on moving the case to Kelowna?

[36] Ms. Hoyte responded on January 12, 2023:

> I don't have any instructions from Terry in this regard, it was only our court application that was to be heard in Kelowna.

[37] The plaintiff replied on the same day:

> I thought that you were going to talk to Terry following the email on December 15th? We are trying to schedule a court date.

[38] On January 27, 2023, counsel for the defendants forwarded the filed Consent Order by way of email letter to the other parties, including the plaintiff. The letter reads as follows:

> Enclosed herewith for service upon you is the Consent Order, filed on January 27, 2023.
>
> We trust you find this to be in order.

[39] Counsel for the defendants also wrote to the plaintiff on the same day as follows:

> We write further to your emails of January 12, 2023. Please be advised that the Defendants, Shelley Zimmer and Leila Vincent, consent to the transfer of the within Court file from Vernon to Kelowna.
>
> We look forward to receipt of the requisite documents for signing in regards to same.

[40] The plaintiff's explanation for the lack of activity following the first notice of application is set out in his affidavit. At para. 41, the plaintiff deposes that he signed the Consent Order on December 21, 2022, at the request of Ms. Hoyte. He further deposes:

> [41] . . . I did not seek legal advice before I signed the Consent Order. I did not understand that Ms. Hoyte was acting on behalf of the Vendors' lawyer and that I did not have to consent to the proposed terms. I understood that the parties were cooperating in order to get a trial date.
>
> . . .
>
> [43] I did what I understood the Consent Order required of me at the time. In particular:
>
> a) I understood the Consent Order related to the First Application.

b) When I sent the defendants my application response to the First Application and my affidavit in support, I thought I had complied with the requirement that I provide a “List of Documents”.

c) I did not know what examinations for discovery were; and I did not take any steps in this respect. I do not recall any discussions with any of the defendants about scheduling examinations for discovery. To the best of my knowledge, they have never discussed this step with me.

d) I expected the court registry to unilaterally set a trial date and contact me once they set that date.

e) I understood that the Consent Order did not require me to take any steps other than to appear in court on the date set by the court registry.

[41] I do not accept the plaintiff's explanation as to why he consented to the proposed terms. He had already consented to the same substantive terms back in November following his conversation with counsel for the defendants at the time the first application was adjourned. The only purpose of the version of the Consent Order forwarded by Ms. Hoyte on December 21, 2022 was to replace the previous version.

[42] As for the scheduling of a trial date, the plaintiff deposes that he commenced a small claims proceeding in 2021 and that the registry contacted him to advise of trial dates. He was not aware until very recently that the same process did not apply in Supreme Court. As such, he was waiting for the registry to advise of the trial date. However, in correspondence to the plaintiff accompanying the first draft of the Consent Order, counsel for the defendants referred to the plaintiff filing the notice of trial, even though the Consent Order did not assign the task to any party.

[43] Counsel for the plaintiff points to the fact opposing counsel did not advise the plaintiff that they were acting only for the defendants and that the plaintiff should obtain his own legal advice. However, counsel for the defendants took notes of his telephone conversation with the plaintiff that led to the adjournment of the first application and the terms of the Consent Order. From these notes, it appears that the plaintiff indicated that he would speak to his family lawyer. Accepting counsel’s

note, it was readily apparent to the plaintiff that he should get legal advice and that he intended to do so.

[44] It would have been better had defence counsel made express reference to the plaintiff obtaining independent legal advice in their correspondence. However, from the correspondence tendered, it is evident that the plaintiff knew that counsel for the defendants was not acting on his behalf.

[45] I turn now to the terms of the Consent Order.

[46] The plaintiff says that he believed that he had complied with the requirement for documents because he had included his documents in his Affidavit No. 1. With respect, it is difficult to accept this explanation. Defence counsel required the Consent Order in order to adjourn the first application. The first requirement outlined in the Consent Order was that the plaintiff prepare a list of documents. It would therefore be readily apparent that the plaintiff's Affidavit No. 1, which he had filed a couple of weeks earlier, was insufficient, even if he did not know precisely what was required of him.

[47] I also accept that the plaintiff may not have known what documents might be required to transfer the file from Vernon to Kelowna for trial, and that he may have expected that the defendants were working with him to effect the transfer. However, there is no evidence that he took steps to set a trial. If he had attempted to schedule a trial in Kelowna for a Vernon action, the registry would have rejected the request and the requisite notice of trial. However, there is no evidence of the registry rejecting a notice of trial because the plaintiff did not seek to file one.

