[2020] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 22/2018

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**M S B LIMITED**	**1st APPELLANT**
AND	**FINSAC LIMITED**	**2nd APPELLANT**
AND	**JOYCELYN THOMAS**	**RESPONDENT**

Ms Shanique Scott instructed by Hylton Powell for the appellants

Ransford Braham QC instructed by Braham Legal for the respondent

30 May 2019 and 21 February 2020

F WILLIAMS JA

[1] I agree and have nothing further to add.

STRAW JA

[2] I too agree and have nothing useful to add.

EDWARDS JA

Introduction

[3] This is an appeal against the decision of Daye J (the judge), made 13 February 2018, refusing the application of the appellants, who were the defendants in the court below, to strike out the claim brought by the respondent against them for want of prosecution. The appellants also challenge the award of costs made against them by the learned judge.

Background

[4] The respondent's claim against the appellants arose out of a commercial relationship between the respondent and the 1st appellant, which at the material time was a limited liability company operating in the financial sector providing loans and other financial services. The 2nd appellant was a limited liability company, owned and operated by the Government of Jamaica, which, during the financial meltdown of the 1990s, assumed responsibility for some of the loan accounts of the 1st appellant, including that of the respondent and her husband.

[5] On 26 October 1993 the 1st appellant entered into a loan contract totalling $1,000,000.00 with the respondent and her husband. That loan was secured by a mortgage over premises held jointly by the respondent and her husband. According to the respondent, subsequent to the grant of that loan, on 13 September 1999 she discovered that, unbeknownst to her and without her consent, the 1st appellant had 'upstamped' the mortgage of 26 October 1993 for an additional amount of $10,000,000.00, by way of instrument dated 1 July 1998. This additional loan and

guarantee, she alleged, had been negotiated by her husband without her consent and presented to her three years after the initial loan, at which time she had expressly refused to sign the said documents. The additional amount loaned, however, was also secured by the relevant property and endorsed on the duplicate certificate of title on 13 August 1998.

[6] The loan, inclusive of the 'upstamped' amount, subsequently went into arrears, and it is alleged that, on or about 8 September 1999, the 1st appellant, acting by itself and or its agents, or through the 2nd appellant, purported to exercise its power of sale by causing and or directing that the relevant property be advertised for sale. Consequently, on 14 September 1999, the respondent filed a writ of summons against the appellants, under the old Civil Procedure Code (CPC), seeking, amongst other things, an injunction and damages for breach of the mortgage contract. The respondent's particulars of claim were filed on 7 October 1999, and an appearance was entered for the 2nd appellant on 22 October 1999. An appearance was entered for the 1st appellant on 27 October 1999.

[7] On 9 December 1999, an interlocutory injunction was granted in favour of the respondent, pursuant to summons dated 27 October 1999, restraining the appellants from exercising their power of sale. No further action is recorded as having taken place with the claim from that period up until December of 2003, when, by letter dated 23 December 2003, pursuant to the transitional provisions of the new Civil Procedure Rules 2002 (CPR), the respondent wrote to the Registrar of the Supreme Court, requesting a case management conference (CMC) date be fixed. A date was fixed by the Registrar but

there is no record of a CMC being held. Nothing further took place in the claim until 5 October 2016, 13 years later, when the respondent amended her claim and particulars of claim to include an allegation of fraud against both appellants. She also added a 3rd defendant, Jamaica Redevelopment Foundation Inc, the entity now in control of the relevant mortgage. The respondent also filed a notice of change of attorney-at-law on 12 October 2016.

[8] On 12 January 2017, the respondent consented to the appellants filing their defence out of time, and on 16 January 2017, a joint defence was duly filed. In their defence, the appellants admitted 'upstamping' the mortgage as alleged, but averred that they were entitled to do so pursuant to the mortgage loan contract. They denied all allegations of fraud and denied that they had breached the mortgage loan contract. The appellants also averred that the respondent had executed an instrument of guarantee by which she guaranteed payment of all monies due from her husband to the 1st appellant.

[9] This claim, which began its life in 1999 under the old CPC, could, therefore, easily be described as a stale claim.

The application in the court below

[10] On 7 March 2017, the appellants filed an application to strike out the claim for want of prosecution. The application was made on the basis that the respondent's delay in proceeding with the matter was inordinate and inexcusable, and that, as a result, the appellants had suffered and were likely to suffer substantial prejudice.

[11] The application was supported by the affidavit of Errol Campbell, who was at the time, a director of the 1st appellant and general manager of the 2nd appellant. Mr Campbell deponed that, due to the fact that the allegations against the appellants involved events that allegedly occurred between September 1993 and July 1998, the appellants would necessarily have to rely on the employee(s) of the 1st appellant who had dealt with the respondent's loan account, as well as documents that were in the possession of the 1st appellant at the material time. He also deponed that as a result of the inordinate delay in prosecuting the claim, the appellants were no longer in a position to produce these witnesses or documents in support of their defence, as they no longer had any files or documents in relation to the 1st appellant's operations during the material time, including those in respect of the respondent's loan. He also deponed that the 1st appellant did not 'know of or how to contact' any of the employees who would be in a position to respond to the factual allegations. Further, even if those employees could be found, he asserted, it would be very likely that, due to the length of the delay, their memories would have faded.

[12] It was further averred that on or around 30 September 1996, the 1st appellant had ceased operations as a bank and came under the control of the National Commercial Bank (NCB). At some point in 1998, a subsidiary of the 2nd appellant, Recon Trust Limited, purchased certain non-performing loans and credit facilities, including the claimant's loan, from NCB. Subsequently, in 2002, the claimant's loan was reassigned to the Jamaica Redevelopment Foundation Inc, the 3rd defendant in the court below.

[13] Mr Campbell further deponed that, as a result of these circumstances, the appellants had only been able to complete their defence by relying on documents filed in court by the respondent.

