



NEUTRAL CITATION NUMBER: [2026] CIGC (Civ) 25

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

**CAUSE: G 66 OF 2018
(LACV 179 OF 2016)**

BETWEEN:

**CARLTON CLEMMINGS
(As Personal Representative of the estate of Doreen Clemmings)**

Plaintiff

AND:

DR MICHELLE MON DESIR

Defendant

IN CHAMBERS

CORAM: Hon. Justice Alastair Walters (Act.)

**Appearances: Miss Clare Price and Ms Lynne McDonagh of KSG
Attorneys at Law for the Plaintiff
Mr John Connoles and Mr Zach McLaughlin (articled
clerk) of Hampson and Company Attorneys for the
Defendant**

Heard: 10 June 2026

Draft Circulated: 21 July 2026

Judgment Delivered: 30 July 2026

*Medical negligence claim. Inordinate delay on the part of the Plaintiff's attorney in prosecuting the claim.
Whether sufficient prejudice to Defendant including loss of memory, financial, professional and emotional
to justify strike out.*

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JUDGMENT

1. This is the Defendant's summons seeking an order striking out the Plaintiff's claim pursuant to GCR O. 25, r.1(4) and the inherent jurisdiction of the Court for:
 - 1.1 want of prosecution, inordinate, inexcusable and/or culpable delay;
and/or,
 - 1.2 abuse of process on the basis that the Court must be compelled to infer that the Plaintiff has no bona fide intention of prosecuting this action to a conclusion.

Background

2. The Plaintiff is the widower of Mrs Doreen Clemmings (the "Deceased") and is the personal representative of her estate with Letters of Administration *ad colligenda bona* having been granted to him on 28 March 2018.
3. The claim is brought by the Plaintiff on behalf of himself, on behalf of the Deceased pursuant to the *Estate Proceedings Act (1995 Revision)* and on behalf of the dependents of the Deceased pursuant to the *Torts (Reform) Act (2026 Revision)*.
4. The Writ was issued in a generally endorsed form on 29 March 2018. An Acknowledgement of Service Form was filed by the Defendant on 18 July 2018 indicating an intention to defend the proceedings. The Statement of Claim was filed on 10 July 2018. It is alleged as follows:
 - 4.1 The Deceased was 51 at the time of her death.
 - 4.2 The Defendant was at all material times and is a General Practitioner and the Deceased was one of her patients.
 - 4.3 The Deceased underwent a splenectomy in 1991 following a motor vehicle accident.
 - 4.4 On 27 October 2014, the Deceased attended the Defendant's clinic for medical assistance, complaining of coughing, sore throat and a headache. The clinical records of that visit record the previous splenectomy.
 - 4.5 On 31 March 2015, the Deceased attended the Defendant's clinic complaining of body aches, fever and a headache.
 - 4.6 The records of that visit show that the Defendant assessed that the Deceased potentially had contracted chikungunya and sought to rule out meningitis. The Defendant gave the Deceased an anti-inflammatory injection and prescribed further anti-inflammatories to be taken orally. The Defendant also organized blood tests.

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- 4.7 The Defendant spoke to the Deceased by telephone later the same day and advised her that the blood tests were good and prescribed an anti-sickness medication. The Deceased advised the Defendant that she continued to feel unwell.
- 4.8 On 1 April 2015 the Deceased's condition had deteriorated and became unresponsive on her way to George Town hospital. There she was pronounced dead with the cause of death being confirmed as acute pneumococcal meningitis and pneumonia.
5. It is alleged that the Defendant failed negligently to diagnose the Deceased's condition, the particulars of negligence being alleged as follows:
 - 5.1 Failed to institute an appropriate program of vaccination when she was aware that the Deceased did not have a spleen.
 - 5.2 Failed to conduct a proper examination of the deceased.
 - 5.3 Failed to observe and analyze the signs and symptoms of the Deceased's condition.
 - 5.4 Failed to refer the Deceased to hospital or to arrange for her to have a lumbar puncture when she made a possible diagnosis of meningitis.
 - 5.5 Failed to explain the risks and benefits of the management options to the Deceased.
 - 5.6 Failed to send or admit the Deceased to hospital after receiving the blood test results¹.
 - 5.7 Failed to recognize that the blood test did not rule out meningitis or sepsis when they corroborated the presence of infection.
 - 5.8 Failed to undertake a clinical examination when the Deceased continued to feel unwell.
 - 5.9 Wrongly concluded that the Deceased was not suffering from any serious condition.
6. The Statement of Claim sets out a claim in damages.
7. The Defendant denies in her Defence that she was negligent as alleged and by way of summary it is pleaded that:
 - 7.1 The Deceased's splenectomy was known to numerous doctors who had been consulted by the Deceased for many conditions over the years and it would have been the obligation of those doctors who she had seen and who had treated her to advise her about the consequences of that procedure. Indeed, it is specifically alleged that when the Deceased

¹ In a Reply to a Request for Further and Better Particulars dated 11 January 2019 it is alleged that the blood test results arranged by the Defendant showed an increase in band neutrophils indicating that there was an infection that was severe enough that the bone marrow had been signaled to produce excess neutrophils to fight the overwhelming pneumococcal infection.

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attend the Defendant's clinic on 27 October 2014, the Defendant discussed the vaccination protocol for asplenic individuals and the Deceased is said to have confirmed that she was aware of and familiar with the vaccination protocol. It is said that she was advised to follow up with the Public Health Department of the Cayman Islands Health Services Authority for a vaccination and to return for a follow up urine and blood pressure check but failed to re-attend.

- 7.2 It is claimed that the Defendant conducted appropriate tests on 31 March 2015 to determine whether the Deceased might have has meningitis including looking for the Kernig and Brudzinski's signs and both tests were negative. The Defendant carried out a physical examination and says that she did not rule out meningitis and ordered blood tests to further investigate.
- 7.3 The Defendant says that the Deceased was told to return to the Defendant's clinic if her symptoms did not improve and that if they worsened then she should go to the Emergency Room.
- 7.4 It is said that the blood tests results were received at around 4:40 p.m. on 31 March 2015 and that the complete blood test results did not show an elevation in white blood cells.
- 7.5 The Defendant says that she tried to call the Deceased twice that afternoon but did not manage to speak to her. The Deceased did however call the Defendant back at around 5.45 p.m. and said that she was feeling much better and had had one episode of vomiting and diarrhea. The Defendant suggested that her symptoms may have been from food poisoning and the Defendant said that she had eaten some take-out food the evening before.
- 7.6 The Defendant says that she advised the Deceased of her blood test results and that she would leave a prescription for her to collect.

