SUPREME COURT OF NOVA SCOTIA
Citation: *O'Connell v. Farr*, 2015 NSSC 85

Date: 2015-02-18
Docket: Hfx. No. 297703
Registry: Halifax

Between:

Heather Jane O'Connell

Plaintiff

v.

Constance Farr, Chelsea Farr and Anton Lorde

Defendants

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: February 11th, 2015, in Halifax, Nova Scotia

Oral Decision: February 18th, 2015

Written Release: March 24th, 2015

Counsel: Jason T. Cooke, for the Plaintiff, Heather Jane O'Connell
Franco Tarulli, for the Defendants, Constance Farr and Chelsea Farr
Shelley A. Wood and Nathan Sutherland, for the Defendant, Anton Lorde

By the Court:

[1] The Plaintiff in this action, Heather O'Connell, has brought a motion for an order setting aside the dismissal of the action and allowing for the renewal of the Originating Notice (Action) and Statement of Claim. She relies on the inherent jurisdiction of the court to set aside the dismissal of the action and Civil Procedure Rule 4.04(5)(b) as authority for the renewal.

FACTS

[2] This action relates to a four-vehicle collision that is said to have occurred on Main Street in Dartmouth, Nova Scotia, on June 20th, 2005. According to the pleadings, the Plaintiff was stopped behind other vehicles at a red light. The Defendant, Lorde, is alleged to have been stopped behind the Plaintiff when he was rear-ended by the Defendant, Chelsea Farr. The force of that collision allegedly caused the Lorde vehicle to collide, in turn, with the Plaintiff's vehicle.

[3] The Plaintiff suggests that she suffered numerous injuries as a result of the accident for which she continues to receive treatment.

[4] In April of 2008, the Plaintiff retained Mr. David Richey to represent her in relation to the collision. On June 19th, 2008, Mr. Richey filed an Originating Notice (Action) and Statement of Claim naming Constance Farr, Chelsea Farr and Anton Lorde as Defendants. By letter of the same date, Mr. Richey forwarded a copy of the originating documents to the insurers of the Farr vehicle. He did not serve any of the Defendants personally with the pleadings, nor did he send a copy of the documents or give any notice to Mr. Lorde's insurers.

[5] The Plaintiff's action expired without being served. On July 28th, 2009, the Plaintiff's solicitor brought an *ex parte* motion pursuant to Civil Procedure Rule 4.04 to renew the Originating Notice (Action) and Statement of Claim. An Order was issued the following day, renewing the Originating Notice until June 20th, 2010. No attempts were made to serve either of the Defendants after this Order was issued.

[6] On June 25th, 2013, the Prothonotary forwarded an Appearance Day notice to the Plaintiff's solicitor seeking to have the action dismissed pursuant to Civil Procedure Rule 4.22. The matter was returnable at Appearance Day on August 16th, 2013. On August 15th, 2013, the Plaintiff's solicitor wrote to the court indicating that a dismissal would work a substantial injustice to the Plaintiff and that he was prepared to abide by any direction given by the court. At Appearance Day the following day, the court noted that the action had expired without being served. The Plaintiff's solicitor was directed to file a motion to renew the Originating Notice (Action) and Statement of Claim by September 30th, 2013 upon notice to both of the Defendants. The matter was docketed to return to Appearance Day on January 17th, 2014 for a status report.

[7] Despite Mr. Richey's indication that he was prepared to abide by the direction of the court, he failed to bring a motion to renew.

[8] On January 16th, 2014 (the day before the matter was to return for a status report), Mr. Richey wrote to the court saying that he was "swamped with other deadlines" and asked that the matter be adjourned to February 14th, 2014. The adjournment request was granted.

[9] On February 13th, 2014, Mr. Richey wrote to the court requesting an extension of time for filing the renewal motion. He apologized for his delay, said (again) that to have the matter dismissed would work a substantial injustice to the Plaintiff and indicated (again) that he was prepared to abide by any direction from the court.

[10] The matter came before Justice M. Heather Robertson in Appearance Day on February 14th, 2014. A transcript of that appearance is before me. Mr. Richey attended on behalf of the Plaintiff and Mr. Tarulli appeared on behalf of the Farr Defendants. It is unclear how Mr. Tarulli became aware of the proceeding that day. It does not appear that he was provided notice by Mr. Richey or the court (no defence having been filed.)