[14] Having heard the matter, the judge refused the application, and it is this refusal that is the focus of this appeal.

The grounds of appeal

[15] On 27 February 2018, the appellants filed notice and grounds of appeal challenging the learned judge's order refusing their application to strike out the respondent's claim, as well as the award of costs to the respondent. The grounds of appeal filed were as follows:

> "(a) The Learned Judge erred in law when he found that the Appellants had to prove that they have been prejudiced by the delay in order to succeed in their application to strike out the claim for want of prosecution.
>
> (b) Alternatively, the Learned Judge erred in fact when he found that the Appellants had failed to prove that they had been prejudiced by the delay.
>
> (c) The Learned Judge erred when he found that the Appellants had to adduce evidence to show that they had taken steps to locate witnesses but had been unable to locate them in order to establish prejudice.
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> (d) The Learned Judge erred when he found that the Appellants could properly and fairly respond to the issues and factual allegations raised in the claim, notwithstanding the delay.
>
> (e) The Learned Judge erred when he found that the delay was not caused by the Respondent.

(f) The Learned Judge erred when he found that where the delay is caused by administrative difficulties, such applications should be resolved in favour of a claimant."

[16] Based on those grounds, the appellants sought orders that:

(a) the learned judge's order made 13 February 2018 dismissing the application to strike out the claim, be set aside;

(b) the claim be struck out for want of prosecution; and

(c) the respondent pays the costs in this court and in the court below."

The submissions

A. *The Appellants' submissions*

[17] The appellants challenge the decision of the court below under two broad headings: (1) the reason for the delay (grounds (e) to (f)) and (2) prejudice (grounds (a) to (d)).

(1) Reason for the delay

[18] In respect of the reason for the delay, the appellant submitted that although the judge accepted that there had been an inordinate and inexcusable delay, the judge erred when he found that this had not been caused by the respondent's inactivity, but by "administrative difficulties", and that in such cases the application should be resolved in the respondent's favour. In so doing, it was submitted, the judge failed to give sufficient weight to the factors that ought to be considered by the court in determining whether the delay was caused by the respondent or her attorney-at-law.

[19] Relying particularly on **Reggentin v Beecholme Bakeries Ltd** [1968] 1 All ER 566, the appellants submitted that the authorities establish that a claimant has the duty to prosecute the claim expeditiously, failing which the claim may be struck out. The judge, therefore, should have taken into consideration whether the respondent had taken any or sufficient steps to prosecute the matter in a timely manner. In that respect, the evidence before the court, was that for almost 13 years the respondent took no steps whatsoever to progress the matter. This, counsel argued, was an inordinate delay that could not be justified by praying in aid the failure of the Registrar of the Supreme Court to set a CMC date. Such excuses, it was contended, have been consistently rejected by our courts. The cases of **Spurgeon Reid v Corporal Lobban and the Attorney General for Jamaica** (unreported), Supreme Court, Jamaica, Suit No CL 1989/R-014, judgment delivered 12 June 2001, at page 7, **Heather Reid v Hendrick Smellie and Glastone Thayne**, (unreported), Supreme Court, Jamaica, Claim No 2004 HCV 01625, judgment delivered 26 March 2010, and **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6, were relied on by counsel in support of this contention.

[20] Counsel submitted that the judge further erred, because his conclusion that delay caused by administrative difficulties should be resolved in favour of the claimant was inconsistent with the inherent power of the court to dismiss a claim for want of prosecution, as well as the overriding objective.

[21] The appellants relied on the dicta of Lord Woolf in **Grovit and Others v Doctor and Others** [1997] 1 All ER 417, at page 424, for the principle that where there has been no action taken by a claimant to pursue the claim, this can amount to an abuse of the court's process, and the court may dismiss the action for want of prosecution.

(2) Prejudice

[22] The appellants complained that the judge wrongly found that the appellants had failed to prove that they had been prejudiced by the delay, and that to establish prejudice, the appellants were required to adduce evidence to show that they had taken steps to locate the witnesses but had been unsuccessful in doing so. Counsel further submitted that the learned judge also fell into error when he held that the appellants could properly and fairly respond to the issues and factual allegations raised in the claim, notwithstanding the delay.

[23] Counsel relied on the decision of this court in **Wood v H G Liquors Ltd and Anor** (1995) 48 WIR 240, at page 255, and submitted that in order to succeed in an application to strike out a claim for want of prosecution, the applicant need only satisfy the following two conditions:

> "(a) there has been inordinate and inexcusable delay; and
>
> (b) as a result of the delay there is a substantial risk that it is not possible to have a fair trial or the delay is likely to cause or to have caused serious prejudice to the defendants."

[24] Therefore, counsel for the appellants submitted, a claim may be struck out for want of prosecution, if it is shown that, as a result of the delay, there is a substantial risk

that there would not be a fair trial, or that the delay is likely to cause or has caused serious prejudice to the defendants. Thus, it was submitted, the appellants did not have to prove actual prejudice in order to succeed in an application to strike out the claim for want of prosecution.

[25] The appellants also relied on the reasoning in **West Indies Sugar v Stanley Minnell** (1993) 30 JLR 542 and **Alcan Jamaica Company v Herbert Johnson and Idel Thompson Clarke** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 20/2003, judgment delivered 30 July 2004, at pages 22-23, for the proposition that the length of the delay in and of itself is evidence that there is a substantial risk that a fair trial is not possible. The House of Lords decision of **Birkett v James** [1977] 2 All ER 801, was also relied on in this regard.

[26] Counsel for the appellants submitted, therefore, that the respondent's failure to do anything to move the matter along for 13 years is more than sufficient to show that there is a substantial risk that justice could not be done in this case, especially considering the shorter periods of delay held to be unacceptable in the aforementioned cases, being between four and 11 years.