Procedural history

8. As mentioned above, the Deceased died on 1 April 2015.
9. The writ was not issued until 29 March 2018, two days before the expiry of the primary three year limitation period². Indeed, it seems from the Statement of Claim that the Plaintiff was not in a position to bring proceedings until 28 March 2018 which is when it is pleaded that he was granted Letters of Administration. The Defendant says that she had no notice that proceedings were to be

² S. 16 Limitation Act (1996 Revision).

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commenced. Indeed, she says that she was not served with the Writ and Statement of Claim until 11 July 2018 a week before the period of its validity would have expired³.

10. Following a request pursuant to RSC O.24, r.10 copies of some of the Deceased's medical and other records were provided to the Defendant's attorneys on 24 July 2018.
11. The Defendant served a request for Further and Better Particulars of the Statement of Claim on 20 August 2018. It is said that despite following up on this, replies were not provided until 11 January 2019.
12. The Defendant says that she had some difficulty in obtaining expert evidence and there was therefore an agreed extension of time for the service of her Defence which was prepared with the assistance of London counsel served on 29 November 2019. That delay was not the fault of the Plaintiff. No further pleadings were served.
13. The Defendant says that pursuant to GCR O.25, r.1, the Plaintiff was obliged 1 month after the close of pleadings to issue a summons for directions which he failed to do.
14. Notices of Intention to Proceed were filed on 28 March 2023 and 15 April 2025 but it seems were not served on the Defendant's attorneys. A third Notice was filed and served on 6 November 2025 but it appears that until 11 November 2025 nothing was heard from the Plaintiff or his attorneys at all.
15. The same day that the most recent Notice of Intention to Proceed was served the Defendant's attorneys issued the present summons.
16. On 27 January 2026 the Plaintiff's attorneys issued a summons seeking an order pursuant to GCR O.3, r.5 seeking an extension of time for the filing of a summons for directions which was also listed for hearing at the same time as the Defendant's summons to strike out.

³ GCC O.6, r.8 - a period of 4 months.

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The delay on the part of the Plaintiff

17. The position of the Plaintiff is set out in affidavits dated 27 January 2026 sworn by the Plaintiff and by Mr James Kennedy, the managing partner of the Plaintiff's attorneys, KSG.
18. Mr Clemmings' evidence is as follows:
 - 18.1 He sets out some of the medical history relevant to the claim and also refers to what he says is the content of some expert evidence that he has obtained but that evidence was not exhibited to his affidavit in an independent form. He says that based on that evidence he believes that he has a good claim against the Defendant.
 - 18.2 He goes on to explain that he does wish to pursue the claim against the Defendant and that the failure to prosecute the action is due to the inaction of his attorney, Ms Kim Grandage who, until 27 June 2025, worked at KSG. He says that it appears that from 2019 despite what Ms Grandage told him, she did not progress his claim in any meaningful way.
 - 18.3 Mr Clemmings says that he first instructed Ms Grandage in 2015 when she was with another firm. In 2017 Ms Grandage moved firms to KSG and took Mr Clemmings' file with her. In 2018 apparently Ms Grandage instructed a Dr Ough to prepare an expert report dated 22 May 2018. Apparently, he was also instructed to prepare an addendum to that report after the Defence was served. The report and addendum have not been served on the Defendant but Mr Clemmings says that he will serve them if the action is not struck out. Mr Clemmings also says that on 22 October 2020 he provided documents to Ms Grandage to enable her to prepare a schedule of loss. A draft was sent to him on 14 July 2022 for his approval. Despite it being approved it was not served.
 - 18.4 Mr Clemmings says that he tried to contact Ms Grandage periodically to enquire about the progress of the claim but either was not able to speak with her or was told that matters were progressing. He exhibits a call log from KSG which starts in 2020. This records that Mr Clemmings stopped at KSG's office in January 2022 wishing to speak with Ms Grandage. He also called KSG's office twice in February 2022. It appears that he also called in February, March and August 2023 and in various months in 2024.
19. Mr Kennedy says that he reviewed his firm's file and does not shy away from the fact that there has been delay in this case and offers his apologies for that. It appears that immediately prior to Ms Grandage's departure from KSG, Mr Kennedy became aware that she had not progressed this matter along with another unrelated claim. The only excuse that Ms Grandage seems to have been able to offer for her failure to act was the challenge that she felt dealing with Mr Keeble of

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Hampsons. This is despite Ms Grandage having been a partner at KSG and head of the firm's clinical negligence and personal injury practice. Mr Kennedy says that he can only conclude that she developed some kind of mental block about this file.

20. In July 2025 the file was reviewed by Mr Kennedy and by Miss Price who appears on behalf of Mr Clemmings. Subsequent to that KSG identified and instructed Dr Robert Baker, a consultant medical microbiologist to advise in relation to causation. Mr Kennedy says that his report can be served if appropriate directions are given.
21. In relation to prejudice, Mr Kennedy says that because of Mrs Clemmings' untimely death she was never able to give evidence regarding her consultation with the Defendant. He also says that her medical records are available. Finally, he says that both parties have obtained expert evidence on the question of breach of duty and as mentioned above, in the case of the Plaintiff in relation to causation. Mr Kennedy says that, in his view, the case can be progressed promptly to trial without further delay.
22. If the case is struck out Mr Kennedy says that Mr Clemmings would be left with a claim against KSG for professional negligence. Mr Kennedy says that in his view, damages would be assessed on the basis of a loss of chance which would be different from the measure of damages that Mr Clemmings might be awarded in this action. He also raises the question of his firm's terms and conditions which seek to limit the firm's liability by reference to the maximum amount of fees charged. In this case, as Mr Clemmings is legally aided, Mr Kennedy says that any damages award would be very limited.

Delay and the position of the Defendant

23. The Defendant has sworn two affidavits dated 20 November 2025 and 16 April 2026. In her first affidavit she deals relatively briefly with her position. She says that when the Writ was issued it in 2018 it was also made available publicly. She says that this caused her a great deal of professional embarrassment amongst friends and professional colleagues and caused her stress. As a practical matter she says that the claim has created difficulties with her professional malpractice insurer in that she has been unable to change insurers because of the challenge of explaining the history and this claim to other prospective insurers. The Defendant says that if the matter had come on for trial promptly then she could have been exonerated and the damage to her reputation and her embarrassment could have been mitigated. Ms Mon Desir goes on to say that she has been a physician for well over 20 years and has never had any other claims, actions or complaints made

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or brought against her. She also raises a concern about the extent to which she can and will be able to recall details about her encounters with the Deceased due to the amount of time that has passed.

