CAUSE NO: G2017-0139

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

MAGDALYN BURLINGTON

Plaintiff

-and-

BUTTERFIELD BANK (CAYMAN) LIMITED

Defendant

Appearances:	**Mr Delroy Murray of Murray & Westerborg for the Plaintiff**
	Mr Alexander Davies of HSM Chambers for the Defendant
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**31 May 2024**
Judgment:	**10 July 2024**

Civil Procedure—Strike out for want of prosecution—principles to be applied—allocation of responsibility for delay—whether delay excusable due to plaintiff's impecuniosity—expert becoming unavailable to give evidence—whether claim to be struck out where liability admitted and payment into court

Civil Procedure—Strike out as abuse of process—whether appropriate to draw inference that plaintiff does not intend to progress claim to trial—whether claim to be struck out as a result

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JUDGMENT

A. Introduction

1. On 2 September 2014, Ms Magdalyn Burlington was at work at the Butterfield Bank branch at Albert Panton Street in George Town. Just after midday, she was walking down the stairs in the attached garage, from the ground floor level to the basement level, when she slipped and fell. She alleges in her Statement of Claim that it had been raining and the steps were wet.

2. In due course, the Plaintiff sued the Defendant for negligence and for breach of its duty as an occupier to lawful visitors. Her allegations are that the Defendant failed to take sufficient care in various respects to ensure that she would be reasonably safe when using the stairs.

3. The Plaintiff alleges that she suffered the following injuries as a result of the accident:

   3.1 prolapse of her L4/L5 intervertebral disk causing nerve root compression

   3.2 tear of her talo-fibular ligament in her left ankle

   3.3 chondral lesion to the talar dome in her left ankle

   3.4 traumatic arthrosis of her left sub-talar joint

   3.5 damage to the trochlear surface of her left talus, and

   3.6 associated pain.

   It will be seen from the above that, apart from the nerve root compression, all of the Plaintiff's injuries involved her left ankle.

4. The Plaintiff's current complaints go some way beyond her pleaded case. The Plaintiff alleges that she has suffered continuous chronic pain in her left ankle since the accident. She has had steroid injections into her ankle which resulted in some improvement, and surgery in February 2017 to repair damage to her ankle ligaments. In December 2017, she was complaining that she had bilateral pain in both legs and arms and needed a walking stick to mobilise. At some point she

became unable to work as a result of her chronic ongoing pain. Her condition does not appear to have improved at any time since then, and in fact has deteriorated. One of the medical experts instructed on her behalf has concluded that she is suffering from chronic regional pain syndrome. Another does not agree with that diagnosis but considers that the Plaintiff does have an acceleration of back pain which she would have suffered naturally, within 5 years of the index injury, that her pain is worse than it would have been, and, that she has neuropathic pain in her left leg.

5. The medical evidence obtained by the Plaintiff suggests that she intends to put forward a significant claim for general damages and a large claim for special damages in respect of her loss of earnings for some 5-20 years.

6. Having initially denied the claim, in March 2021, the Defendant admitted liability but continued to dispute causation of the alleged consequences of the Plaintiff's injuries.

7. The Defendant's experts do not agree that the Plaintiff has chronic regional pain syndrome. They conclude that there is no orthopaedic source for her complaints and that those complaints are not explicable from a pain management perspective either. The Defendant's position is that, apart from the immediate soft tissue injury to the Plaintiff's left ankle, which should have resolved within weeks or a few months of the accident, none of her current complaints of ongoing serious continuous pain are causally related to the accident.

B. Procedural history

8. The case came before me on 31 May 2024 on a summons filed by the Defendant on 9 February 2024 to strike out the claim for want of prosecution. The summons was supported by two affidavits sworn by Janique Bodden, a paralegal employed by HSM Chambers. The Plaintiff swore an affidavit in opposition.

9. Given the nature of the Defendant's summons, it is necessary to set out the procedural history of this case in a little detail. Ms Bodden exhibited a chronology to her first affidavit. The Plaintiff did not disagree with Ms Bodden's chronology. Following circulation of my draft judgment, the

Defendants' attorneys provided some additional information regarding earlier stages of the conduct of the matter. I have therefore largely drawn the following from Ms Bodden's chronology, supplemented by the court file and the Defendants' further comments. In addition, I have included in italics dates on which certain procedural steps were due to take place and other notable dates.