[27] Further, and in any event, it was submitted, the appellants did in fact prove actual prejudice, as the unchallenged evidence before the court below was that, due to the inordinate delay, the appellants are not now in a position to produce documents or witnesses to assist in their defence, nor do they know how to contact any of the relevant employees. There was also evidence before the court that, as was asserted, even if those

employees could be found, it is very likely that their memories would have faded due to the length of time that has passed since the material events.

[28] Counsel for the appellants also asserted that, furthermore, there was no need for the appellants to give evidence that they had taken steps to locate the witnesses and had been unsuccessful, as such a requirement would undoubtedly cause more prejudice to the appellants in having to incur expense to try to identify and locate them. Counsel relied on the decision of this court in **Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Company** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 18/2001, judgment delivered 11 March 2002. Consequently, it was submitted, the appellants had proven actual and potential prejudice in the court below and the learned judge had plainly erred.

B. *The Respondent's submissions*

[29] Counsel for the respondent, Mr Braham QC, submitted that the learned judge was correct to dismiss the application, as, while there had been a delay in the matter, there was no evidence that this was due to any action or inaction on the part of the respondent. In fact, it was asserted, the delay was caused by an administrative failure on the part of the court, as well as the failure of the appellants to file their defence in a timely manner.

[30] In that regard, it was submitted that although the respondent had duly requested by letter that a CMC date be set, and a notice was issued for the CMC to take place 11 November 2005, none was held. Queen's Counsel argued that it was the duty of the

registrar of the court, particularly under the new regime, to set the requisite date so that the parties could proceed.

[31] Further, it was submitted, although appearances for both appellants had been entered in October of 1999, between the years of 1999 and 2017, the appellants filed no defence, and were, therefore, substantially responsible for the delay.

[32] In respect of the appellants' contention that they have suffered prejudice, Queen's Counsel urged the court to consider that the appellants were in fact able to obtain instructions in order to file their defence. Consequently, it was submitted, the judge was not plainly wrong in his decision and the appeal should, therefore, be dismissed.

The issues raised in this appeal

[33] From the grounds of appeal filed and the submissions of counsel for both sides, it can be gleaned that the sole issue for this court to contend with is whether the judge was plainly wrong to refuse the appellants' application to dismiss the claim for want of prosecution. In making that determination this court must, of necessity, determine the following questions:

1) was the inordinate delay substantially caused by the respondent? (grounds e-f)

2) were the appellants required to prove that they had been prejudiced by the delay, and if so: (a) was there sufficient evidence to show that they had been so prejudiced; and (b) were the appellants required to show what actual steps they took to locate the witnesses? (grounds a-d)

Discussion

The court's jurisdiction to dismiss an action for want of prosecution

[34] Before embarking on a discussion of the individual issues, it may be useful to distil the applicable principles which govern a determination by any court in this jurisdiction to dismiss a claim for want of prosecution. Every court of competent jurisdiction has an inherent jurisdiction to dismiss a matter for want of prosecution. However, in order to do so, the court must be satisfied that there has been a default that was, to use the language often used in decisions made under the old rules, "intentional and contumelious", or that there has been an inordinate and inexcusable delay on the part of a claimant or his/her lawyers, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the action, or, that the delay is likely to cause or have caused serious prejudice to the defendant(s). The principles which are to inform any such determination are those stated in **Allen v Sir Alfred McAlpine & Sons** [1968] 1 All ER 543, particularly at 547, which were reiterated and restated by Lord Diplock in **Birkett v James,** and approved and applied in this jurisdiction in several cases, including the Privy Council decision of **Warshaw, Gillings and Alder v Drew** (1990) 27 JLR 189.

[35] In **Allen v Sir Alfred McAlpine** Lord Denning MR, at page 547, stated as follows:

> "The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."

[36] At page 553 of the same case, Diplock LJ (as he then was) gave his opinion as follows:

> "Moreover, where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. There may come a time, however, when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed."

[37] It has long been accepted that the Supreme Court has an inherent jurisdiction to protect itself from abuse of its processes by litigants who file actions with no intention to prosecute them. In this regard, in **Wood v H G Liquors Ltd,** this court, per Gordon JA, cited with approval the following passage from **Bremer Vulkan Schiffbau & Maschinenfabrik v South India Shipping Corporation Ltd** [1981] 2 WLR 141, page 147, which I think is so apt:

> "The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would

> stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.
>
> The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an "inherent power" the exercise of which is in the "inherent jurisdiction" of the High Court. It would I think be conducive to legal clarity if it [sic] use of these two expressions were confined to the doing by the court of acts which it needs must have the power to in order to maintain its character as a court of justice."

[38] In **Birkett v James**, Lord Diplock, at page 805, stated the criteria for consideration by a court in determining whether to dismiss for want of prosecution as follows:

> "The power should be exercised only where the court is satisfied either: (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; **or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is 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**." (Emphasis added)

[39] In **Grovit v Doctor**, the House of Lords further examined the principles dealing with the striking out of an action for abuse of process, and decided that the court could invoke its inherent power to do so without the need to establish a want of prosecution. The House of Lords approved the approach in **Birkett v James** (subject to any changes affecting those principles which may have been brought about by the new Civil Procedure Rules).

[40] In **Grovit v Doctor,** the House of Lords found that the plaintiffs' inactivity was an abuse of process, and on this basis alone the court was justified to dismiss proceedings without resort to establishing a want of prosecution under the **Birkett v James** principle. Lord Woolf put it this way:

> "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 required (which will frequently be the case) the courts will dismiss the action. The evidence which was relied on 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**. In this case once the conclusion was reached that the reason for the delay were [sic] one which involve abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court were [sic] entitled to dismiss the proceedings."

[41] These principles have been repeatedly applied by the courts in this jurisdiction. In the present appeal, this court is only concerned with the second of the principles set out by Lord Diplock in **Birkett v James**, as there was no allegation by the appellants of an abuse of the process of the court by the respondent.