24. Dr Mon Desir expands on these points in her second affidavit.

Recollection

25. She emphasizes the amount of time that has elapsed since the relevant consultations with the Deceased. She says that her memory of the events of those consultations over eleven years ago has inevitably and seriously diminished. She says that whilst some contemporaneous medical records exist, they cannot refresh or revive her memory or substitute for a clear and reliable memory of, for example:

- 25.1 the critical nuances of the patient's presentation;
- 25.2 the broader clinical context in which the consultation occurred;
- 25.3 the questions asked and answers given;
- 25.4 the patient's demeanor, affect, and non-verbal cues;
- 25.5 the clinical reasoning process applied at the time, including the differential diagnoses considered and the judgment exercised in real time.
- 25.6 In relation to the allegations against her in the Statement of Claim, Dr Mon Desir identifies a number of aspects of her evidence that she says will be key to her defence. Criticism is made of her diagnosis in the light of knowledge that the deceased did not have a spleen. She says that will require her to remember what she knew of the deceased's previous history at the time she attended on 31st March 2015. Apart from what is contained in the notes, which she described as are no more than the briefest summary, she says that she will have to try to recollect her interaction with this patient 11 years ago (or more by the time this case gets to trial) when she has had hundreds if not thousands of consultations with other patients since that date.
- 25.7 The Defendant says that she is accused of failing to:
 - 25.7.1 observe and analyze the signs and symptoms of the Deceased's condition;
 - 25.7.2 refer the Deceased to hospital in the first instance and then after receiving blood test results; and,
 - 25.7.3 administer a lumbar puncture and failing to recognize that the blood tests did not rule out meningitis or sepsis.

- 25.8 In relation to those failings the Defendant says that she will have to reconstruct the reasons why she did or did not act in a certain way or what she knew at the time. She says that this is almost impossible after the effluxion of so much time.
- 25.9 She says that she is also accused of failing to undertake a clinical examination when the Deceased continued to feel unwell but does not know at what stage she should have undertaken a clinical (and what clinical) examination, when it is said that the Deceased felt unwell, her appreciation of such lack of wellness and her reasons for not undertaking some (unknown) clinical examination.
- 25.10 The Defendant says that medical records alone cannot convey the interaction between a patient and their doctor. The Defendant also notes that the nurse who interacted with the Deceased at the same time is still on-island but says that no statement has been taken from her meaning that her recollection of that interaction is similarly compromised.

Medical malpractice insurance

26. The Defendant says that she maintains her individual medical malpractice insurance through the Medical Protection Society (“MPS”). However, she says that as a result of this outstanding claim she is unable to obtain practice-level or group insurance practice for her practice, Oasis. This is because MPS does not offer group cover and other insurers have declined to provide her with coverage for Oasis pending the resolution of this litigation. It is said that the effect of this is that the Defendant’s insurance premium has been higher than if she was insured at a group level and other members of Oasis have had to carry their own personal insurance as opposed to benefiting from group cover.

Effect of stress

27. The Defendant says that the prolonged uncertainty about this litigation has had a material effect on her health as a result of significant distress, anxiety and ongoing emotional strain. In November 2020 she says that she suffered from severe palpitations which reoccurred in July 2022 and were attributed to stress. Apparently, such episodes have repeated, often triggered, the Defendant says, by events in this case.
28. The Defendant also says that in January 2025 she suffered a transient ischemic attack (“TIA”), a mini-stroke which she accepts may have multifactorial causes but was contributed to materially by the ongoing stress of this case.

Prejudice to career and professional advancement

29. A further area of prejudice is said to be the psychological and practical effect this ongoing claim has had on the Defendant's ability to pursue professional advancement or to seek overseas appointments of hospital privileges all of which would likely require disclosure of these proceedings. The Defendant says that she has suffered from "lost years" of advancement and opportunity as a result of the outstanding litigation.

Overly cautious and defensive practice of medicine

30. The Defendant says that whilst the death of a patient is obviously very upsetting, the ongoing proceedings relating to that death have led to her becoming overly cautious and defensive in her management of patients and affects her management of her patients more than she feels that it should.

Summary of the Defendant's position

31. In summary, the Defendant says that as a result of the delay in the proceedings substantial prejudice has been caused to her and there is a substantial risk that a fair trial of the issues is no longer possible.

Relevant legal principles

32. The court has discretionary jurisdiction to strike out by virtue of RSC O.18, r.19.

"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

- (a) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

33. The Court also has an inherent jurisdiction, again discretionary, to make similar orders.

34. The relevant, well established, legal principles that arise in applications to strike out for want of prosecution have been set out recently by Asif J in *Walter v Patino*⁴:

“54. The power in the Cayman Islands to strike out an action for want of prosecution has been applied in a number of cases, adopting the English approach based on Birkett v James [1978] A.C. 297 and Allen v McAlpine [1968] 2 Q.B. 229 and the many cases that followed in England & Wales during the 1990s, when the jurisdiction was closely scrutinised and refined. The principles to be applied can be summarised briefly as follows.

55. There are two bases for seeking to strike out a claim for want of prosecution, which are:

55.1 contumelious default – meaning a deliberate breach of a court order, but that avenue is closed as soon as the defaulting party complies with the order in question; and

55.2 inordinate and inexcusable delay preventing a fair trial or prejudicing a defendant. At least in the second case, it is a requirement that the applicable limitation period must have expired, otherwise the plaintiff could simply start a new action based on the same cause of action.

56. Focusing on inordinate and inexcusable delay, the following principles apply:

56.1 There must be inordinate delay on the plaintiff’s side in progressing the claim.

56.2 “Inordinate” means “materially longer than the time usually regarded by the profession and Courts as an acceptable period.”

56.3 The specific inordinate delay: (a) must give rise to a substantial risk that it is not possible to have a fair trial of the issues; or (b) must be likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

56.4 Time permitted by the Limitation Act cannot be inordinate delay. However, the later the plaintiff starts his or her action the higher is the duty to prosecute it with diligence. Thus, where the plaintiff has delayed within the period allowed by the Limitation Act, any

⁴ [2025] CIGC (Civ) 2.

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additional prejudice flowing from any delay thereafter may be “serious” if more than minimal.