Date	**Key Details / Event**
02-Sep-14	Plaintiff suffers accident
18-Aug-15	Plaintiff engages Brooks & Brooks
12-Sep-16	Plaintiff engages McGrath Tonner in place of Brooks & Brooks
2017	Plaintiff obtains legal aid to pursue her claim (precise date unclear from papers)
05-Jul-17	Plaintiff engages Priestleys in place of McGrath Tonner – I was told in argument that this was related to the relevant fee-earner changing employment
25-Aug-17	Plaintiff issues writ endorsed with Statement of Claim
02-Sep-17	***Third anniversary of accident, expiry of limitation period***
13-Sep-17	Date of report on building code compliance (Plaintiff's expert)
25-Sep-17	Defendant files Defence denying liability, alleging contributory negligence and denying causation of any injuries and continuing consequences
05-May-18	Date of expert report from Dr Akinwunmi (Plaintiff's neurologist with interest in pain management): Plaintiff is suffering from complex regional pain syndrome
24-Mar-18	*Parties agree terms of Consent order for Directions*
07-May-18	Parties file Consent order for directions: 1. Simultaneous exchange of expert reports by 18-May-18 (medical and surveyor) 2. Experts' meetings by 15-Jun-18 3. Experts' joint statements by 29-Jun-18 4. Experts' supplemental reports by 13-Jul-18 5. Plaintiff to file and serve a Schedule of Loss by 29-Jun-18 6. Defendant to file and serve Counter-schedule of Loss by 13-Jul-18 7. Parties to file and serve factual witness statements by 13-Jul-18 8. Trial to commence on first available date after 31-Aug-18
18-May-18	*Exchange of experts' reports due (07-May-18 consent order)*
23-May-18	*Parties agree extension of time for exchange of expert reports, dates to be agreed*

Date	Key Details / Event
18-Jun-18	Plaintiff serves expert report of Dr Akinwunmi
13-Jul-18	Defendant files summons to join McAlpine as third party
24-Aug-18	Plaintiff files summons to join McAlpine as second defendant
02-Sep-18	***Fourth anniversary of accident***
02-Nov-18	Plaintiff examined by Dr Markham on behalf of Defendant (orthopaedic surgeon)
16-Nov-18	Plaintiff examined by Dr Hepple on behalf of Defendant (consultant in pain management)
25-Nov-18	Date of expert report from Dr Hepple: Plaintiff's complaints not explained by any orthopaedic pathology
Dec 2018	Date of expert report of Dr Markham: Plaintiff does not have and has never had complex regional pain syndrome
12-Dec-18	Plaintiff issues summons to disapply Limitation Act
13-Mar-19	Hearing of summonses to join McAlpine
26-Aug-19	Judgment on summonses to join McAlpine
27-Aug-19	Order sealed joining McAlpine
27-Aug-19	Defendant issues Third Party Notice against McAlpine
27-Aug-19	Defendant files Amended Defence
29-Aug-19	McAlpine obtains leave to appeal against order for joinder
30-Aug-19	Date of Dr Hepple's addendum report
02-Sep-19	***Fifth anniversary of accident***
12-Nov-19	McAlpine's appeal allowed, joinder of McAlpine set aside
Mar 2020	COVID restrictions imposed
Aug 2020	WP correspondence between the parties; Defendant makes a payment into court
02-Sep-20	***Sixth anniversary of accident***
Nov 2020	Plaintiff engages KSG in place of Priestleys

Date	Key Details / Event
05-Mar-21	Defendant issues summons for directions
12-Mar-21	Parties agree consent order for directions: 1. Judgment to be entered for damages to be assessed 2. Plaintiff to serve updated discovery on quantum by 09-Apr-21 3. Plaintiff to serve expert report on pain management by 07-May-21 4. Defendant to serve any expert report in response by 04-Jun-21 5. Experts' meetings by 02-Jul-21 6. Experts' joint statements by 30-Jul-21
09-Apr-21	*Plaintiff's updated discovery on quantum due (12-Mar-21 consent order)*
07-May-21	*Plaintiff's expert report on pain management due (12-Mar-21 consent order)*
04-Jun-21	*Defendant's expert report on pain management in response due (if any) (12-Mar-21 consent order)*
02-Jul-21	*Experts' meetings due to have been completed (12-Mar-21 consent order)*
23-Jul-21	Defendant complains Plaintiff failing to comply with consent order for directions
30-Jul-21	*Experts' joint statements due (12-Mar-21 consent order)*
02-Sep-21	***Seventh anniversary of accident***
02-Sep-21	Date of Dr Lieberman's expert report (Plaintiff's expert in pain medicine) – consequences of accident are: acceleration of back pain by 5 years; exacerbation of back pain; exacerbation of pain that Plaintiff would have developed; neuropathic pain in left leg but agrees that Plaintiff does not have complex regional pain syndrome
15-Sep-21	Plaintiff serves Dr Lieberman's expert report and additional discovery
Nov 2021	Date of Dr Markham's supplementary expert report
21-Nov-21	Date of Dr Hepple's supplementary expert report
08-Feb-22	Defendant serves Dr Markham's and Dr Hepple's supplementary reports
28-Mar-22	Plaintiff requests interim payment to pay for spinal cord stimulation
28-Jun-22	Defendant makes voluntary interim payment of US $20,000
02-Sep-22	***Eighth anniversary of accident***