The basis upon which an appellate court will interfere with the exercise of a judge's discretion

[42] In considering the issues in this appeal, I bear in mind that this court may only interfere with the exercise of the discretion of the learned judge in the court below, where it is clear that the judge was plainly wrong, had come to a finding based on a misunderstanding of the law or evidence, or had made a decision of such a nature which

no judge, regardful of his or her duty, would have come to (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, para. [20]).

[43] Equally, if this court is satisfied that the judge erred in principle by giving weight to irrelevant considerations, or failed to take account of relevant factors, the decision may be set aside on that basis also (see the approach taken in **Ward v James** [1966] 1 QB 273 at 293).

[44] In the absence of the judge's written reasons as to why he exercised his discretion in the manner he did, this court may determine, simply by the way he has decided the case based on the evidence before him, whether the judge correctly exercised his discretion to refuse to dismiss the claim for want of prosecution, or whether he erred in one way or the other. I am assisted in this exercise by the submissions of counsel on both sides, which seem to be *ad idem* as to at least some of the reasons why the judge refused the application. I will, therefore, address the issues with that in mind.

(1) Was the inordinate delay substantially caused by the respondent (grounds e-f)

[45] Undoubtedly, the delay in prosecuting this case has been inordinate, and there is no dispute as to that fact. By the time of the filing of the application to strike out in 2017, between the date of the respondent's request for the CMC and the filing of the respondent's amended claim in 2016, 13 years had elapsed in which no action at all had been taken by the respondent to progress the matter. This is compounded by the fact that a total of 18 years had passed since the filing of the writ in September of 1999, and

19 years since the cause of action would have arisen in 1998, when the impugned mortgage loan was 'upstamped'.

[46] In fact, from the outset there was delay in this claim, as, after the claim commenced in 1999 it went dormant for about four years, until a CMC was requested of the Registrar of the Supreme Court under the transitional rules in December 2003 (otherwise it would have automatically been struck out). A notice for the CMC was issued by the Registrar with a date for it to be held, but for reasons unknown it was not held. The respondent did nothing further to pursue the claim until 12 October 2016 when the claim was amended. That was almost 13 years later. On the other hand, other than entering an appearance, the appellants took no action in the matter until 2016 when they entered a defence to the amended claim.

[47] The respondent would have us believe that it is the appellants who are substantially responsible for the delay. This, I would say right off the bat, is a surprising submission, since it is the respondent who brought the claim, and who had applied for and received from the Registrar of the Supreme Court, the date, time and place fixed for a CMC to be held.

[48] Although the respondent does not dispute the delay, it has been argued that the delay was not due to any fault of her own or of her advisers, but rather due on the one part to an administrative failure of the court to set the date for the CMC, and on the other, the failure of the appellants to file their defence in a timely manner. To this, the appellants have said the failure of the court to set a CMC date is no excuse, and does not

negate the duty of the respondent's advisers, to, as stated by Lord Denning in **Reggentin v Beecholme Bakeries Ltd**, "get on with the case" as public policy demands.

[49] In respect of the defence, although the appellants entered an appearance under the old rules in 1999, there is no evidence that a defence had been filed before the one filed in 2017. Although the appellants did not, in their submissions, address the assertion that they had filed their defence late, the record indicates that the respondent consented to the appellants filing their defence out of time on 12 January 2017, and that the defence was subsequently filed on 16 January 2017, 18 years after the claim was initially commenced, and 14 years after the new court rules came into effect.

[50] As this case began before the implementation of the CPR in 2002, its transitional rules dealing with cases carrying over from the old CPC, such as this one, would have been applicable. Rules 73.3(4), (6) and (7) of the CPR provide, that:

> "(4) Where in any old proceedings a trial date has not been fixed to take place within the first term after the commencement date, it is the duty of the claimant to apply for a case management conference to be fixed.
>
> …
>
> (6) When an application under paragraph (4) is received, the registry must fix a date, time and place for a case management conference under Part 27 and the claimant must give all parties at least 28 days notice of the date, time and place fixed for the case management conference.
>
> (7) These Rules apply to old proceedings from the date that the notice of the case management conference is given."

[51] Rule 73.3(4) of the CPR is clear that the onus is on a claimant in 'old proceedings', where no date has been set for trial, to apply for a CMC to be held. This the respondent did before 31 December 2003, as required by rule 73.3(8). A notice of appointment was issued by the registry, pursuant to rule 73.3(6), for a CMC hearing to be held on 11 November 2005. There is, however, no indication on the record that the CMC was held and if not, why. Rule 73.3(6) requires the claimant to give all the parties at least 28 days' notice of the date, time and place fixed for the CMC. There is no evidence from the respondent or otherwise that she had complied with this rule or that she had turned up on the day set for the CMC.

[52] Pursuant to rule 73.3(7), once the registrar had fixed the date and the respondent served the notice for the CMC, the CPR would have been deemed to apply to these proceedings, as at the date of the notice.

[53] It is not clear, therefore, how the blame could be placed at the feet of the Registrar of the Supreme Court, who had done what was required by the rules. It is the respondent and her advisers who have failed to adhere to the requirements of the rules and, nothing to the contrary having been indicated to this court, also failed to turn up on the date set.

[54] Be that as it may, what is clear is that the respondent was content to take no further active steps to move the matter along. There was no evidence before the court of any further enquiries or entreaties made to the registry by or on behalf of the respondent as to what was happening or for another date to be set. In the almost 16

years there is no evidence of one single letter being written to the registrar enquiring about the matter. Significantly, all through this period, the respondent seemed to have been content with the interlocutory injunction she had obtained from as early as 13 December 1999, restraining the appellants from exercising their power of sale.