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35. In relation to striking out on the grounds of abuse of process, the judge said the following:

“57. There is also a parallel jurisdiction to strike out a claim as an abuse of process. The English case of Grovit v Doctor [1997] 1 WLR 640 is authority from the House of Lords that where the court can properly infer that a plaintiff has no bona fide intention of prosecuting the claim and bringing it to a conclusion, that can be an abuse of process justifying the striking out of the claim, without the need to show any prejudice accruing to the defendant. Lord Woolf, with whom all the other Law Lords agreed, said at page 647F-H: “... I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James [1978] A.C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.” (emphasis added)

58. *This remedy is available even before the relevant limitation period has expired but is unlikely to be granted in that situation unless the plaintiff's conduct is particularly egregious.*

59. *Like dismissal for want of prosecution, judges of the Grand Court have accepted in several cases that the Grovit v Doctor approach to abuse of*

process is available in the Cayman Islands, although I am not aware of a case where it has been directly applied.”

36. In the *Patino* case, pleadings closed in June 2001 and apart from agreeing a consent order in March 2003 the plaintiff failed to issue a summons for directions and no substantive progress had been made since. Blame for delay was attributed to both the lawyers involved and the plaintiff. What exacerbated the delay was the fact that the claim against the defendant made serious allegations of fraud. The judge dismissed the action on the ground that he found that the plaintiff had no bona fide intention of advancing the claim to a conclusion. He also dismissed it for want of prosecution saying:

“70... Whilst Mr Allen sought at one stage to argue that the Defendants had contributed to the delays, the fact is that a defendant is not under the same duty as a plaintiff to advance the proceedings to a conclusion: a defendant may allow sleeping dogs to lie. The fact that the Defendant has made a Counterclaim does not affect the analysis since her Counterclaim is entirely responsive to the Plaintiffs’ claims, as indicated earlier in this judgment.

71. The period of delay, amounting to 19 years 10 months in aggregate since May 2003 during which time the only progress achieved is close of pleadings, is clearly inordinate.

72. The Plaintiffs have not sought to put forward any excuse for the delay, and in my judgment, it is completely inexcusable.”

Position of the Defendant

37. Mr Connole on behalf of the Defendant refers to the *Patino* case and a number of English authorities. In relation to delay in this case he makes the following points:

- 37.1 there was delay from the outset in that the Writ was only issued two days prior to the expiry of the limitation period;
- 37.2 the Plaintiff failed to issue a summons for directions as required by GCR O. 25, r1 (1) as explained above;
- 37.3 from 2020 to 2025 there was no communication from the Plaintiff or his attorney;
- 37.4 it is now eleven years since the alleged negligence and for nine of those years there was inactivity on the part of the Plaintiff; and,

37.5 the evidence provided by the Plaintiff suggests that he made minimal effort to contact his attorneys between January 2020 and July 2025. It seems that he received no feedback from KSG about the claim leading to the conclusion, it is argued, that the Plaintiff had no confidence in his case or did not want to pursue it.

38. In *Birkett v James*, Lord Diplock set out the standard in relation to delay and said⁵:

“To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from his sub-sequent delay (beyond the period allowed by rules of court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must be more than minimal.”

39. He also refers to the case of *In Thorpe v Alexander Fork Lift Trucks Ltd*⁶ Lord Denning said²⁷

“As I said in Sweeney v Sir Robert McAlpine & Sons ... the plaintiff is not entitled to delay as of right for four years from the accident, three years before issuing the writ and another year for service. He has no such right. He is not entitled to delay at all. It is his duty, once the writ is issued to serve it promptly and get on with it promptly.”

Also the case of *Biss v Lambeth, Southwark and Lewisham Health Authority (Teaching)*⁷ a case in which medical negligence was alleged to have occurred in 1966, proceedings were issued in 1975 with a delay of 9 months after close of pleadings before the application was made to dismiss the case for want of prosecution. Lord Denning said:

“It is, I believe, accepted on all hands, that if the plaintiff is guilty of inordinate and inexcusable delay before issuing the writ, then it is his duty to proceed with it with expedition after the issue of the writ. He must comply with all the Rules of Court and do everything that is reasonable to bring the case quickly for trial. Even a short delay after the writ may in many circumstances be regarded as inordinate and inexcusable, and give a basis for an application to dismiss for want of prosecution. So in the present case the delay of nine months was properly admitted to be inordinate and inexcusable. It is a serious prejudice to the hospital to have the action hanging over its head even for that time. On this simple ground I think that this action should be dismissed for want of prosecution.”

⁵ Page 325G.

⁶ [1975] 1 WLR 1459 at 1464A.

⁷ [1978] 1 WLR 382 at 390H.

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40. Although not cited by Mr Connole, in the case of *Williams v Bob Soto Diving Limited*⁸ Smellie, Ag.J. (as he then was) dealt with an application for dismissal for want of prosecution. The plaintiff had suffered an injury in 1984 aboard a dive boat owned by the defendant. Proceedings were issued in 1987 but still within the statutory limitation period. A request for further and better particulars was served in 1988 but there was no response for 16 months. The plaintiff was examined by the plaintiff's medical expert who concluded that she had a pre-existing condition. The Plaintiff failed to disclose her prior medical records. As a result of damage caused by a hurricane, the vessel in question underwent repairs and its crew was dispersed and the captain left the islands. The accident reconstruction expert who had been retained died in 1992. In dismissing the action, the judge considered various authorities including *Birkett v James* and reached the conclusion that on the facts of that case the defendant had demonstrated that there had been an inordinate and inexcusable delay and that there was likely to be a substantial risk that a fair trial would not be possible or that there was a substantial risk of likely prejudice to the defendant in presenting its defence in the action.
41. Mr Connole argues that even if his summons is dismissed, there is still going to be further delay before this matter can come to trial. He says that this is a clear case of inordinate delay and that the explanation from Mr Kennedy should be viewed with some caution as KSG has an interest in the action not being struck out and thereby avoiding a claim from Mr Clemmings. In relation to the question of a claim by Mr Clemmings against KSG and its relevance to the current application, Mr Connole refers to the case of *Birkett v James* in which the House of Lords said as follows⁹:

“(3) *The relevance of the plaintiff's remedies against his solicitor*

*Where an action is dismissed for want of prosecution the fault must lie either with the plaintiff or with his solicitors or with both. Which of them is to blame for the inordinate and inexcusable delay does not affect the prejudice caused to the defendant, which is the justification for the dismissal of the action; nor should it, in principle, affect his remedy. If it were a matter which the judge ought to take into account in deciding whether to dismiss the action, the Court upon an interlocutory application in an action between different parties would have to embark upon what in effect would be the trial of an action by the plaintiff against his actual or former solicitor for professional negligence. That, clearly, is impossible, and apart from an initial hesitation by Sachs L.J. in *Sayle v. Cooksey* [1969] 2 Lloyd's Rep. 618, 625 there has been a consensus of judicial opinion in the Court of Appeal that the question of what remedy, if*

⁸ [1992-93 CILR 318]

⁹ [1978] AC 297 at 324A.