[48] There is no evidence on this application that the plaintiff could not access counsel nor afford legal services. He hired a lawyer to prepare his small claims action in 2021, and he advised counsel for the defendants that he would speak to his family lawyer. Presumably, the plaintiff has access to lawyers and knows how to retain lawyers. He did not suggest that he has insufficient funds to retain a lawyer.

While self-represented litigants are often given considerable latitude, they are nonetheless required to comply with rules and orders.

[49] I conclude that the delay in this matter is inexcusable.

[50] I will now consider the third aspect of the test, whether the interests of justice require for the action to proceed. This requires consideration of the nine non-exhaustive factors.

3. Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

a) The risk of or actual prejudice to the defendant

[51] There is no evidence to suggest that the defendants will be unable to defend the proceeding, other than the general concerns about the passage of time, such as fading memories of events and a hypothetical concern about locating evidence.

[52] The defendants referred to an inability to access the property to conduct their own inspection and the remedial work that was undertaken roughly three years before the notice of civil claim was served on the defendants. However, it is unlikely that access to the property would have either been granted, given its subsequent transfer, or would have been helpful, given the passage of time. Put another way, this particular concern of the defendants, while valid, would have existed regardless of any delay. I find that a risk of or actual prejudice to the defendant does not play a substantial role in the interests of justice analysis here.

b) The length of the delay

[53] The notice of civil claim was filed six years ago and I have already concluded that is an inordinate delay. I further note that this is not a particularly complicated case from a legal perspective, save for factual disputes. Therefore, I find the length of the delay here does not suggest that it is in the interests of justice for the matter to proceed.

c) The stage of the litigation

[54] The litigation is in its infancy and therefore is not particularly close to conclusion.

[55] If the claim were at a more advanced stage, this factor would tend to push towards the interests of justice allowing the matter to proceed. This is a neutral factor in the interests of justice analysis.

d) The impact of the delay on the defendant's professional, business or personal interests

[56] The parties agree that there are no professional or business interests at stake in the matter. However, although the claim filed by the plaintiff against the defendants does not touch upon any professional or business interests, the claim does include a claim for fraudulent misrepresentation. The plaintiff seeks relief in the notice of civil claim for the following:

> 1. The Plaintiff claims against the Vendors for:
>
> (a) Damages for fraudulent misrepresentation or, in the alternative negligent misrepresentation;
>
> (b) Damages for fraudulent breach of contract or, in the alternative, breach of contract.

[57] In the legal basis section of the notice of civil claim, the plaintiff alleges the following:

> 2. At all material times the Vendors owed duties in tort and in contract to the Plaintiff to make full disclosure of the Property Defect and not to conceal or misrepresent their knowledge or information with respect to the Property Defect. The Property Defect was a latent defect which affected the habitability of the Property.
> 3. The Vendors made the Vendors Disclosure Statement Representations and the Vendors Water Damage Representations to the Plaintiff. These representations were false. The Vendors knew when they made the representations that the representations were false. The Plaintiff was induced to enter into the Contract of Purchase and Sale and to complete the Contract of Purchase and Sale by the false representations.

[58] The plaintiff's allegations against the defendants are serious ones that carry a risk to their reputations. This factor weighs in favour of allowing the defendants' application for want of prosecution.

e) The context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed

[59] This factor is a relevant consideration because the Consent Order was a resolution by consent to the defendants' previous application to dismiss for want of prosecution. The steps enumerated in the Consent Order represented a compromise and provided the plaintiff with a further opportunity to move his case forward, notwithstanding that there had already been a period of significant delay.

[60] The Court in *Giacomini* discussed the role of the defendant and the steps in the litigation:

> [76] Third, it should not be forgotten that there are avenues available to defendants concerned about the pace of litigation, including setting timelines for pre-trial steps through the terms of a case plan order. Put simply, the plaintiff's delay does not tie the hands of a defendant who is motivated to bring the case to its conclusion. There 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. However, 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.

[61] The defendants have not been passive in this litigation. They brought the first application and entered into the Consent Order in an apparent attempt to move the litigation forward. While the Court in *Giacomini* refers to the possibility of a case plan order that sets timelines for pretrial steps if the defendant is concerned about the pace of litigation, I am satisfied that the Consent Order in this case contains the various types of provisions that a case plan order might be expected to include. This factor weighs in favour of allowing the defendants' application for want of prosecution.

g) The reasons offered for the delay and the role of counsel in causing delay

[62] I have already addressed these issues in my consideration of whether the delay is inexcusable. I accept that some delay that resulted from inaction on the part of former counsel could be characterized as excusable and I recognize that processes were generally slower during the COVID pandemic.