[11] It appears from the transcript of the proceeding that the learned judge sitting in Appearance Day initially thought that Mr. Richey was appearing on his own motion (presumably to extend the time for the bringing of a motion to renew the Originating Notice.) Mr. Tarulli clarified that the matter was before the court on a Motion to Dismiss brought by the Prothonotary. He encouraged the Court to dismiss the matter. Justice Robertson was clearly concerned about proceeding with a Motion to Dismiss in these circumstances. She stated:

> **The Court:** … this is a five minute matter that I'm supposed to reflect on today and I thought that Mr. Richey was here just saying look please forebear; I've had health issues and there's circumstances in my life. I've got these trials; I'll get them over with and I promise I'll attend to this in the next 90 days. And I would say alright Mr. Richey but you're coming to the end of the line here because the Court has extended you those 90 days many times. But now since you're here you're really arguing the case and –
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> **Mr. Tarulli:** I guess I'm supporting the Motion to Dismiss.

> **The Court:** Well, I guess I want some robust briefs and that kind of stuff and I don't have that now. So I mean – I would prefer to know that Mr. Richey was giving his drop dead undertaking that he'll look after this in the next 90 days.
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> **Mr. Richey:** I'm prepared to give that undertaking, My Lady.
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> **Mr. Tarulli:** So then might there be –
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> **Mr. Richey:** And I have more to say, My Lady, if you're going to give any consideration to –
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> **The Court:** No, **well I'm just not prepared to argue the whole – the merits of whether this be dismissed or not**. I mean, you would be, I suppose, free to make a motion and present briefs to the Court and such to say that this is a severe prejudice to my client and the matter should just be dismissed. You shouldn't be allowed to serve the documents.
>
> **Mr. Richey:** My Lady, that opportunity arises when the motion is brought. The motion is being brought on notice to the defence – that's the time to argue these issues.….
>
> [Emphasis added]

[12] Mr. Tarulli then asked the court to order that if the motion to renew was not brought within ninety days, the Statement of Claim would be struck. Mr. Richey objected to this. He suggested that if there was a contest on the matter, it should be removed from Appearance Day.

[13] Without any affidavit evidence or hearing from the parties on the test for an Order dismissing an action pursuant to Civil Procedure Rule 4.22, the learned judge indicated that she was prepared to grant an Order giving Mr. Richey ninety days to serve a motion to renew the Statement of Claim, failing which the Prothonotary's Motion to Dismiss would be granted. She was, no doubt, confident that Mr. Richey, as an officer of the court, would comply with his undertaking.

[14] The Order that was issued following Appearance Day was slightly different than what had been discussed in court. Rather than giving Mr. Richey ninety days

to *serve* a motion to renew, it gave him ninety days to *file* such a motion. The Order provided:

> **IT IS ORDERED THAT** a motion to renew the Statement of Claim must be filed by counsel for the Plaintiff within ninety (90) days from February 14, 2014, or the action will be dismissed out of this court pursuant to ***Civil Procedure Rule 4.22***.

[15] On May 29th, 2014, Mr. Tarulli wrote to the Prothonotary asking for the action to be dismissed. He was of the view that the ninety days had expired without Mr. Richey filing his documents to renew the Statement of Claim. His letter was copied to and received by Mr. Richey.

[16] On May 30th, 2014, the Prothonotary wrote to Mr. Tarulli advising that pursuant to Civil Procedure Rule 94.11, the ninety days referred to in Justice Robertson's Order were clear business days and, accordingly, the deadline would not expire until June 26th, 2014.

[17] Despite the knowledge that the deadline was approaching and that Mr. Tarulli was obviously monitoring the ninety-day period, Mr. Richey waited until the ninetieth day to attempt to file his motion to renew and then arrived at the Prothonotary's office shortly after it had closed for the day. He had a Law Courts Commissionaire stamp an envelope (which Mr. Richey says contained the motion to renew documents) at 4:50 pm on June 26th, 2014. The documents were delivered to Mr. Tarulli the next day. They were not delivered to Mr. Lorde or his insurers.

[18] According to Mr. Richey's affidavit sworn to on January 16th, 2015, the Prothonotary refused to date the documents as having been filed on June 26th, 2014, due to their late arrival. No further documents were filed in relation to the matter until October 1st, 2014, when Mr. Cooke (now acting on the Plaintiff's behalf) applied to set aside Justice Robertson's Order and renew the Originating Notice (Action) and Statement of Claim. In particular, no request was made for the action to be dismissed (as had been done by Mr. Tarulli earlier in May).

[19] The Defendant, Anton Lorde, was not involved with, or aware of, any of this. He and his insurer still had no idea that he had been sued by the Plaintiff in relation to an accident that had occurred nine years earlier.

INHERENT JURISDICTION

[20] The Plaintiff relies on the inherent jurisdiction of the court to set aside Justice Robertson's Order. She did not apply pursuant to Civil Procedure Rule 78.08 to extend the time to bring a motion to renew, which may have been the preferable route to follow.