[55] The authorities relied on by the appellants in this respect gives credence to the stance they have taken that it is the respondent who has failed to move her case along. In **Reggentin v Beecholme Bakeries Ltd**, at page 278, Lord Denning took, what I consider to be the correct position, that it was the duty of the plaintiff and his advisors to "get on with the case" when he said this:

> "Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisers to get on with the case. Every year that passes prejudices the fair trial. When a case goes to sleep, as this one did, for some thirteen months or more, the defendants are entitled to take out a summons to dismiss for want of prosecution. If no sufficient reason is shown for reviving it, it can be dismissed."

[56] In **Spurgeon Reid**, the delay was seven years from the filing of the writ of summons to the date the summons for direction was made, during which period the case fell dormant for over five years. McDonald J (Ag) (as she then was), in dismissing the case for want of prosecution, concluded that the delay in prosecuting the claim was inordinate and inexcusable, was caused substantially by the plaintiff, and would give rise to a substantial risk that it would not be possible to have a fair trial. This she found to be so, even taking into consideration that, on the plaintiff's case, the plaintiff's attorney had requested, by letter to the registrar, that the matter be set down for hearing. The learned judge determined that there was no evidence that the letter had come to the attention

of the registrar, but that even if it had, there was no evidence that any enquiry had been made or that the plaintiff took any steps to ensure that the matter had been placed on the cause list and assigned a trial date. Further, she found that, even if the file had been lost, this could have been reconstructed, with permission. Counsel would also have been required to file an application to extend time to set the matter for hearing, which was not done.

[57] McDonald J (Ag), relying on **City Printery Ltd. v Gleaner Co. Ltd** (1968) 12 WIR 126 and **Gwendolyn Salmon v Ronford Wright** (1964) 8 JLR 510, at page 8 of her judgment, reiterated the principle that "public policy demands that the plaintiff prosecute the matter with diligence and dispatch" (page 8). Certainly that was the correct approach under the old Civil Procedure Code and even more so under these new rules.

[58] She also, correctly in my view, stated that, even if the delay had been caused by the plaintiff's attorney, this would not have availed him. This is so precisely because of the potential prejudice that delay may cause, and the substantial risk that there could no longer be a fair trial (see the cases of **Wood v H G Liquors** and **Reggentin)**.

[59] In **Heather Reid v Hendrick Smellie and others**, which was a decision of E Brown J (Ag) (as he then was), the blame for the delay in proceeding with the trial had been laid at the feet of the Registrar of the Supreme Court for failing to set a CMC date after the original date had been adjourned for a date to be fixed by the registrar, the claimant having failed to appear. In that case, the learned judge traversed the principles both under the former CPC and the CPR, and concluded that under the CPR, the claimant

had a responsibility to ensure that the case was dealt with expeditiously and fairly. The inactivity of the claimant in that case, even in the face of enquiries by the 1st defendant about a CMC date, constrained the court to take the view that proceedings had been issued without any intention of taking the case further. The delay in that case was 12 years from the date the cause of action arose, and five years from the date the CMC was adjourned.

[60] The claimant in that case had relied on the decision in **Jamaica Car Rentals Ltd v Wayne Taylor** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 28/1996, judgment delivered 30 March 1998, a case decided under the CPC. In that case, this court found that the trial judge had been correct to find that the plaintiff was not responsible for a three year delay, in circumstances where the registrar had failed to set down the case for trial following the filing of a certificate of readiness by the plaintiff's attorney-at-law as required. The delay was blamed on administrative inefficiency by the trial judge, which was upheld by this court. E Brown J (Ag) distinguished that case from the case before him, on the basis that the claimant had done what was necessary to set the registry in motion, unlike the claimant in the case before him, who had done nothing. For my part, I am doubtful that the case of **Jamaica Car Rentals Ltd and Wayne Taylor** would have been decided in the same way under the CPR, especially in light of the overriding objective in rule 1.1 and the duty of the parties in rule 1.3. I would also distinguish that case from the instant case on the same basis as E Brown J (Ag).

[61] Even a cursory examination of the history of the instant case shows that very little action was taken by the respondent to move the claim along. After the filing of the writ in 1999 and obtaining an injunction, nothing was done until the request for a CMC in December 2003, which was granted. Thereafter, nothing was done until 2017 when the amendment was made to the statement of case.

[62] There is no evidence that the respondent or her attorney made any enquiries or did anything towards ensuring that a CMC was held in the years between 2003 and 2016. It would appear that the respondent only applied for a CMC in 2003 in order to fulfil the requirements of the transitional provisions, but had no intention, or at the very least, was not in a position to advance the case before the amendment was made to the statement of case.

[63] I, therefore, agree with the submissions of counsel for the appellants that, even (and there was no concession that there was) where there may have been some administrative inefficiency on the part of the court, the respondent and her counsel still had a duty to do something to move the case along.

[64] As regards the assertion, in the instant case, that the delay was partially a result of the appellants' failure to file a defence, this argument, to my mind is not sustainable. There are several options open to a claimant where a defendant served with a claim has not filed an acknowledgment of service or a defence. These options were available under the old rules and even more so under the CPR. The respondent exercised none of those

options. This conduct demonstrates a lack of interest by the respondent in seriously pursuing the claim.

[65] Although rule 27.3 of the CPR generally places the onus on the registry to fix a date for the CMC after a defence has been filed, the rules equally provide an avenue for a claimant to move the matter forward where the defence has not yet been filed.

[66] The CMC date which had been set by the registrar under the transitional rules in this case was required to be set pursuant to Part 27 of the CPR. This means that all the rules under that part were applicable to this claim. The relevant portions of rule 27.3 of the CPR provide that:

> "27.3 (1) The general rule is that the registry must fix a case management conference immediately upon the filing of a defence to a claim other than a fixed date claim.
>
> (2) Where the defendant files a defence and also an admission of a specified sum of money, the case management conference is not to be fixed until the claimant gives notice under rule 14.7(3) that the claim is to continue.
>
> (3) The case management conference must take place not less than 4 weeks nor more than 8 weeks after the defence is filed (or notice is given under rule 14,7(3)) unless any rule or practice direction prescribes a shorter or longer period or the case is urgent.
>
> (4) **However a party may apply to the court to fix a case management conference before a defence is filed.**
>
> (5) The application may be without notice but must state the reasons for the application.