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any, the plaintiff will have against his solicitors if his action is dismissed is an irrelevant consideration: Paxton v. Allsopp [1971] 1 W.L.R.1310.”

42. Mr Connole makes a number of submissions in relation to a possible claim by Mr Clemmings and the extent to which KSG’s terms and conditions might or might not limit a claim in negligence and/or contract. Following the approach in *Birkett v James*,¹⁰ I do not believe that this is an issue that is material to the current exercise of the Court’s discretion. The issue to consider is the prejudice caused to the Defendant.
43. In relation to the question of whether a fair trial is no longer likely to be possible Mr Connole refers to the evidence of the Defendant in relation to concerns about her recollection and the fact that it appears that no statement was taken from the nurse at the time. Mr Connole argues that the court is entitled to assume that the very substantial delay from the end of 2019 to the present would inevitably lead to memory loss in addition to the period between the Deceased’s death and the issuing of proceedings. In that regard he refers to the House of Lords case of *Roebuck v Mungovin*¹¹ which involved injuries arising as a result of a road accident in 1984. Proceedings were issued in 1986 and an application to strike out for want of prosecution was issued in 1991. Lord Browne Wilkinson said as follows:

“In the ordinary case the prejudice suffered by a defendant caused by the plaintiff’s delay is the dimming of witnesses’ memories. Where there are two periods of delay, how can it be shown that a witness has forgotten during the later, rather than the earlier, period? We were referred to an unreported decision of the Court of Appeal, Homagold v. Fairclough Building Ltd (unreported), 27 May 1993; F Court of Appeal (Civil Division) Transcript No. 634 of 1993, where there was a difference of opinion as to whether in such a case it was necessary to adduce specific evidence that the prejudice flowed from the loss of memory in the later period. I have no doubt that such evidence is not necessary and that a judge can infer that any substantial delay at whatever period leads to a further loss of recollection.”

44. It is argued that the Court should also take into account the other forms of prejudice suffered by the Defendant. In particular, he says that the question of the Defendant’s anxiety is relevant although

¹⁰ Which approach was also followed in *Williams v Bob Soto Diving* at 324 line 11-16 “As to the third additional principle settled in *Birkett v James*, it is to the effect that whether the plaintiff may have an effective remedy against this attorneys for professional negligence (arising from delay) is an irrelevant consideration in deciding whether to dismiss an action for want of prosecution. Accordingly the court is to have no regard to such considerations.”

¹¹ [1994] 2 AC 224 at 234E.

generally it is only in exceptional cases that such an issue alone can form the grounds of a strike out application. See for example *The Supreme Court Practice 1999* at 25/L/7 which states:

“Prejudice entitling a defendant to strike out an action is not confined to prejudice affecting the actual conduct of the trial, but includes, inter-alia, prejudice to the defendant's business interests (Department of Transport the Chris Smaller (Transport) Ltd [1989] 1 All ER89 7HL). The court however should be cautious about allowing the anxiety that accompanies any litigation to be regarded by itself as a sufficient ground of prejudice to justify the striking out of the action; as a general rule it will be an exceptional case where that sort of anxiety alone founds sufficient ground for striking out. Biss v Lambeth, Southwark and Lewisham Health Authority (Teaching) [1970] 1 WLR 382 where the action hung over the defendant for 11 ½ years with professional reputations at stake was such an exceptional case (Eagil Trust v Pigott-Brown [1985] 3 All ER 119, C.A.).

45. Indeed, Lord Denning M.R. addressed this issue in the *Biss* case, commenting as follows¹²:

“... The one solution that I see is that the prejudice to a defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories, or in the loss or destruction of records. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial... So in the case of the President of India.... the business house was prejudiced because it could not carry on its business affairs with any confidence - or enter into forward commitments - while the action for damages was still in being against it. Likewise, the hospital here. There comes a time when it is entitled to have some peace of mind and to regard the incident as closed. It should not have to keep in touch with the nurses, saying: “We may need you to give evidence.”; or to say to the finance department.: “We ought to keep some funds in reserve in case this claim is persisted in”; or to say to the keepers of records: “Keep these files in a safe place and don't destroy them as we may need them.” It seems to me that in these cases this kind of prejudice is a very real prejudice to a defendant when the plaintiff is guilty of inordinate and inexcusable delaying since the issue of the writ: and that it can properly be regarded as more than minimal. And when this prejudice is added to the great and prejudicial delay before writ... then there is sufficient ground on which to dismiss the action for want of prosecution.”

46. In the same case, Sir Geoffrey Lane said¹³:

“As Lord Denning MR has already indicated, there are many ways in which defendants may be prejudiced by continued delay. A small business concern faced with a huge claim in damages may well suffer continuing financial stringency and

¹² P389 E-G. See also *Eagil Trust v Pigott-Brown* [1985] 3 All ER 119 at 124d and *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 AC 1197 at 1209, *Colin Haynes v Dr G Atkins* 1983 WL 215519 and *Ingram v Turner* Grand Court Cause 59 of 2017 unreported 8 March 2022.

¹³ At p 392H.

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loss each week that goes by through having to set aside funds against their contingent liabilities. In the present case the nurses whose competence and standards of care are in question are no doubt suffering at least some apprehension as to what may happen or be said at the trial. Why, one may ask, should they continue to have to suffer? That to my mind provides enough by way of prejudice to entitle one to say in accordance with Birkett v James ... that extra prejudice beyond that caused by the pre-writ delay has occurred to the defendants here, justifying us in dismissing the action."

47. In summary, Mr Connole says that in the circumstances the Court has ample evidence that by reason of delay causing lapse of memory on the part of the Defendant and the absence of evidence of the nurse, a fair trial is no longer possible. It is also the case, he says, that by reason of the delay the Defendant has suffered severe prejudice and would continue to suffer severe prejudice if this action were to continue.