[21] In the Plaintiff's pre-hearing brief, the suggestion is made that the authorities are clear that this Court has the inherent jurisdiction to set aside a dismissal order granted pursuant to Civil Procedure Rule 4.22. Reference is made to ***Smith v. Lord***, 2013 NSCA 34, where the Court upheld a lower court decision setting aside a dismissal Order that had been issued almost nine years earlier. It is notable that in ***Smith v. Lord***, *supra*, the Order dismissing the action had been made on an *ex parte* basis with no notice to either the plaintiff or the defendant. In the case before

me, Mr. Richey (on behalf of the Plaintiff) had been given notice of the Prothonotary's Motion to Dismiss.

[22] In the materials filed by the Defendants in response to these motions, no dispute was taken with the suggestion that this court had the inherent jurisdiction to set aside an order of a judge of concurrent jurisdiction. However, I raised the issue recognizing that the parties are unable to confer jurisdiction upon the court in circumstances in which it does not exist.

[23] The inherent jurisdiction of a superior court is a nebulous concept. The matter was discussed in some detail in ***Smith v. Lord***, *supra*, where Farrar J.A., speaking for the Court, stated the following:

> [24] Chief Justice MacDonald in **Central Halifax Community Association v. Halifax (Regional Municipality)**, 2007 NSCA 39 provided the following definition of inherent jurisdiction:
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> > **34** Every superior court in this country has a residual discretion to control its process in order to prevent abuse. Procedural rules, however well intentioned, cannot be seen to stand in the way of basic fairness. This overriding judicial discretion is commonly referred to as the court's inherent jurisdiction. It is a jurisdiction sourced independently from any rule of court or statute…..
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> [25] In his seminal article, IH Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23 Jacob defined the inherent jurisdiction of the court as:
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> > … the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.
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> [26] In **Goodwin v. Rodgerson**, 2002 NSCA 137, this Court is unequivocal:
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> > 17 The inherent jurisdiction of the court has been described as a vague concept and one difficult to pin down. It is a doctrine which

> has received little by way of analysis, but there is no question it is a power which a superior trial court enjoys to be used where it is just and equitable to do so…..

[27] Inherent jurisdiction is a highly flexible tool. As Master Jacob said at p.23:

> … [I]t "may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways. This peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits.

[28] The scope of inherent jurisdiction was discussed in **Halifax (Regional Municipality) v. Ofume**, 2003 NSCA 110, where Saunders, J.A. delineated the scope of inherent jurisdiction broadly to encompass judicial actions that further the goals of "effectiveness", "efficiency" and "fairness":

> [40] … In the instant case the discretion exercised by … [the trial judge] derives from the Court's inherent jurisdiction to control its own proceedings. I see this control as fundamental to a court that derives its power and existence not from statute but from the Constitution. The operation of the court is a necessary function of our society. The inherent jurisdiction which helps to maintain the efficiency and fairness of such a court is something far greater than the jurisdiction to correct substantive problems, as was considered in **Baxter**. The inherent jurisdiction exercised by the Chambers judge here is the kind of jurisdiction spoken of by Lord Morris in **Connelly**, **supra**, quoted in **Montreal Trust Co.**, **supra**, which gives rise to the "powers which are necessary to enable [a court] to act effectively."
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> [Emphasis by Farrar J.A. throughout]

[24] Justice Farrar also made reference to the Manitoba Court of Appeal decision ***Perfaniuk v. Ladobruk and Canadian Home Insurance***, [1960] M.J. No. 40 (Q.L.) and stated at ¶33:

> The Manitoba Court of Appeal was satisfied the Court of Queen's Bench had inherent power to set aside any of its judgments in a proper case and rejected as

> without foundation the argument that entry of a final judgment put an end to the jurisdiction of the court to set it aside (¶7).

[25] While the courts' inherent jurisdiction has been described as a highly flexible tool, it must be exercised with caution. This is clear from Farrar J.A.'s comments in ***Smith v. Lord***, *supra*, where he states at ¶29:

> Despite its large scope and flexibility, inherent jurisdiction is not available for use in every situation. As Chief Justice MacDonald in **Central Halifax**, **supra**, observed: … [Inherent jurisdiction] remains a safety net that can prevent abuse in those truly exceptional cases. (¶44) It must be exercised judicially and with caution. It is typically limited to procedural matters. It cannot effect changes in the substantive law, and it cannot be exercised so as to contravene a law.

[26] A careful review of the jurisprudence dealing with inherent jurisdiction indicates that it is usually exercised in cases that have been determined on an *ex parte* basis (with no notice to the person who subsequently seeks to set aside or vary an order) or which involve default judgments. However, that is not always the case. In ***Gates Estate v. Pirate's Lure Beverage Room***, 2004 NSCA 36, the Court of Appeal concluded that the Supreme Court had jurisdiction to set aside its own order in circumstances somewhat similar to the case before me. In that case, counsel for both parties had consented to the issuance of an order which required production of documents within thirty days, failing which the plaintiff's action would be dismissed. Not all of the documents were produced within the thirty days and the defendants took the position that the action stood dismissed. It was noted by the Court of Appeal that the defendants had not applied for or obtained an order actually dismissing the action.