(6) The registry must give all parties not less than 14 days notice of the date, time and place of the case management conference.

(7) However the court may with or without an application direct that shorter notice be given-

(a) If the parties agree; or

(b) in urgent cases." (Emphasis mine)

[67] The import of the combination of the aforementioned transitional provision in rule 73.3(4) and rule 27.3(4), is that, once an application is made by a claimant for a CMC date to be fixed under rule 73.3(4), the registry is to fix a date, time and place for the CMC to be held and there is no need or requirement to await a defence to be filed as under the general rule in rule 27.3(1). Once the registry had notified the respondent of the date, time and place fixed for the CMC, it would have been incumbent on the respondent or her advisers to give notice of the CMC to the appellants of at least 28 days. Once notice was served on the appellants, pursuant to rule 73.3(7), the provisions of the CPR would have automatically become applicable to the action. In this case the notice sent to the respondent was also addressed to the appellants.

[68] The respondent would also have had the option, under rule 27.11, to apply to the court to vary the date which the registrar had fixed for the CMC to be held, if the previous date set was inconvenient. This the respondent did not do. Alternatively, the CMC not having been held, the respondent could have availed herself of the option at rule 27.3(4) to make another application, supported by evidence on affidavit, for a CMC to be held prior to the filing of a defence.

[69] Therefore, the registrar having already set a date for the CMC under the transitional rules, there was no need for the respondent to wait for the registrar to fix another CMC date following the filing of the defence, under the general rule in rule 27.3(1). Having been issued the notice of the CMC, the next step would have been for the respondent to serve the notice that had been issued to her on the appellants and turn up at court on the date set. However, there is no indication, before this court, that this notice was in fact served on the appellants by the respondent or as stated before, why the CMC was not held. But having been issued with the notice, the onus was on the respondent to comply with the rules.

[70] In any event, the respondent could have applied, pursuant to rule 27.4, to dispense with the CMC for any of the reasons stated in rule 27.4(1) (a-c). She did not do so either.

[71] Further, the respondent failed to take the logical step in such situations where a defendant has failed to file a defence in the time stipulated, of seeking a judgment in default of defence. Even if it could be said (and I do not agree that it could properly be said) that the registrar had failed to ensure that a date was set for the CMC to be held, I agree with the appellants that this does not excuse the respondent's nonchalance in pursuing this matter, so many options under the CPR being readily available for her to pursue.

[72] It is clear that the delay was entirely, or at the very least, substantially the fault of the respondent and or her advisers, and she cannot rely on the excuse that the fault lies with the appellants or the registrar. The registrar did her duty in setting down the matter

for CMC, and the respondent failed to attend at the time and place fixed for the CMC. Neither did she or her advisers follow up on her case and ensure that it progressed through the courts in a timely manner. These grounds have merit.

(2) Were the appellants required to prove that they had been prejudiced by the delay, and, if so (a) was there sufficient evidence to show that they had been so prejudiced; and (b) were the appellants required to show what actual steps they took to locate the witnesses? (grounds a-d)

[73] The authorities from this court are clear that actual prejudice need not be shown in order for the court to exercise its discretion to dismiss for want of prosecution. Certainly the court may dismiss the claim if it is satisfied that there is prejudice, but similarly, the court may move to dismiss the claim if there is a likelihood that the appellant would be caused serious prejudice should the matter go to trial. This is a separate and independent consideration from the question of whether there is a substantial risk that a fair trial would not be possible consequent on the delay.

[74] In **West Indies Sugar v Stanley Minnell**, Forte JA (as he then was) found that the cases demonstrate that 'the possibility of a fair hearing and prejudice to the defendants were alternative principles upon which the court acts in deciding how to exercise its discretion'. The head note in that case states that:

> "[I]nordinate delay by itself can be relied on to show prejudice and while it is true that the appellant did not take steps to file a summons to dismiss for want of prosecution the court has an inherent jurisdiction to do so;
>
> (ii)the paramount interest is that of the administration of justice and the Master was obliged to determine whether a fair trial could have taken place; the appellant ought to have known the case that it had to meet and to prepare from September 1988;

> (iii)the issue of the witnesses' credibility after so long a period of time had elapsed should be addressed; that is, would they still have recall of the details of the accident. In such circumstances prejudice ought to be inferred against the appellant."

[75] In keeping with the principles in **Allen v Sir Alfred McAlpine & Sons** and **Birkett v James**, Forte JA stated unequivocally at page 544, the following:

> "...the court should not exercise its power to make an order which would discontinue an action unless one of the alternatives expressed in 2(b) above is applicable. If there is a substantial risk that a fair trial would not be possible that would be sufficient ground for refusing the application for extension of time, and in the other alternative it would also be sufficient ground if the defendant would be seriously prejudiced as a result of the prolonged delay."

The reference to 2(b), of course, is a reference to above cited dicta of Lord Diplock in **Birkett v James** set out at paragraph [38]**.**

[76] Forte JA, in **West Indies Sugar v Stanley Minnell**, also determined that the length of the delay since the filing of the writ was in itself evidence that there was a substantial risk that a fair trial was not possible. Patterson JA in agreeing, recognised that the second limb in **Birkett v James** was two pronged, with the requirement that prejudice to the defendant is to be shown being only one aspect, and the second, being whether a fair trial was possible as a result of the delay. He took the view, therefore, that the fundamental issues for the court's consideration were whether the inordinate and inexcusable delay was likely to render a fair trial impossible, or whether there was any prejudice caused or likely to be caused by the delay. Downer JA, in the same case, at page 449, was also of the view, relying on **Clough v Clough** [1968] All ER 1179 at 1181,

that inordinate delay by itself could be relied on to show prejudice to the appellant, as well as to show that the enquiry itself could be prejudiced by the delay.