Position of the Plaintiff

48. Miss Price on behalf of the Plaintiff says:

- 48.1 The Plaintiff disputes that he is to be treated as responsible for the delay and that it is inexcusable. She argues that the evidence shows that, throughout the relevant period, the Plaintiff personally was seeking to advance his claim but the attorney handling it, whilst telling him that it was progressing, in fact did not take steps to do so. It is argued that in such a situation a Plaintiff should not be fixed with the default of his attorney.
- 48.2 In addition, Miss Price contends that the Court should take into account the Defendant's own failure to do anything to advance the matter in determining to what extent there is delay which is inexcusable and the cause of the prejudice about which the Defendant complains.
- 48.3 If, nonetheless, the Court considers there is some inexcusable delay, the Plaintiff contends that it has not caused the Defendant any relevant prejudice.
- 48.4 Further and in any event it is argued that, as a matter of policy, the Court should permit the Plaintiff's claim to go forwards against the Defendant responsible for his wife's death, rather than to throw him back on a secondary claim against his attorney which it is clear will not result in any substantial award in his favour.
- 48.5 Finally, Miss Price says that it is clear from the evidence that the Court should not infer that the Plaintiff has no intention to pursue his claim and therefore should not conclude that it is an abuse of process.

49. Miss Price argues that for the correct approach of the Court when faced at the same time by both a Defendant's application to have an action dismissed for want of prosecution and a Plaintiff's application for an extension of time under GCR Order 3, rule 5, is as set out in the note to *The Supreme Court Practice* 1999 3/5/12 which cites *Costellow v Somerset County Council* [1993] 1WLR 256, per Sir Thomas Bingham M.R (as he then was):

"As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met ... This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.

"The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by Ord. 3, r.5, a discretion to be exercised in accordance with the requirements of justice in the particular case. ...

"Neither of those principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default has caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, factor....

"... in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant ...

"Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the Plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under O. 3, r.5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed."

50. That passage was adopted by Segal J in *Intertrust Corporate Services (Cayman) Ltd v Cayman Islands Monetary Authority* [2021] (2) CILR 422:

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“ ... even in a case involving a public law challenge, the Court is not required to and should not adopt a mechanistic approach involving, as the Authority contended, rigid preconditions that had to be satisfied before the Court is able to grant the extensions of time sought But it is, in my view, only an adaptation of the underlying approach to the exercise of a broad discretion to extend time rather than the substitution of an entirely different approach.”

51. Miss Price says that the overriding principle is that justice must be done between the parties. The editorial notes to *The Supreme Court Practice* at paragraph 3/5/4 record that, in *Mortgage Corporation v Sandoes* [1997] PNLR 263, guidance was given which includes the following guidelines approved by the Master of the Rolls and the Vice Chancellor, as Head of Civil Justice, as to the approach which litigants can expect the Court to adopt to the failure to adhere to time limits contained in the rules or directions of the court:
- 51.1 Time requirements laid down by the rules and directions given by the Court are not merely targets to be attempted; they are rules to be observed.
- 51.2 At the same time the overriding principle is that justice must be done.
- 51.3 Litigants are entitled to have their cases resolved with reasonable expedition. Non-compliance with time limits can cause prejudice to one or more of the parties to the litigation.
- 51.4 The court will not look with favour on a party who seeks to take tactical advantage from the failure of another party to comply with time limits.
- 51.5 In considering whether to grant an extension of time to a party who is in default, the court will look at all the circumstances.
52. In relation to the power of the court to strike out for inordinate delay Miss Price also refers to *Birkett v James*, *Allen v McAlpine*¹⁴ and *Watler v Patino*.
53. Referring to the evidence from the Defendant, Miss Price notes that in her affidavit evidence the Defendant says that “[t]he delay – and particularly the delay since March 2018 – places me at a serious disadvantage and undermines my ability to present a full and fair defence eleven years after the fact” but, Miss Price says, that is not the relevant period for the purpose of her application.
54. It is argued that time which elapsed before the issue of the Writ cannot of itself be inordinate delay.

¹⁴ [1968] 2 QB 229.

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Only delay after the issue of the Writ and expiration of the limitation period is relevant.

55. Miss Price reiterates that in this case:

55.1 The Writ was issued on 29 March 2018.

55.2 The limitation period expired on 1 April 2018.

55.3 The last step taken in the action was the service of the Defence on 29 November 2019, a date for service agreed by the parties.

55.4 Pleadings were deemed to be closed on 13 December 2019.

55.5 Ms. Grandage should have taken out a Summons for Directions within 1 month after the close of pleadings, i.e. by 13 January 2020.

56. The Plaintiff accordingly says:

56.1 The period between 1 April 2015 and 13 January 2020 is not a relevant period of delay.

56.2 It is accepted that there was inordinate delay between 14 January 2020 and 27 June 2025 when Ms. Grandage retired from the partnership at KSG (a period of 5 years, 5 months and 13 days). This is the relevant period of delay for the purposes of the applications before the Court.

56.3 There has been no delay on the Plaintiff's part since Ms. Grandage retired from KSG.

57. Miss Price emphasizes that both Mr. Kennedy and Mr. Clemmings have apologized for the relevant delay and says that the evidence is that Ms. Grandage found herself unable to deal with Mr. Keeble on this matter and she appears to have developed some kind of mental block on her ability to progress it.

58. Miss Price says that the period of delay has, however, not been caused by the Plaintiff's actions nor by his having no bona fide intention to prosecute this matter to a conclusion, as the Defendant has wrongly asserted, nor by any inexcusable failings on his part. As Mr. Clemmings has explained, he regularly contacted Ms. Grandage to ask about progress on his claim and, on those occasions when she did speak to him, she reassured him that the matter was progressing. He provided her with documents to assist with the preparation of a draft Schedule of Loss.

59. As a layman, it is argued, he was doing his best to follow up with Ms. Grandage and to give her instructions to progress the matter and he should not be fixed with her inaction: see *Corbin v Penfold Metallising Company Ltd*¹⁵ per Buxton LJ at paragraph 22:

“The main difficulty about that approach is the emphasis that is placed upon the failings on the part of the defendant’s solicitors, because in his analysis of whether the Claimant had acted diligently, the Judge undoubtedly attributes – and entirely attributes – the actions of the solicitors to the Claimant himself. Unless the Claimant is, as a matter of law, bound by and bears the responsibility for that which is done by his solicitors, that attribution is plainly not right because, on the evidence, Mr Corbin did what a man in his position might be expected to do, which is to go to his solicitors, who are apparently efficient and responsible in this area of work, and left them to get on with it. ...