[27] The plaintiff applied to a Supreme Court judge in Chambers to set aside the Consent Order. The Chambers judge determined that he lacked jurisdiction to set aside the Order and dismissed the application. He was of the view that the Court of Appeal's decision in ***Bank of Nova Scotia v. Golden Forest Holdings Ltd.*** (1990), 98 N.S.R. (2d) 429 (N.S.S.C. (A.D.)) precluded him from exercising jurisdiction. On appeal, the plaintiff argued, *inter alia*, that the Chambers judge had jurisdiction to set aside the Order because it did not dispose of the case on its merits. Hamilton J.A. noted the difference between consent orders that resolve substantive issues between the parties and those that do not. She stated at ¶29:

> The order in this appeal is of a different nature. This type of order is used to ensure the carriage of an action proceeds as it should. In this case the order was an attempt to ensure timely documentary disclosure. The involvement of the court in varying this type of order does not carry the same risk of undoing a negotiated agreement of the parties. With interlocutory orders such as this dealing with the litigation process, there is residual discretion to grant relief against dismissal of the action or striking of the defences, in other words to relieve against the sanction provided for failure to comply.
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> [Emphasis added]

[28] I have concluded that in the circumstances of this case, I have the inherent jurisdiction to grant relief against dismissal of the action. While the Plaintiff in this action had notice of the Prothonotary's Motion to Dismiss (which clearly makes this case distinguishable from ***Smith v. Lord***, *supra*), I am satisfied that the appearance before Justice Robertson did not result in a hearing on the merits of the motion. In fact, Robertson J. made it clear that she was not prepared to "argue" the merits of whether the case should be dismissed or not. The court was trying to ensure that Mr. Richey moved the matter along. He had given a "drop dead" undertaking to do so. It is clear from the record that Justice Robertson's

acquiescence to Mr. Tarulli's request that the action be dismissed if Mr. Richey did not apply to renew the proceeding did not involve a weighing of the prejudice to the various parties or any of the considerations that one would usually take into account before issuing such an order. In these particular circumstances, I am satisfied that the court has the inherent jurisdiction to grant relief against dismissal of the action. The question is whether I should exercise that jurisdiction with the facts that are before me.

[29] Before leaving this issue, there is one additional matter that I should comment upon. During the hearing, Mr. Tarulli suggested that the doctrine of *functus officio* prevents the Court from granting the relief requested. He referred, *inter alia*, to the recent decision in ***Canada (Attorney General) v. MacQueen***, 2014 NSCA 73, where the court quoted from ***Midland Doherty Ltd. v. Rohrer*** (1985), 70 N.S.R. (2d) 234 (N.S.S.C. (A.D.)), where it was stated at ¶5:

> Once a final order is issued on appeal this court has prima facie no jurisdiction to open the appeal to grant a new hearing of the appeal or to correct any substantive error made by it on the appeal; a party aggrieved by our error must ordinarily look for remedy to the Supreme Court of Canada, if appeal to that Court is available.

[30] In my view, in the case at bar, Justice Robertson did not issue a final Order. She issued an Order which gave the Plaintiff ninety days to apply to renew her Statement of Claim, failing which the action "will be dismissed". She did not actually dismiss the action. This interpretation of the Order is consistent with Mr. Tarulli writing to the Prothonotary on May 29th, 2014 (after he thought that the ninety days had expired) asking for the action to be dismissed.

[31] That takes me to the Plaintiff's first motion.

MOTION TO SET ASIDE JUSTICE ROBERTSON'S ORDER

[32] The Plaintiff has asked the court to set aside the dismissal of this action. As I have indicated, in my view the action has not yet been dismissed. I will therefore interpret this request as a motion to set aside Justice Robertson's Order.

[33] Robertson J. indicated that if Mr. Richey did not file a motion to renew the Plaintiff's Statement of Claim within ninety days from February 14th, 2014, the Plaintiff's action would be dismissed pursuant Civil Procedure Rule 4.22. In my view, when considering whether to exercise my inherent jurisdiction to grant relief from this Order, it is appropriate to consider the same test that the Court would use when deciding a motion to set aside a Prothonotary's Dismissal Order under former Rule 28.11 (*Civil Procedure Rules 1972*). In my view, the Plaintiff in this case (as the moving party) has the burden of proving:

1. That there is no inordinate or inexcusable delay, or, if there is, that it is not the Plaintiff personally who is to blame for the delay;

2. That the Plaintiff has always intended to proceed with the action and was unaware of her solicitor's failure to move the action forward in a timely manner;

3. That the Defendants have not likely been seriously prejudiced by the delay; and

4. After balancing all the relevant factors, it is shown to be in the interests of justice, to set aside the Order. [1]

[34] It is useful, in my view, to consider the application of this test to the Farr Defendants and to Mr. Lorde, individually. I will deal first with the Farr Defendants.