[77] In **Wood v H G Liquors Ltd and Another**, Wolfe JA (as he then was) accepted that, in order to succeed in an application to strike out a claim for want of prosecution, an applicant need only satisfy the two conditions in 2(b) of Lord Diplock's criteria. In that case, the appeal against the Master's order dismissing the action for want of prosecution was dismissed on the basis that, because the delay in prosecuting the claim had been inordinate and inexcusable, there was a substantial risk that justice would not be done, and that, even in the absence of evidence that the delay would operate to the disadvantage of the 1st respondent, it would be unfair to allow the claim to proceed.

[78] In following Forte JA in **West Indies Sugar Limited v Stanley Minnell**, Wolfe JA agreed that prejudice apart, inordinate delay by itself may make a fair trial impossible. He also took the view that prejudice not only included actual prejudice but also potential prejudice. Further, at pages 254-255, relying again on the dicta of Forte JA, Wolfe JA stated the following:

> "Clearly Forte JA is making the point that the substantial risk that there cannot be a fair trial because of the inordinate delay and prejudice are two separate entities and that the proof of one or the other entitles a party to have the matter dismissed for want of prosecution. Once there is evidence that the nature of the delay exposes a party to the possibility of an unfair trial he is entitled to the favourable exercise of the court's discretion, prejudice apart. *Inordinate delay, by itself, may make a fair trial impossible*. Prejudice, in my view, includes not only actual prejudice but potential prejudice which in the instant case would be the possibility of not being able to obtain a fair trial because of the passage of time."

[79] In the case of **Reggentin**, the English Court of Appeal found similarly. In that case, Mr Reggentin had been injured in 1961 in the course of his employment, having slipped and fallen in the defendant's bakery. He died before he could file suit in 1963, and the plaintiff, his wife and administratrix of his estate, filed an action against the employers in January of 1964. In June of 1964 it was ordered, among other things, that the action should be set down in six weeks. This did not occur, and, although in August of 1965 inspection of the premises took place, nothing further occurred for over a year. In November of 1966, the defendants applied to dismiss the action for want of prosecution when the plaintiff asked for further interrogatories to be answered. The Master allowed the revival of the case, but on appeal, it was dismissed by the judge. The Court of Appeal dismissed the appeal against the judge's decision on the basis that the case was borderline, and that the court would not interfere unless satisfied that the judge was wrong, which it was not. In doing so, the court found that delay in itself was prejudicial.

[80] In **Barrett Manchester Ltd v Metropolitan Borough Council and another** [1989] 1 All ER, in dismissing an action for want of prosecution, it was held that the greater the delay, the less the need to establish prejudice, and that where there has been serious and prolonged delay, the court should not hesitate to dismiss even if it were not shown to have occasioned any actual prejudice on the other party.

[81] The cases demonstrate that this court has not only followed with approval the aforementioned principles in the decision of **Birkett and James** and decisions

subsequent, but has refined these principles to deal with our own peculiar circumstances with respect to delays. It is clear, therefore, that delay in and of itself may give rise to a substantial risk that a fair trial will not be possible. Again delay in and of itself may provide evidence of potential or likely prejudice to the appellant. Separately, there may also be evidence of actual prejudice.

[82] In **Alcan Jamaica Company v Herbert Johnson and Idel Thompson Clarke**, Cooke JA, in referring to the development of the law in this area in our jurisdiction, said at page 15 of that judgment, that:

> "This review of the cases indicates that in the development of our jurisprudence in this area much emphasis has been placed whether or not there is a substantial risk that a fair trial is not possible when there is inordinate and inexcusable delay. Delay is inimical to there being a fair trial. For my part, this emphasis is to be applauded."

[83] Consequently, based on the foregoing authorities, the questions for this court are whether there was sufficient evidence before the learned judge that either the appellants had been prejudiced by the delay or were likely to be prejudiced, or, whether due to the delay, there was a substantial risk that a fair trial was not possible.

[84] The fact is that the appellants did provide sufficient evidence of not only the likelihood of prejudice, that is potential prejudice, but also of actual prejudice. The unchallenged evidence before the court below, outlined in the affidavit of Errol Campbell filed 7 March 2017 in support of the application, was that the appellants were not in a position to produce documents or witnesses to assist in their defence because of the

inordinate delay in prosecuting the claim. The allegation against the appellants relate to events which allegedly took place between 1993 and 1998.

[85] The evidence was that the appellants no longer had any files or documents in relation to the 1st appellant's business operations during that time period, including those relating to the respondent's loan. They also did not know how to contact any of the employees who would have dealt with the respondent's loan account and who would be in a position to respond to the factual allegations that have been raised by the respondent, particularly those in relation to fraud, the 1st appellant having long ceased to operate. Further, even if those employees could be found, it was very likely that their memories would have faded having regard to the length of time that has passed since the events in question occurred and there would be no documents from which they could be made to refresh their memories. This is evidence which also would have tended to show that a fair trial would no longer have been possible.

[86] The House of Lords, in **Birkett v James,** held that the "postponement of a trial until memories had faded and witnesses had vanished created a substantial risk that justice could not be done" (page 804).

[87] In **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd**, at paragraph 24, this court was of a similar view, approving the approach and conclusion taken by Master Simmons (as she then was) at first instance that:

> "The overriding objective as stated in the CPR requires the Court to deal "justly" with case management conferences which arise for its

> consideration. Among the factors which determine whether a case is being dealt with 'justly' is whether it can be conducted 'expeditiously and fairly'. It is therefore required that key witnesses, if not all witnesses, be available to give evidence on behalf of the claimant and the defendant. In this matter, I have accepted that the defendant is unable to find its witnesses. I have also accepted that even if they are located it is likely that their memories would be impaired by the lapse of time, as nearly thirty years have passed since this matter commenced. The defendant in the circumstances, has discharged its burden of proof and has satisfied the court, that for the reasons stated above it will be prejudiced if the matter were to proceed to trial and a fair trial would be at risk."