“23. This Court has recently considered the impact in this particular area of limitation of fault on the part of those advising the Claimant. It did that in the case of Das v Ganju ... Sir Christopher Staunton ... then said this:

“If that passage means that as a matter of law anything done by the lawyers must be visited on the client, it cannot in my view be reconciled with other authority. ... it is no reproach to the plaintiff that he has received the wrong legal advice.”

60. As to the issue of inexcusable delay, the Plaintiff submits:

- 60.1 Viewed objectively, he cannot properly be described as being responsible for “inexcusable” delay in the circumstances of this case.
- 60.2 The Defendant has herself acquiesced in the delay. There has throughout been a number of actions available to her which she has chosen not to take: see *Grovit v Doctor*¹⁶. For example, she could have filed a summons for directions herself: see GCR Order 25, rule (1)(4).
- 60.3 A Defendant may choose to take no action to stimulate the Plaintiff – “to let sleeping dogs lie” - but the Defendant runs the risk that the Court may decide that the Defendant encouraged or contributed to the delay: see *Watler v Patino* (above), per Asif J. It is said that this is the case here. It is argued that it is not correct to say that the Defendant has had “no

¹⁵ [2000] Lloyds Rep Med 247.

¹⁶ [1997] WLR 640.

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control over [the] progression” of this matter as suggested in paragraph 5 Defendant’s second affidavit.

61. If (contrary to the above), the Court is persuaded that the Plaintiff should be treated as being responsible for both inordinate and inexcusable delay, Miss Price says that the Court must ask whether has the delay caused prejudice to the Defendant or a substantial risk that a fair trial is not possible?
62. Miss Price contends that the professional and personal embarrassment which the Defendant claims to have suffered was caused by her negligent treatment of Mrs. Clemmings and the issue of the Writ, not by any post-issue delay. She is in no different position to any other professional who is sued for the negligent performance of their duty of care.
63. In her second affidavit, the Defendant says that she is:

“7. ... sure that my recollection would have been better than at present some three years after March 31, 2015, i.e. March 2018. However, in the nearly eight years that have expired since, during which I have dealt with innumerable other cases, my memory of the events of one encounter eleven years has inevitably and seriously further diminished ...

“11. The delay – and particularly the delay since March 2018 – places me at a significant disadvantage and undermines my ability to present a full and fair defence eleven years after the fact. In particular, I am deprived of the ability to give detailed evidence, presented forcefully and grounded in my clear recollection rather than inferences from records, recollection refreshed or even false memories that the mind inevitably constructs over time. In trying now to recollect the original and true memory, my recollection is inevitably clouded, degraded and overwritten if you will, by the hundreds of encounters with similar patients presenting with similar symptoms over the years since.

“12. I am as a result significantly disadvantaged in responding to any reconstructed narrative advanced by the Plaintiff, particularly where allegations may turn on what was said, not said, emphasised, or understood.”

64. Miss Price argues that the Defendant misunderstands the evidence which will be relied upon by the Court to decide this claim. She argues that:

64.1 Witness recollection of a particular consultation may be relevant where the Court has to decide whether a clinical record is inaccurate or incorrect or where there is material which justifies the conclusion that witness evidence contrary to the record is unreliable or incorrect. That is not the case here.

64.2 In this matter, the Defendant's contemporaneous medical records are available and the Plaintiff is not challenging them as a correct and accurate record. In the absence of a dispute that her contemporaneous notes are an accurate record, the Defendant's complaints as to the alleged fading of her memory are of little, if any, relevance. Unsurprisingly, it is argued, she does not assert that her own record is unreliable or incorrect and, indeed, accepts (as she must given its contents) that:

"she made a note querying whether she should rule out meningitis": paragraph 8 of her Defence.

64.3 Thus, it is contended, liability in respect of the Defendant's contact with Mrs. Clemmings on 31 March 2015 will turn on expert opinion evidence as to whether, given her recognition of the need to rule out meningitis, she should have sought secondary care advice and accordingly sent Mrs. Clemmings to hospital as an emergency for further investigations: see by way of example *Farthing v North East Essex Health Authority*¹⁷.

64.4 Miss Price says that before 30 October 2019, the Defendant had obtained such expert evidence and had had a conference with Counsel in London. It is likely she argues that the Defendant would have prepared a statement for the preparation of the report and conference – notably, Miss Price says, she has failed to confirm whether she did or not.

64.5 In any event, it is argued:

64.5.1 Eight years from March 2018 is not the relevant period of delay.

64.5.2 The Defendant needs to prove what more has happened during the period between 14 January 2020 and 27 June 2025 which has caused her memory of events to have dimmed considerably, rather than at an earlier or later time, and how that has caused prejudice to her given that liability will depend on the views of experts in general practice as to whether she should have referred

¹⁷ [1998] Lloyds Rep Med 37.

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Mrs. Clemmings for further investigation, as the Plaintiff alleges. She has not done either. It is argued that of particular note, she does not say whether her attorneys have taken a statement from her. If not, the failure is hers and her attorneys, not the Plaintiff's. If there is a statement, she will be able to rely on it at trial. She has been able to plead a lengthy Defence which includes, amongst other matters, that she performed a thorough examination of the Deceased

64.5.3 Her assertion that she is “*significantly disadvantaged in responding to any reconstructed narrative advanced by the Plaintiff*” is argued to be irrelevant. Mr Price says that as Mr. Kennedy observes and as is apparent to everyone, Mrs. Clemmings sadly died on 1 April 2015, very shortly after the 31 March 2015 consultations with the Defendant. Whilst her medical records are available, Mrs. Clemmings was never able to give any evidence about her consultations with the Defendant.

64.5.4 Further, it is argued, underlying the Defendant's assertion is a faulty model of memory as a mental record which is fixed at the time of an event and then fades (more or less slowly) over time: see the decisions of Leggatt J in *Gestmin SGPS S.A. v (1) Credit Suisse (UK) Limited (2) Credit Suisse (Europe) Limited*¹⁸ and, by way of example, *CXB v North West Anglia NHS Foundation Trust* for its relevance in clinical negligence cases¹⁹.

65. I do note that although Miss Price did not take me to the latter decision during the course of her submissions, upon reviewing it I see that the judge, Gore J expressed some caution about the approach taken in the *Gestmin* decision. Gore J reviewed a number of decisions that dealt with approach of a court when considering documentary evidence and evidence from witnesses. The judge observed as follows:

“13. *I should not let judicial consideration of this issue pass without making reference to the decision of the Court of Appeal in Synclair v East Lancashire Hospital NHS Trust. Tomlinson LJ, at paras. 10 to 15, addressed the issue concerning the inherent reliability of contemporaneous clinical notes against what was submitted to be the less reliable oral testimony of witnesses. I can*

¹⁸ [2013] EWHC 3560 (Comm).