THE FARR DEFENDANTS

[35] I am fully satisfied that there has been inordinate delay in the circumstances of this case. However, I am also satisfied that the Plaintiff is not personally responsible for the delay.

[36] Further, the Plaintiff has satisfied me that she has always intended to proceed with this action and, until recently, was unaware of her lawyer's failure to move the matter forward in a timely manner.

[37] The issue of serious prejudice requires greater analysis. The Farr Defendants have filed an affidavit of Don Hanninen, a Bodily Injury Examiner with their motor vehicle insurers. He indicates that his office became aware of the Plaintiff's claim on June 23rd, 2005 (just days after the collision), and the case was

[1] See ***Hiscock v. Pasher***, 2008 NSCA 101, at ¶23, and ***Smith v. Lord***, *supra*, at ¶40-43. Note that I have amended the wording of the second and fourth part of the test set out in ***Hiscock v. Pasher,*** *supra*, in light of the fact that Civil Procedure Rule 28.11 no longer exists and, in this case, we are not dealing with a prothonotary's order.

assigned to an independent adjuster. Shortly thereafter, on July 6th, 2005, that adjuster took a statement from the Plaintiff which sets out the details of the accident as well as the Plaintiff's injuries. According to Mr. Hanninen's affidavit, over the next few years the adjuster was in contact with the Plaintiff on a number of occasions and obtained medical information from her.

[38] On February 15th, 2008, the adjuster received correspondence from Mr. Richey advising of his retainer and revoking all previous medical and other authorizations that the Plaintiff had given. He did, however, indicate that he was prepared to recommend that the Plaintiff allow him to release copies of any medical reports that he obtained, provided that the adjuster agreed to cover the cost of same. There is no indication in the insurer's file of any medical information in relation to the Plaintiff being received after that date.

[39] The Farr Defendants argue that as a result of the Plaintiff's delay in serving and advancing her claim they have been denied the opportunity to properly investigate her injuries, including:

(a) Obtaining full copies of her medical records from prior to the accident;

(b) Monitoring her recovery over time;

(c) Conducting surveillance on her at different times during her alleged convalescence;

(d) Requesting that she undergo an independent medical examination, functional capacity evaluation, or other testing to determine the nature of her injuries and their impact at various points in the 9 ½ years since the accident;

(e) Engaging counsel for formal exchange of documents and the conduct of examination for discovery at an earlier point in time, leading to a proper and complete understanding of how the Plaintiff's injuries affected her.

[40] In addition, these Defendants argue that they have lost the opportunity to investigate and attempt an early resolution of this claim through negotiation, alternative dispute resolution or trial.

[41] The Plaintiff responds by submitting that there will be no prejudice to the Defendants if Justice Robertson's Order is set aside and certainly nothing approaching serious prejudice. The Plaintiff notes that the accident in question was a rear-end collision and that the facts surrounding the accident are straightforward. She has filed an affidavit showing that almost all of her medical records from the time of the accident onward are available for review by the Defendants. She also notes that independent medical examinations were conducted of her in 2008 and 2010 at the request of her Section "B" insurer. She suggests that all of this information will be available to the Defendants and will help to negate any prejudice that may have arisen as a result of the passage of time.

[42] As I have indicated, in my view, the Plaintiff in this case has the burden of proving that the Defendants have not likely been seriously prejudiced by the delay that has occurred in dealing with this action.

[43] In some cases, serious prejudice is presumed in light of inordinate delay. As Farrar J.A. stated in ***Smith v. Lord***, *supra*, the circumstances of the case will determine whether such a presumption is appropriate (see ¶¶44 and 45).

[44] The Farr Defendants were made aware of the Plaintiff's claim within days of the accident. They had access to the Plaintiff and obtained medical records from her for a number of years, until February of 2008, when Mr. Richey was retained. Further, they were provided with a copy of the Plaintiff's Originating Notice (Action) and Statement of Claim within days of it being issued. Being aware of the Plaintiff's alleged injuries and the filing of her Statement of Claim, they were free to ask for present and past medical records, conduct surveillance, request an independent medical examination, and so on. In these circumstances, I am not satisfied that it is appropriate to presume serious prejudice in relation to the Farr Defendants.

[45] The Plaintiff has provided evidence showing that virtually all of her medical records relating to the collision are still in existence and are available for review. The Farr Defendants had an opportunity to obtain a statement from the Plaintiff and obtain medical documentation from her. They were free to investigate the claim as they saw fit. In these circumstances, the Plaintiff has satisfied me that the Farr Defendants have not likely been seriously prejudiced by the delay that has occurred.

[46] That leaves me with the fourth part of the test – whether, after balancing all relevant factors, I am satisfied that it is in the interests of justice to set aside the Order.