[63] However, the fact that I have already concluded that the delay is inexcusable means that these factors do not militate in favour of the plaintiff. The plaintiff is a businessperson with access to lawyers, and he is not impecunious. Therefore, it is not in the interests of justice for the plaintiff's claim to proceed on this ground.

h) The public interest in having cases that are of genuine public importance heard on their merits

[64] This case involves the plaintiff seeking to recover expenses he incurred in remediating a home he purchased. It is a private dispute. The plaintiff resold the property some months later. Therefore, it is not a case of public importance, and is a claim for financial compensation. This factor does not assist the plaintiff.

i) Merits of the action

[65] Generally speaking, the interests of justice are served by having matters determined on their merits. As the Court said in *Giacomini*:

> [75] . . . An application will succeed only if the court is persuaded that the interests of justice justify depriving the plaintiff of their presumptive entitlement to an adjudication on the merits.

[66] While this is a factor to be considered, it is not a significant consideration in this case. This is not a novel type of claim but rather fits within a well-established category of claim in British Columbia, namely the failure to disclose or concealing of a latent defect on a contract of purchase and sale of real estate. It is not clear that the case lacks merit at this stage of the litigation.

[67] As for the magnitude of the plaintiff's claim, he attached two invoices to his first affidavit that form a part of his claim. Together, they total a little under $40,000.

The larger of the two invoices was issued by a company owned by the plaintiff. I am advised that there are likely other expenses but that the plaintiff's file has not yet been retrieved from former counsel. This is a neutral factor in the interests of justice analysis.

j) Conclusion on the factors

[68] In establishing the new test for want of prosecution, the Court of Appeal confirmed that the court needs to consider the interests of justice as a "more nuanced balancing of the competing considerations of the interests of the defendants, and the justice system as a whole": *Giacomini* at para. 75.

[69] Per *Giacomini,* the court is required to consider all of the various factors in determining whether it is in the interests of justice to dismiss the claim or to allow it to proceed to trial. The allegations made by the plaintiff are serious because they include fraud, even if the amounts in issue may not be significant. I am satisfied that the defendants afforded the plaintiff an opportunity to get the claim back on track following the previous application to dismiss for want of prosecution. They did so by entering into the Consent Order and without proceeding to court following the filing of the first application.

[70] From my review of *Giacomini*, the Court of Appeal was concerned about an overemphasis on litigation prejudice and the ability for the defendants to have a fair trial, as opposed to looking at a broader array of circumstances. The Court stated the following:

> [72] Under this framework of analysis, the prejudice to the defendant's ability to defend the action remains a relevant, and indeed important consideration. However, prejudice to the defendant is not a pre-requisite to an order dismissing a claim for want of prosecution. At the interests of justice stage, the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.

[71] The Court commented that dismissing a matter for want of prosecution should no longer be perceived as a 'draconian' remedy. After confirming that the analysis

regarding the interests of justice only applies once there has been inordinate and inexcusable delay, the Court of Appeal said the following:

> [74] . . . Undue litigation delay undermines public confidence in the justice system, and should not be countenanced. Generally speaking, a plaintiff who has filed a civil claim should be expected to get on with it. If, having regard to the circumstances, it is not in the interests of justice to allow an action characterized by such delay to continue, then the remedy of dismissal is not excessively harsh or punitive. Rather, it is justified.

[72] The plaintiff has had every opportunity to advance his claim—in which he makes serious allegations of fraud—against the defendants. They have been subject to this outstanding litigation now for six years and the case is no closer to a resolution now than it was on the day it was filed.

[73] The plaintiff was obligated to advance his case and the defendants provided him with a further opportunity to do so following the filing of the first application from which the Consent Order emerged. Even if the first application to dismiss had proceeded to hearing before the court, the plaintiff may well have been looking at a similar order. There is nothing unusual or concerning about the terms of the Consent Order. I do not agree that it had the effect of encouraging further delay. Rather, it represents the defendants' wish to move forward.

[74] Given the plaintiff's inaction and the passage of time, the defendants are entitled to have the matter concluded and to be relieved of the burden of being subject to outstanding litigation. I conclude that dismissing the claim is not contrary to the interests of justice in all of the circumstances.

Disposition

[75] The defendants' application is granted and the claim is dismissed as against these defendants.

"Wilson J."