¹⁹ [2019] EWHC 2053 (QB) at paragraph 13.

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deal with the case shortly because it is no more than a decided example of the trial judge being upheld by the Court of Appeal for rejection of reliance on the clinical note in question for forensic reasons fully and properly articulated in his judgment. The case posed and answered the relevant underlying questions which are whether, when the evidence is viewed as a whole, there is material that justifies the conclusion that the clinical record is unreliable or incorrect or whether, when the evidence is viewed as a whole, there is material that justifies the conclusion that the witness evidence to the contrary is unreliable or incorrect. That is the issue which is for the court to decide viewing the documentary and testamentary evidence forensically and not simply by subjective criteria such as demeanour of live witnesses. All that the decided cases to which I have made reference do is to remind judges that care has to be taken in making these assessments, and full and proper reasons have to be given for the conclusions reached, but beyond that I do not find anything in these judgments to be of assistance as a matter of principle in explaining how this task should be undertaken by judges.”

66. In summary, it is argued that there is no serious prejudice as between the Defendant and the Plaintiff and no substantial risk that a fair trial is not possible.
67. In relation to the question of financial prejudice, Mr Price argues that no independent evidence is adduced to support the claim that the Defendant has had any difficulty in obtaining group medical malpractice insurance. It is also argued that to the extent that there has been any other financial or continuing professional prejudice it could have been mitigated by the Defendant herself by seeking to progress these proceedings.

Analysis and decision

68. The relevant legal principles are not in dispute. It is accepted that there has been inordinate delay certainly after the expiry of the relevant limitation period. I do also bear in mind that the Letters of Administration were only issued the day before the Writ was issued and that, in turn, was only two days before the limitation period expired. The Writ was served very shortly before it was due to expire. No explanation has been given as to why those delays occurred.

69. As the authorities set out above explain, where there is inordinate delay, that delay must give rise to a substantial risk that it is not possible to have a fair trial of the issues or must be likely to cause or to have caused serious prejudice to the defendant. As is also clear from the cases referred to, although the limitation period cannot be taken into account when considering delay, the later a plaintiff starts their action, the higher the duty to prosecute it with diligence²⁰. In such circumstances, any additional prejudice suffered by a defendant flowing from any delay thereafter may be serious if it is more than minimal.
70. Considering the affidavits from the Defendant, it seems to me that there is evidence of prejudice. The most obvious area is the dimming of the Defendant's memory. As the court in *Roebuck* noted, where there are two periods of delay (prior to the limitation period expiring and after) it is not practical to try to discern which period had the greater effect in any loss of memory, it is for the judge to infer that any substantial delay at whatever period leads to a further loss or recollection. Miss Price seeks to argue that in this case the key evidence is the clinical records over which she says there is no dispute and that any evidence from the Defendant is of less significance. I do not agree with that. As the Defendant has highlighted there are a number of areas of the Plaintiff's case that may well require her to recall certain events or reasons for decisions taken. Added to that is the absence of any disclosed expert medical evidence identifying the specific areas of agreement or disagreement between the experts and identifying the key issues that will form the focus of arguments and cross examination at trial. As matters stand, while the Defendant has prepared affidavit evidence for this hearing it seems to me that at trial not only will the clinical records be relevant evidence but so too will evidence from the Defendant and the nurse who assisted her.
71. The Defendant has also provided evidence of the anxiety and stress that she has suffered and continues to suffer. As the court in *Biss* said that may in itself not be sufficient prejudice to justify a strike out unless it is an exceptional situation. In that case where an action had hung over the defendant for 11 1/2 years with their professional reputation at stake it was treated as an exceptional case. In this case, in my view it is similarly exceptional and a material factor in my decision. As Sir Geoffrey Land said in *Biss* (also quoted above);

"In the present case the nurses whose competence and standards of care are in question are no doubt suffering at least some apprehension as to what may happen or be said at the trial. Why, one may ask, should they continue to have to suffer?"

²⁰ See *Walter v Patino*.

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That to my mind provides enough by way of prejudice to entitle one to say in accordance with Birkett v James ... that extra prejudice beyond that caused by the pre-writ delay has occurred to the defendants here, justifying us in dismissing the action."

72. The intentions of Mr Clemmings have been questioned. As I mention above, there is no explanation for the delays prior to the commencement of proceedings. It is not clear whether those were the fault of Mr Clemmings, his attorneys or caused by delays in obtaining the Letters of Administration. Whatever the reasons, once proceedings were issued, they should have been pursued with diligence. I accept that Ms Grandage failed in her duty to her client and it appears compounded that by misleading him into believing that his case was being prosecuted actively. Bearing in mind what was said in *Corbin* as set out above, I am not of the view that there is any evidence that Mr Clemmings had no or little intention of pursuing this action.
73. I believe that it is also relevant that despite the parties having already obtained some medical expert evidence, there have been no directions given as to the number of witnesses that the parties may be at liberty to call or their disciplines. It appears to be the case that some medical evidence may have been obtained when proceedings were issued, such evidence is now a number of years old and it is not clear whether the parties may still be wishing or able to rely on it, all of which seems to risk further delay. A further issue that was touched on at the hearing is the fact that the Defendant's treatment of the Deceased will have to be assessed on the basis of the standards of treatment at the time that the Deceased was treated by the Defendant. As time goes by it may well be that this becomes a more difficult issue especially if standards of treatment have evolved since then.
74. Overall, my conclusion is that there is evidence of serious prejudice to the Defendant as a result of the effluxion of so much time. The key aspects of that in this case are the risk of loss of memory of relevant details and the stress and anxiety of having this action hanging over her head in circumstances in which it questions the Defendant's professionalism and competence. I have considered the fact that the Defendant did not take any steps to strike this claim out until the latest Notice of Intention to Proceed was served. That does not change the fact that the circumstances are such that I am of the view that a fair trial is not now possible. On that basis the Plaintiff's action is struck out for inordinate delay.
75. I am aware that the Plaintiff is legal aided and that a costs order could not be made against the Plaintiff in favour of the Defendant. However, I give the parties 14 days from the date that this

judgment is handed down to make brief submissions on costs to the extent that it might be argued that KSG should bear some responsibility for them.

A handwritten signature in black ink, appearing to read "Alistair Walters".

Hon. Justice Alistair Walters
Acting Judge of the Grand Court