[47] Mr. Tarulli notes the inordinate delay that has occurred in this action. The Plaintiff's originating documents were allowed to expire twice, the Plaintiff's lawyer ignored the direction of the court to apply to renew the originating documents by September 30th, 2013, and the case was permitted to languish for years. Mr. Tarulli submits that the court should not be seen to "countenance this level of neglect". He suggests that the interests of justice do not favour setting aside a dismissal of the Plaintiff's claim as the Plaintiff has a clear case of negligence against her solicitor.

[48] With the greatest of respect to Mr. Tarulli, I believe that his argument misses the mark. Clearly, the court does not condone the delay that occurred in this case or the disregarding of the direction of the court. However, the court must separate the conduct of the solicitor from that of the client. In this case, I am fully satisfied that the delay that occurred was the responsibility of Ms. O'Connell's solicitor, not Ms. O'Connell herself.

[49] A dismissal of an action before it is heard on its merits is a significant remedy that is rarely exercised. *Serious* prejudice is required before such an order will be granted. The fact that the Plaintiff may have an action against her former solicitor is one of the factors that I can take into account when weighing the interests of justice. However, it should not be a predominant factor.

[50] The Farr Defendants were well aware of the Plaintiff's injuries since shortly after the accident occurred. They were also aware that she was pursuing a lawsuit shortly after the originating documents were filed. They had the opportunity to pursue the various investigative techniques that they now suggest they have been denied. While the delay in this case is inordinate, in relation to the Farr Defendants, I am not satisfied that *serious* prejudice will be suffered if the case proceeds.

[51] Weighing the various factors, I am satisfied that in relation to these Defendants, it is in the interests of justice to grant the Plaintiff relief from Justice Robertson's Order.

ANTON LORDE

[52] That takes me to Mr. Lorde. I view the situation with him quite differently. While the Farr Defendants were aware of the Plaintiff's claim within days of the accident, neither Mr. Lorde nor his insurer were aware of the Plaintiff's claim until recently.

[53] Mr. Lorde and his insurers were clearly aware of the accident itself. The evidence establishes that Mr. Lorde contacted his insurers on the day of the collision and advised them of the accident. His insurance company discussed the collision with him and obtained a copy of the police report relating to the accident. Further, in June of 2008, Mr. Lorde commenced an action against Chelsea Farr for

injuries that he says he incurred in the collision. That action was settled in or around 2012.

[54] However, it was only in October of 2014 (approximately 9 ½ years after the accident occurred), when the Plaintiff applied to set aside Justice Robertson's Order, that Mr. Lorde and his insurers became aware that Ms. O'Connell was advancing a claim against him in relation to this collision.

[55] Mr. Lorde's insurers gave evidence that when served with a Notice of Action and Statement of Claim they will ordinarily do some or all of the following in order to investigate the matter:

(a) Take statements from witnesses of the accident or persons who have relevant information related to the accident;

(b) Take photographs of the accident scene;

(c) Assess the damage to the vehicles involved in the collision;

(d) Reconstruct the accident scene with the assistance of a professional accident reconstruction specialist or otherwise;

(e) Establish accurate reserves.

[56] They further submit that since they were not notified of the Plaintiff's claim, they did not take steps to assess the Plaintiff's injuries such as reviewing her medical records, discovering the Plaintiff at an early stage, obtaining an

independent medical examination or similar independent evaluation or performing surveillance.

[57] Further, they note that they were notified of the Plaintiff's action well after the three year limitation period for this type of action and submit that this gives rise to an inference of prejudice. They have referred the court to the decision in ***Grosse v. White***, 2010 NSSC 10, where McDougall J. stated at ¶32:

> Although the rule pertaining to expiry and renewal of a notice of action has changed, the test if inadvertence is being relied upon has not changed appreciably. As such the decision of the Nova Scotia Court of Appeal in **Minkoff** v. **Poole** (1991), 101 N.S.R. (2d) 143 remains applicable. In delivering the decision for the panel which included Chief Justice Clarke and Justice Matthews, Chipman, J.A., stated the following…..
>
> > [22] It will be seen therefore that the overriding consideration on an application to renew an originating notice should be that justice be done and that in determining this, the injustice to the plaintiff in terminating the proceedings will be balanced against the prejudice to the defendant that may result from permitting them to continue. In stating the test to be applied in the broad term "for just cause", the rule has conferred upon the court a wide and largely unfettered discretion.
> >
> > [23] In all cases, the particular circumstances will govern. It is recognized that long delay of itself gives rise to an inference of prejudice. The strength of the inference depends, again, on all the circumstances. The intervention of a limitation period is another circumstance to be considered in exercising discretion and renewal may well be granted after the expiry of limitation: **Moffat v. Rawding**, supra, at p. 898. The significance of the expiration of the limitation period is to alert the court that the case is likely to be one in which the delay may have resulted in prejudice to the defendant: **Simpson**, supra, p. 332…..