Date	Key Details / Event
30-Jan-23	KSG write to Defendant that Plaintiff's legal aid has been restored *However, no corresponding legal aid certificate has been served and the Plaintiff's counsel told me in argument that her legal aid has not been restored*
Mar 2023	KSG indicate Plaintiff changing attorney
02-May-23	Murray & Westerborg file Notice of Appointment
02-May-23	Murray & Westerborg file Notice of Intention to Proceed
Jul 2023	Defendant attempts to contact Murray & Westerborg by telephone but receives no response
07-Jul-23	KSG write to Murray & Westerborg requesting Notice of Change and confirmation that instructed in place of KSG
22-Aug-23 24-Aug-23	Defendant writes to Murray & Westerborg and is told the relevant fee earner is away until 04-Sep-23
02-Sep-23	***Ninth anniversary of accident***
25-Sep-23	Defendant writes to Murray & Westerborg chasing for a response
26-Sep-23	Murray & Westerborg respond that they filed a Notice of Change on 05-May-23
27-Sep-23	Murray & Westerborg provide a copy of Notice of Appointment dated 05-May-23
15-Nov-23	Murray & Westerborg write that they are unable to quantify the Plaintiff's losses
28-Nov-23	Defendant files Notice of Intention to Proceed
04-Dec-23	Defendant serves Notice of Intention to proceed and says will apply to strike out the action if no substantive response
18-Jan-24	Dr Markham informs Defendant that he has now retired and is unable to give evidence
09-Feb-24	Defendant files summons to strike out
31-May-24	Hearing of Defendant's application

10. In addition to the foregoing, I was told that a Schedule of Loss was served in 2018 but I have not been provided with a copy and it does not appear to have been filed at court.

11. Mr Murray, appearing for the Plaintiff, told me that he is unable to value the Plaintiff's claim without further medical input. He indicated in argument that he wishes to obtain further expert medical evidence regarding the Plaintiff's condition and prognosis. It appears that he wishes to instruct one of the Plaintiff's current treating physicians to act as a new expert on pain management, in place of Dr Lieberman. The reason for changing experts has not been explained to me, and nor has there been any discussion about the appropriateness of instructing the Plaintiff's treating physicians to act as experts.

12. The Plaintiff has recently requested a further interim payment, apparently to fund a trip to the United States of America for a consultation with the proposed new expert in pain management, although there is no summons for this relief before me.

13. It therefore appears that, on the Plaintiff's case, it will still be many months before the case will be ready for a final determination of causation and damages, and most likely not until 2025.

14. The procedural history set out demonstrates a woeful failure on both sides to progress the matter. It is a matter for real concern that, nearly 10 years after the Plaintiff's accident, her claim for damages has not been tested and quantified, and that her claim does not appear to be close to a resolution, given Mr Murray's position on the need for further expert medical input and his stated inability to value the claim. It is entirely unsurprising that the Defendant has now sought to strike out the claim for want of prosecution.

C. The Law

15. The applicable law is not in dispute between Mr Davies, who appeared for the Defendant, and Mr Murray. The availability of the power to strike out for want of prosecution in the Cayman Islands was confirmed in *Geninvest SA v Bank of Butterfield International (Cayman) Ltd* [1999 CILR 223], where Smellie CJ directly adopted the English approach based on *Birkett v James* [1978] A.C. 297, applying *Allen v McAlpine* [1968] 2 Q.B. 229. It has been applied in many cases in the Cayman Islands and continues to be advanced as a basis for dismissal of stale cases.

16. I can briefly summarise the relevant principles from the editorial notes in the *Supreme Court Practice 1999*, as follows.

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

17.1 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

17.2 inordinate and inexcusable delay preventing a fair trial or prejudicing a defendant.

18. In addition, there is a parallel jurisdiction to strike out a claim as an abuse of process. *Grovit v Doctor* [1997] 1 WLR 640 is authority 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.

19. Focussing on inordinate and inexcusable delay, the following principles apply:

19.1 There must be inordinate delay on the plaintiff's side in progressing the claim.

19.2 "Inordinate" means *"materially longer than the time usually regarded by the profession and Courts as an acceptable period."*

19.3 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.

19.4 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, more than minimal additional prejudice flowing from any delay thereafter may be "serious".

19.5 Whether the relevant delay is inexcusable should be looked at primarily from the defendant's point of view or objectively, but some allowance may be given for illness and mishaps during the conduct of the case.

19.6 The extent of any prejudice to the defendant is a matter of fact and degree. It is a question of fact and is fact sensitive, but the following considerations provide some guidance:

(a) A common factor relied upon is the effect of delay on witnesses' memories (although the damage to their memories may already have been done during earlier non-culpable delay) or their death or disappearance.

(b) The importance of witnesses depends on the issues in the case: their evidence may be very important in a case about an accident or where oral statements or representations are in issue but will be less significant in a heavily documented commercial action.

(c) There must be some specific evidence of prejudice – a bald assertion of prejudice or of a risk that the trial cannot be fair is not sufficient. However, provided that a proper factual foundation has been laid, the court may properly infer, for example, that the memory or reliability of witnesses has deteriorated as a result of culpable delay.

(d) Relevant prejudice is not limited to matters affecting the conduct of the trial, but can include prejudice to the defendant's business interests, the effect of having serious allegations hanging over the heads of professionals for an extended period, increases in the value of the claim attributable to the relevant delay etc. The kinds of detriment that a defendant may suffer are not closed.

19.7 Where both parties have contributed to the delay, the court will consider the conduct of each party, the various periods of delay and the various items of prejudice and decide, where possible, to whose fault they are attributable. If the defendant has considerably contributed to the delay or, *a fortiori,* has agreed to it, he will seldom obtain the dismissal of the action based on that delay. The defendant will only be permitted to rely on causative culpable delay on the part of the plaintiff, and the prejudice attributable to it, for the purpose of seeking summary dismissal of the action.

19.8 A defendant may decide to take no action to stimulate the plaintiff and can *"let sleeping dogs lie"* in the hope that the action may die a natural death. But the defendant runs the risk that the court may conclude that the defendant encouraged or contributed to the delay.

20. Finally, in light of the particular features of this case, I will quote in full paragraph 25/L/13 from the *Supreme Court Practice 1999*:

> "(6) Liability admitted—*The Court is reluctant to dismiss an action on the ground of prejudice to the defendant if liability is not substantially in issue, particularly if there has been a payment into Court. But in some cases it is necessary to do so because the delay has made it impossible, or very difficult, to evaluate the damages or if the delay has been very long indeed, e.g. 10 years. Sometimes justice can best be done by giving the plaintiff a last chance to accept the money in Court."*

D. The Defendant's submissions

21. The essence of the Defendant's submissions is as follows:

21.1 Whilst the ability to strike out a case for want of prosecution is a last resort, this is an exceptional case, where it should be applied.

21.2 The overall delay is 7 years since the issue of proceedings and 10 years since the accident.

21.3 The Plaintiff has allowed the case to go to sleep since about 2020, although the Defendant accepts responsibility for the period from November 2020 to February 2021.

21.4 The delay is inordinate. While some of the earlier delay can fairly be attributed to both sides, the delay since 2020 is chiefly attributable to the Plaintiff.

21.5 The Plaintiff's evidence does not explain the inordinate delay.

21.6 It is implausible that a Schedule of Loss cannot be filed or that there are issues still to be resolved.

21.7 There is no explanation or excuse offered for the Plaintiff's refusal to engage with the proceedings.

21.8 Similarly, no good reason has been put forward by the Plaintiff for her multiple changes of representation – she has been represented by five different attorneys. Notably, her instructions to Priestleys appear to have ceased immediately after the Defendant's without prejudice offers were made. It appears that the Plaintiff's legal aid was withdrawn at around this time, after judgment on liability had been entered.

I pause here to comment that, as is common in applications of this kind, I was informed of the existence of without prejudice discussions, which may be relevant to the question of whether the delay is excusable, but I was not informed of the content of any of those

discussions. Similarly, I was told that a payment into court was made in about August or September 2020 but have not been told any information about the amount of the payment in.

21.9 The Plaintiff engaged KSG in November 2020 in place of Priestleys. There was a long period that then elapsed during which she obtained further medical evidence and the Defendant agreed to make a voluntary interim payment to fund spinal cord stimulation therapy, which was suggested by one of the Plaintiff's treating physicians, but which does not appear to have yielded any real improvement in her condition.

21.10 The Plaintiff's instructions to KSG ceased by about March 2023 and she had engaged Murray & Westerborg by 3 May 2023, when they served Notice of Acting.

21.11 The inference to be drawn from the foregoing is that the Plaintiff is likely to have been shopping for advice, both legal and medical, and rejecting appropriate advice to settle her claim – this would be consistent with the Plaintiff losing her legal aid.

21.12 Mr Davies does not suggest that this is a case where he can rely on the fading of witnesses' memories to ground a complaint of prejudice. But he says that there is significant prejudice to the Defendant as a result of the delay in that the Defendant has now lost access to its nominated expert in chronic pain. This has arisen in the following circumstances:

(a) The Defendant had engaged Dr Markham, who is an eminent specialist and expert witness in the field of chronic pain management. He examined the Plaintiff in person in November 2018. Based on his examination, he casts significant doubt upon the Plaintiff's diagnoses and proposed treatments and disputes that she has chronic regional pain syndrome and disputes the existence of a causative link between her reported injuries and her accident. He is therefore a crucial witness for the Defendant on the quantum issues.