[58] The Plaintiff responds by pointing out that the circumstances surrounding the accident itself are not complicated in light of the fact that it involved a rear-end

collision. Further, she points out that she was not obliged to commence the proceeding until three years after the cause of action arose, nor was she obliged to serve the Defendants immediately after the action was filed. She therefore submits that the prejudice clock cannot begin to run until a number of years after the date of the collision. As indicated previously, she points out that virtually all of her medical records are still in existence as are the independent medical examination reports from 2008 and 2010. Finally, the Plaintiff notes that Mr. Lorde commenced his own action in relation to this accident which remained outstanding until 2012. This suggests that his memory may still be fresh concerning the facts surrounding the collision.

[59] As indicated previously, the Plaintiff has satisfied me on the first two parts of the test set out in ¶33 herein. In relation to the third part of the test, I am satisfied that in relation to the Lorde Defendant, serious prejudice should be presumed in light of the inordinate delay in notifying either Mr. Lorde or his insurer of the Plaintiff's claim. Unlike the Farr Defendants, neither Mr. Lorde nor his insurer had any idea that Ms. O'Connell was advancing an action in relation to this matter for approximately 9 ½ years. Accordingly, they were denied the opportunity to investigate the Plaintiff's claim in a timely manner, including the ability to request independent medical examinations, perform surveillance and attempt to resolve the matter early in the proceeding. In my view, the failure to at least notify Mr. Lorde or his insurer of a claim for nearly a decade has resulted in serious prejudice to this Defendant.

[60] That takes me to the fourth part of the test. The Plaintiff must satisfy me that, balancing all of the relevant factors, it is in the interests of justice to set aside

the Order. As indicated previously, dismissal of an action before it is heard on its merits is a significant remedy that is rarely exercised. In my view, as it relates to Mr. Lorde, this is one of those rare occasions. The delay in at least notifying Mr. Lorde or his insurer of Ms. O'Connell's claim is so inordinate and the prejudice is so great in asking him to defend an action that he only recently became aware of, but which relates to an accident that occurred almost a decade ago, that I am satisfied that it is in the interests of justice not to set aside Justice Robertson's Order as it relates to this Defendant. In coming to this conclusion, I am mindful of the fact that the Plaintiff has not lost her action completely. She is still able to proceed against the Defendants to whom she gave notice shortly after the accident occurred.

[61] That takes me to the motion to renew the Plaintiff's Originating Notice (Action) and Statement of Claim.

RENEWAL OF THE ORIGINATING NOTICE (ACTION) and STATEMENT OF CLAIM

[62] This second motion is brought pursuant to Civil Procedure Rule 4.04(5)(b) which reads:

> **Expiry and renewal of a notice of action**
>
> **4.04** (5) A judge may renew an expired notice of action more than fourteen months after the day the notice of action is filed only if the plaintiff satisfies the judge on either of the following:
>
> (a) …….
>
> (b) inadvertence led to the expiry, the plaintiff will suffer serious prejudice if the proceeding is terminated, and no defendant will suffer serious prejudice that cannot be compensated in costs as a result of the delay in notification.

[63] Again, it is appropriate in my view to analyze this test in relation to the Farr Defendants and Mr. Lorde, individually.

THE FARR DEFENDANTS

[64] Pursuant to Rule 4.04(5)(b), the Plaintiff must satisfy me that inadvertence led to the expiry of the Notice of Action in this matter. Mr. Tarulli has referred me to the decisions in ***Grosse v. White***, *supra*, and ***Thornton v. RBC General Insurance Company***, 2014 NSSC 215, in relation to the issue of what constitutes inadvertence. In ***Grosse v. White***, *supra*, McDougall J. considered the meaning of "inadvertence" as it appears in this Rule and stated at ¶¶28 and 29:

> … According to Black's Law Dictionary, Eighth Edition "inadvertence" is defined as:
>
> > An accidental oversight; a result of carelessness.
>
> The Random House Dictionary of the English Language defines it as:
>
> 1. the quality or condition of being inadvertent; heedlessness.
> 2. act or effect of inattention; an oversight.

[65] Mr. Tarulli takes the position that the Plaintiff has not led sufficient evidence to show that it was inadvertence that led to the expiry of the Plaintiff's Notice of Action.

[66] Mr. Richey has filed an affidavit in support of the Plaintiff's motion. In that affidavit, he acknowledges that he did not pay adequate attention to the deadlines for service and renewal of the originating documents, that he overlooked the

deadlines in the Plaintiff's claim and failed to set proper reminders for himself, he accidentally failed to arrive at the court administration office in time to file his Motion to Renew and that missing the deadline set by Justice Robertson was an oversight on his part. In these circumstances, I have no difficulty finding that inadvertence lead to the expiry of the Plaintiff's Originating Notice (Action) and Statement of Claim.