(b) Dr Markham has recently retired. He has his own medical issues, which led to his retirement, he has no insurance cover and is no longer willing or able to act as one of the Defendant's experts.

(c) If the case is allowed to proceed, the Defendant will be forced to instruct a new expert in pain management. He or she will not have the benefit of having examined the Plaintiff in November 2018 for comparison to any examination performed now. In addition, it is questionable that, a decade after the accident, a doctor could now make

any useful assessment of causation of the Plaintiff's complaints by the accident. The Defendant is therefore significantly handicapped in its ability to contest causation and the quantum of claim as a result.

(d) There will be duplication of work and the Defendant will have to incur additional costs as a result of having to change experts, which will not be recoverable from the Plaintiff or not fully recoverable.

21.13 In addition, the Defendant has had this claim hanging over its head for nearly 10 years now, which also amounts to relevant prejudice.

21.14 Following a query from the bench, Mr Davies embraced the proposition that the Defendant or its insurers will have had to maintain a reserve in respect of the claim and will not have been able to close off their accounts for the year in which this matter was reported.

21.15 The money paid into court by the Defendant is not accruing interest and so is being eroded in real terms by inflation the longer that the claim continues. This is further prejudice to the Defendant.

21.16 Further or alternatively, the Court would be justified in concluding that the Plaintiff's actions disclose that she has no intention of bringing this case to trial, and that she is simply using the proceedings as a tool to obtain interim payments from the Defendant for treatments which are not agreed to be of benefit. This would justify striking out the claim as an abuse of process without the need to demonstrate prejudice caused by the inexcusable delay, applying *Grovit v Doctor* [1997] 1 WLR 640. The Plaintiff may have intended to pursue the claim when it was first started. However, the recent refusal of her attorneys to engage in proper pre-trial directions, or to even pick up the telephone to counsel during 2023 to discuss the case, demonstrates there is now no appetite whatsoever on the part of the Plaintiff effectively to progress this claim.

21.17 If the court is not satisfied that it is right to strike out the claim, then the court should not permit the Plaintiff to engage the proposed new expert and should set a very short timetable for the hearing of the assessment of damages.

E. The Plaintiff's submissions

22. On behalf of the Plaintiff, Mr Murray argues as follows:

22.1 The Plaintiff accepts there has been delay in progressing the case, and that that delay is substantial.

22.2 The length of the delay in this case should not necessarily lead to dismissal of the claim – each case must be judged on own facts.

22.3 The court needs to consider whether there is an excuse for the delay. In this case, the Plaintiff's problem is that she is impecunious, which explains and excuses her inability to progress the case. The Plaintiff's inability to progress the case is due to factors outside the Plaintiff's control, which makes it excusable.

22.4 The Needs Assessment Unit declined to give the Plaintiff financial assistance for various reasons – there is an appeal outstanding.

22.5 When the Plaintiff first engaged Murray & Westerborg, it was necessary to get updated reports on her current state of health. Murray & Westerborg were able to obtain reports from Dr Akinwunmi and Dr Nicholls (two of the Plaintiff's treating physicians). However, Murray & Westerborg are not able to obtain an update from Dr Yungst, the Plaintiff's pain management specialist. The Plaintiff does not have the funds to pay him for an examination and report and to pay for her travel to the USA for that purpose.

22.6 Murray & Westerborg cannot determine quantum without updated medical reports responding to Dr Markham's opinion, particularly from Dr Yungst.

22.7 The Plaintiff will not object to the Defendant relying on Dr Markham's written report as hearsay and obtaining a report from a new expert in pain management.

22.8 The only way that the court can properly adjudicate on what the Plaintiff should be entitled to by way of damages is by allowing her to obtain further medical evidence.

22.9 This is not a case involving memories and liability has already been established. Both of these factors are relevant when considering the question of prejudice.

22.10 It would be unfair to strike out the Plaintiff's claim at this stage, which would have the effect of leaving the Plaintiff without compensation for the Defendant's admitted negligence.

22.11 The court needs to balance the prejudice on both sides. The prejudice to the Plaintiff outweighs any prejudice to the Defendant.

22.12 The Court should order an assessment of damages and allow the Plaintiff to use the money in court to fund obtaining a further medical report.

22.13 It would be wrong to strike out the claim and to leave the Plaintiff to think that she has not had a fair shake of the dice.