[67] I am also satisfied that the Plaintiff will suffer serious prejudice if the proceeding is terminated.

[68] For the reasons that I indicated previously, I am not satisfied that the Farr Defendants will suffer serious prejudice if the action is renewed. As a result, Ms. O'Connell's Originating Notice (Action) and Statement of Claim will be renewed as it relates to the Farr Defendants.

ANTON LORDE

[69] Mr. Lorde also takes the position that the Plaintiff has failed to establish that inadvertence led to the expiry of the originating documents. He notes that at ¶14 of Mr. Richey's affidavit filed in relation to this motion, he acknowledges that he did not send Mr. Lorde or his insurer a copy of the Originating Notice (Action) and Statement of Claim. Mr. Richey does not say why he did not do this or that he failed to do so through inadvertence.

[70] I agree that ¶14 on its own does not establish inadvertence. However, this paragraph cannot be viewed in a vacuum. It must be viewed along with the rest of Mr. Richey's affidavit where he says that he did not pay adequate attention to the

deadline for service and renewal of the originating documents, he overlooked the deadlines in the Plaintiff's claim, failed to set proper reminders for himself and that missing the deadline set by Justice Robertson was an oversight on his part. Considering all of this evidence, I am satisfied that inadvertence led to the expiry of the Plaintiff's Notice of Action.

[71] In relation to the second part of the test, I have concluded that in the unique circumstances of this case, the Plaintiff will not suffer serious prejudice if the Notice of Action is not renewed in relation to this Defendant.

[72] On a motion such as this, I cannot and should not make any findings on liability. However, I can take note of the fact that the Plaintiff herself, in her pleadings, questions whether Mr. Lorde is responsible for this accident. I refer, in particular, to paragraph 2 of the Plaintiff's Statement of Claim which reads:

> The Defendant, Anton Lorde, resides at 52 Mill Pond Court, Musquodobit, in the Halifax Regional Municipality aforesaid, and was at all times material hereto the owner and operator of a 1995 Honda Civic motor vehicle, Nova Scotia License Plate Number DGY 906, herein referred to as the "Lorde motor vehicle". **According to the police report, the Defendant Lorde successfully stopped his motor vehicle before being rear-ended by the Farr motor vehicle, and being forced into the rear of the Plaintiff's motor vehicle, and may not be at fault for these collisions.** Numerous requests by counsel for the Plaintiff for records and statements which could verify these circumstances have been refused by Pamela Mills, of Crawford & Company (Canada) Inc., who are representing the interests of the Defendants Farr, so the Plaintiff has been forced to name Mr. Lorde pending receipt of exculpatory information.
>
> [Emphasis added]

[73] By the Plaintiff's own admission in her Statement of Claim, Mr. Lorde may not be at fault for this collision. The Plaintiff's action will be continuing against the Farr Defendants. While I am satisfied that the Plaintiff will suffer prejudice if

the proceeding against Mr. Lorde is terminated, the Plaintiff has not satisfied me that she will suffer *serious* prejudice if this occurs.

[74] Further, for the reasons indicated previously, I am satisfied that Mr. Lorde will suffer serious prejudice if the action is renewed in relation to him and that such prejudice cannot be compensated for in costs. The Plaintiff's motion to renew the Notice of Action in relation to Mr. Lorde is denied.

ANCILLARY MATTERS

[75] In the event that the court saw fit to continue the Plaintiff's action, Mr. Tarulli requested production, within ten business days, of numerous and various documents from the Plaintiff as well as an order that the Plaintiff submit to a discovery examination by June 30th, 2015, failing which her action would be struck without further order. No motion was made for this relief and, accordingly, I am not prepared to consider the matter. Having said that, I will direct that service of the originating documents shall take place forthwith and counsel shall work expeditiously to gather all relevant documents and proceed to discoveries. If requested, I am also prepared to case manage the proceeding to ensure that it moves forward in a timely manner.

COSTS

[76] That takes me to the issue of costs. As it was Mr. Richey's conduct that precipitated the need for this motion, I have concluded that it is appropriate for him to be personally responsible for the Defendants' costs. I should indicate that I have

given Mr. Richey an opportunity to appear and speak on the issue of whether he should be personally responsible to pay costs, but he has declined to do so.

[77] The hearing itself took ¾ of a day and counsel returned for my oral decision. Accordingly, I consider the matter to be a full day hearing. Numerous affidavits were filed as well as briefs. Mr. Richey shall pay the Farr Defendants and Mr. Lorde the sum of $1,500.00 each in costs and disbursements (totalling $3,000.00), said amount being payable forthwith.

Deborah K. Smith
Associate Chief Justice