F. Analysis

23. The Plaintiff first engaged attorneys in August 2015, 11½ months after her fall. Her claim was commenced 2 years later and approximately 1 week before the expiry of the limitation period. It is clear, therefore, that the Plaintiff was aware that she had a potential claim at an early stage but did not actively pursue it until the end of the limitation period. As a result of this, the Plaintiff is under a higher duty to progress her claim promptly. Any further prejudice to the Defendant as a result of her failure to do so may be "serious" for the purpose of the jurisdiction to strike out for want of prosecution, provided that it is more than minimal in nature.

24. There have been significant periods during the history of this case when it appears that there has been no real progress, or the matter was not actively being advanced. Again, this enhances the duty of the Plaintiff to "get on with it".

25. The Defendant's focus - for the purpose of the application to strike out for want of prosecution - is on the period from about September 2020, just after the Defendant made a payment into court, up to February 2024. During this period of 3 years and five months:

25.1 The Plaintiff engaged KSG in November 2020 in place of her previous attorneys.

25.2 The Defendant filed a summons for directions on 5 March 2021. It does not appear that there had been any procedural progress by the Plaintiff by that time, representing a delay of approximately 4 months.

25.3 The parties agreed a consent order for directions on 12 March 2021. This required the Plaintiff to serve her report from an expert in pain management by 7 May 2021. However, the Plaintiff's expert did not examine the Plaintiff until 29 July 2021 and his report was not finalised and served until September 2021. Preparation and service of this evidence thus took

6 months, and 4 months longer than the parties had agreed it should take. The latter period is relevant delay.

25.4 Another 4 months elapsed between November 2021 and February 2022, when the Defendant had in its possession the supplemental reports of its experts but simply did not serve them. The explanation put before me was that the fee earner with conduct of the matter within the Defendant's attorneys' firm was in the UK, where he caught Covid and was therefore unable to work or travel. There was no explanation offered by the Defendant as to why another fee earner was not covering or could not cover this matter in the interim. Perhaps for this reason, Mr Davies accepted on behalf of the Defendant that this was delay attributable to the Defendant, not the Plaintiff.

25.5 Between February 2022 and May 2023, the Plaintiff requested, and the Defendant agreed to make, a voluntary interim payment. The Plaintiff then travelled to the USA for treatment, which appears to have been unsuccessful. It seems to me that three to four months should be allowed for these steps. The remainder of the period, totalling some 11 or 12 months, is delay attributable to the Plaintiff.

25.6 By May 2023, the Plaintiff had switched attorneys from KSG to Murray & Westerborg. Between May 2023 and February 2024 there was no procedural step taken by the Plaintiff apart from serving notice of intention to proceed in May 2023. The Defendant had to file a further notice of intention to proceed in November 2023, and then filed the summons to strike out for delay, after giving the Plaintiff warning of its intention to do so. This period of 10 months is clearly delay on the part of the Plaintiff.

25.7 From February 2024 to June 2024 has been occupied with preparation for and hearing of the Defendant's summons to strike out and is therefore not a period of delay.

26. The overall delay attributable to the Plaintiff between September 2020 and June 2024 is therefore at least 29 months.

27. Mr Murray urges me to excuse the Plaintiff's delay on the basis that she is impecunious and therefore unable to pay fees to advance the litigation. I reject that submission for two reasons.

28. The first is that the Plaintiff obtained legal aid at an earlier stage of the litigation and was funded until after the Defendant admitted liability and judgment was entered. It appears that she lost her legal aid some time thereafter, and apparently after the Defendant made a payment into court. I consider it is legitimate to infer from this that the Plaintiff's legal aid was probably withdrawn because there was a difference between the Plaintiff and the legal aid authorities concerning whether it was justifiable to continue her funding in light of the payment into court. Accordingly, the Plaintiff's impecuniosity as a result of the loss of her legal aid is her own responsibility.

29. The second reason is that there is no authority that a litigant's impecuniosity provides an excuse for delay in advancing litigation in accordance with the Grand Court Rules and the overriding objective. The editorial notes in the *Supreme Court Practice 1999* include a statement to the contrary at paragraph 25/L/6:

> *"The absence of legal aid in libel proceedings should be treated sympathetically where it is asserted by the plaintiff that the delay was caused by lack of finance* (Gilberthorpe v Hawkins *(1995) The Times, April 3, CA)."*

The transcript of the England & Wales Court of Appeal's judgment dated 15 March 1995 is not available to me, but the note in *Supreme Court Practice* appears to be a serious misdescription of the decision in that case. The abstract of the judgment available on *Westlaw* states:

> *"G sued the defendant for publishing an article alleging that G had admitted that he had been treated for AIDS. At trial G asserted that he was not a homosexual and therefore it was improbable that he had been treated for AIDS. The jury found in G's favour and on May 18, 1988 awarded him GBP 20,750 damages against N and M. N and M appealed on the ground that they had fresh evidence that would show that G had lied at trial. The Court of Appeal were impressed by the evidence of a witness (H) who claimed that he had had sex with G a number of times and had been told by G that he had AIDS. On May 24, 1989, a retrial was ordered. G did not issue a summons for directions for the retrial until July 13, 1993. N and M had issued a summons to strike out for want of prosecution on April 14, 1992. They argued that G was guilty of inordinate and inexcusable delay between May 24, 1989 and April 14, 1992 which was likely to cause serious prejudice to the defendants. G argued that the delay was due to lack of finance and the fact that he was reasonably involved over a period of time in gathering evidence to rebut M and N's fresh evidence. G appealed against the striking out of his action.*
>
> *Held, allowing the appeal, that* ***the judge had properly exercised his discretion with respect to G's excuses for delay. G's lack of finance was no excuse.*** *G had in his possession in March 1989 evidence that H had retracted his evidence. He had no justification for delaying as long as he did on grounds that he was awaiting further and better restrictive evidence from H. On the issue of the prejudice caused by the delay* ***the judge had erred in not giving sufficient weight to the public interest in seeing that all parties and their witnesses declare the truth before the court. H was an influential witness who had retracted his evidence, claiming that M and N***

> ***had bribed him, before going on to retract the retraction. There was a suspicion that there had been a conspiracy by one of the parties to pervert the course of justice in which a solicitor or solicitors were involved. This was an exceptional case where justice demanded that these issues be properly explored at trial.***" (emphasis added)

30. This makes clear that (i) impecuniosity is not an excuse for delay, contrary to the statement in the editorial note in *Supreme Court Practice*; and (ii) *Gilberthorpe* was an exceptional case and should not be relied upon as authority for any general proposition of law or practice as to what can amount to an excuse for inordinate delay.

31. Mr Murray did not put forward any other excuse for the Plaintiff's delay, and I find that there is none. The entire period of 29 months that I have identified is therefore to be treated as culpable delay.

32. Given that the issue in dispute between the parties entirely concerns the Plaintiff's complaint of severe ongoing pain, I accept Mr Davies' submission that Dr Markham is a crucial witness for the Defendant.

33. The correspondence that was exhibited shows that the Defendant was communicating with Dr Markham in November 2018, expressing an expectation that the trial would take place *"towards the end of 2019"*. If the matter had proceeded to trial within that time frame, it appears that Dr Markham would have been able to give evidence.

34. However, in emails dated 29 January 2024, which were exhibited by Ms Bodden, Dr Markham confirmed that he retired in December 2021, his professional indemnity insurance expired in April 2022, and he removed his name from the medical register in the UK on 17 August 2022. In addition, he indicated that he was advised by his GP to retire due to hypertension, which would also be a contraindication to him giving expert evidence now. Finally, in terms of potential prejudice, the company through which Dr Markham provided his expert witness services was wound up in about November 2023.

35. I do not have any evidence regarding when Dr Markham first developed the hypertension which led to his GP's recommendation that he retire. His actual retirement date falls within the period of delay attributable to the Defendant. However, the dates when he allowed his professional indemnity insurance to lapse, when he removed his name from the medical register and when he wound up the company through which he provided his expert witness services, are all within the period of culpable delay on the part of the Plaintiff.

36. Furthermore, standing back and looking at the case in the round, I am satisfied that if the Plaintiff had progressed her claim more expeditiously during its lifetime, and specifically during 2020-2024, there is a realistic prospect that it would have been tried by no later than 2022 and that, to the extent necessary and with a specific end date in sight, Dr Markham would have been prevailed upon to retain his insurance, professional registration and company in existence until the conclusion of the trial – the correspondence exhibited by Ms Bodden indicates that there was some discussion along these lines initially, and Mr Davies made the same point in his oral argument.

37. I therefore conclude that the Defendant has suffered real prejudice attributable to the Plaintiff's delay, which is more than minimal, in its inability to adduce evidence from Dr Markham in opposition to the Plaintiff's case on causation and quantum. The Defendant has also suffered more than minimal additional prejudice as a result of the duplication of work that will be involved if it has to instruct a new expert in pain management to replace Dr Markham.

38. However, I do not accept Mr Davies' argument that the Defendant has suffered prejudice as a result of the claim hanging over it for the last 10 years. The Defendant is a corporate organisation, rather than an individual professional, and therefore does not suffer stress and anxiety, or personal reputational damage, in the same way as a natural person.

39. Whilst the financial consequences for the Defendant or its insurers could amount to relevant prejudice, as I queried in argument, the Defendant has not put forward any evidence to demonstrate such prejudice has in fact occurred in this case. I therefore do not find that the Defendant has suffered prejudice of this kind.

40. Finally on this topic, I was surprised to be told during argument that the money paid into court by the Defendant is not accruing interest, so that the value of the money deposited is reducing every year due to inflation. As I indicated in argument that I would do, I made enquiries with the Court Funds Office and was told that its current practice is only to place money paid into court into an interest earning deposit account where there is an order or request by the party to do so. This does not appear to be consistent with the requirements of GCR O.92, rr.17 and 21, and the wording of Form 103, and I understand that the Court Funds Office is updating its practice going forward.

41. In the circumstances, I accept that the erosion of the value of the Defendants' payment into court by inflation, in the absence of interest being credited to these funds, is some small additional prejudice to the Defendant flowing from the Plaintiff's delay in this case.

42. Separately from the question of prejudice to the Defendant resulting from the Plaintiff's culpable delay, in my judgment it is not now possible to have a fair trial of the quantum issues as a result of Dr Markham's unavailability to give evidence. I can foresee that it is likely to be very difficult for the trial judge to reach a conclusion on the evidence that is arrived at in a fair manner in the absence of oral evidence from Dr Markham, including cross-examination, and where his place is taken by another expert who has not had the benefit of examining the Plaintiff during 2018.

43. The question that I must now grapple with is what should be the outcome to do justice between the parties: (a) to reflect the difficulty in having a fair trial and the prejudice suffered by the Defendant as a result of the Plaintiff's relevant inordinate and inexcusable delay, but also (b) to reflect that judgment on liability has been entered by consent.

44. I consider the commentary at paragraph 25/L/13 of *Supreme Court Practice* to be helpful guidance. I agree that the court *should* be reluctant to dismiss an action for want of prosecution where liability is not substantially in dispute, and *a fortiori* where judgment on liability has been entered by consent and the defendant has made a payment into court. However, that does not mean that such a case can never be struck out for want of prosecution. For example, it may nevertheless become unfair to try to resolve the causation and quantum issues, particularly because of evidential

difficulties that have arisen because of culpable delay; and real prejudice to the Defendant's ability to challenge causation and quantum may also require dismissal of the claim.

45. In this case, two of the features mentioned in paragraph 25/L/13 of *Supreme Court Practice* as possibly justifying summary dismissal even where liability is not seriously in dispute are present: (a) prejudice to the ability to have a fair trial and to the Defendant's ability to challenge the Plaintiff's case on causation and quantum; and (b) very long delay overall, in this case 10 years since the Plaintiff's accident, although not all of this period qualifies as culpable delay.

46. However, Mr Murray is right to say that it would be unfair to strike out the whole of the Plaintiff's claim, which would have the effect of leaving the Plaintiff without compensation for the Defendant's admitted negligence. This would not be to balance the prejudice on both sides fairly. Instead, in my judgment, the outcome that best reflects the positions on both sides, the delays that have occurred and the responsibility for them, and the resulting prejudice, is to strike out any claim (and, given that it has not been expressly pleaded so far, to debar the Plaintiff from advancing any claim) that the consequences of her accident have persisted beyond the immediate sequelae of the soft tissue injuries that she suffered to her left ankle as a result of her fall. In other words, the Plaintiff may pursue her claim for damages in respect of those soft tissue injuries and for the surgical treatment that she underwent to repair the ligaments in her foot and ankle and any pain or loss of amenity directly consequential upon that injury and surgery, limited to matters for which there is support from an expert in orthopaedic injuries. She may not pursue any claim that she has developed complex regional pain syndrome or any similar condition, or that any of the general continuing pain that she complains of is a consequence of her accident.

47. Lastly, Mr Davies asked me in the alternative to strike out the Plaintiff's claim as an abuse of process on the basis of *Grovit v Doctor*. I am not persuaded on the evidence I have seen that I should infer that the Plaintiff does not have a *bona fide* intention of bringing her claim to a conclusion and that she is misusing the court's processes for her own ends. Instead, it strikes me that this is a case where her lawyers may not fully have got to grips with the issues, or where the Plaintiff may not have accepted advice that she finds unpalatable and has therefore changed lawyers. I was left with the impression that the Plaintiff does want to bring this case to a conclusion,

but on the basis that her claim is accepted in its entirety, which the professionals she has engaged from time to time have not been able to deliver, which is what has led to the delays in progress of the case.

48. As requested by Mr Davies, I will therefore give directions towards an early final hearing of the outstanding assessment of damages. Within 7 days of handing down of this judgment, counsel should submit an agreed draft order for directions, and failing that should indicate: (a) whether they wish to be heard on the directions and any other consequential matters including costs, providing their agreed available dates for a hearing; or (b) whether they will submit written submissions on these points within 14 days.

Dated 10 July 2024

THE HONOURABLE JUSTICE ASIF KC
JUDGE OF THE GRAND COURT