[88] In both **West Indies Sugar v Stanley Minnell** and **Alcan Jamaica Company v Herbert Johnson and Idel Thompson Clarke**, this court also held that the length of delay itself was evidence that there would be a substantial risk that a fair trial would not be possible due to the negative effect the passage of time would have likely had on the memories of the potential witnesses. In the latter case, Cooke JA, at pages 22-23, stated that:

> "If this case were to be allowed to proceed to trial even with court management, taking into consideration the realities of the trial process in the Supreme Court the most optimistic forecast is that it would not come up for trial for another nine months. At that time there would have been a substantial risk that it would not be possible to have a fair trial. The passage of time would probably have wreaked havoc with the memory of the potential witnesses on both sides. It is my view that the learned trial judge did not place any or sufficient weight to this

> aspect of the case. Her decision was inconsistent with the authorities which I have previously reviewed. I would therefore say that her decision ought to be reversed.
>
> It is also my view that in this case the delay is likely to cause serious prejudice to the defendants. In paragraph 7 of the Marcia Tai Chun affidavit the evidence is that the 1st respondent/defendant who was the driver of the appellant/2nd defendant's vehicle is no longer in the employment of the 2nd defendant. Further, he cannot he located...It is unimpressively novel for this plaintiff to suggest that to cure her grave failings, the remedy is to provide the names of potential witnesses on which the defendants could rely."

[89] Thus, in the instant case, where the evidence showed a delay of over 13 years, particularly having regard to the evidence of all the changes in the appellant's business status during those years, there was more than adequate evidence to show that there was a substantial risk that justice could not be done in this case. The judge was, therefore, wrong to have rejected the evidence and to have held that the appellants could proceed to respond to the claim despite the delay.

[90] I am also of the view that the judge further erred in respect of his finding that the appellants had been required to show that they had taken steps to locate the witnesses but were unsuccessful. There is no such requirement in the law and the ability to locate witnesses is only a factor for the court to consider in assessing whether the defendant is likely to be prejudiced by the delay. Such a requirement would put the appellants through the expense of proving that they tried to find witnesses, who may have long dispersed to nether regions of the earth after such an inordinate delay.

[91] In **Port Services Ltd v Mobay Undersea Tours Limited and Fireman's Fund Insurance Company**, this court held that requiring a defendant to prove that witnesses could not be found was likely to cause him serious prejudice. Forte P, in assessing the issue of whether it was possible to have a fair trial due to the delay, and the trial judge's finding that this could be so, as the statements of the witnesses would be admissible under the Evidence Act, at page 8, stated as follows:

> "In respect of (ii) the appellant would be required to prove that the witnesses cannot be found after all reasonable steps have been taken to find them. This naturally would put the appellant to the expense of trying to find the witnesses ….
>
> In my view, to place the appellant in the position of having to satisfy the conditions of the Evidence (Amendment) Act with the possible result that it may fail so to do, is likely to cause serious prejudice to the appellant in advancing its defence."

[92] Having examined the question of the availability of witnesses, Forte P went on to declare, at page 9 of his judgment, that in all the circumstances, having regard to the inordinate and inexcusable delay, there was a likelihood that the appellant would be seriously prejudiced and a substantial risk that a fair trial was not possible.

[93] In this instant case, the potential witnesses were former employees of the 1st appellant, who owed no duty or loyalty to the appellants. The incident of which the respondent complains is alleged to have occurred in 1998, at a time when the 1st appellant had already, since 1996, ceased operations as a bank, and had been subsumed by the NCB. In that same year, loan accounts including that of the respondent were purchased

from NCB by Recon Trust Limited, which was managed by the 2nd appellant. However, by 2002, the respondent's loan portfolio was no longer in the control of the 1st or 2nd appellant, and thus it was their evidence that they no longer had any of the relevant files or documents. In fact, it was the appellants' evidence that they were only able to complete their defence by relying on the documents the respondent had filed into court. In the face of that evidence, I find that the requirement imposed by the judge that the appellants show what steps they took to locate the witnesses, was onerous and was likely to cause the appellants serious prejudice and expense in order to answer such a stale claim. The judge would have erred in that regard.

[94] The court should also necessarily consider when the case is likely to go to trial, as a result of the delay, if it is not dismissed. In this case, certainly, with all the best efforts, this case would not likely be ready for trial before 2026. There is merit in these grounds.

Should the judge's discretion be interfered with?

[95] The decision whether to dismiss a case for want of prosecution is in the first instance, at the discretion of the judge. This court will not interfere with the exercise of the judge's discretion unless it is found to have been wrongly exercised on the basis I have already outlined in paragraph [42].

[96] In this case, the decision of the judge was inconsistent with the authorities. Although he correctly found that the delay was inordinate, he fell into error when he found that the delay was not the fault of the respondent but was due to the fault of the registry, and therefore that the respondent must be given the benefit thereof. It is clear

that the judge failed to take into consideration the relevant fact that a CMC had been set by the Registrar under the transitional rules, and that the respondent took no further action thereafter. This despite the plethora of options available to the respondent to move her case along one way or the other. The view that the judge seems to have taken that the respondent was entitled to sit on her laurels for upwards of 16 years because of administrative blunders, (which in any event, did not occur) is against the weight of the authorities.

[97] The judge also erred when he found that the appellants had to prove that they had attempted to find the witnesses but had failed. Again this was not in keeping with the weight of the authorities. In failing to take account of the likelihood of a fair trial being impossible because of the inordinate delay, he erred, as this was a relevant factor which ought to have weighed heavily in coming to his decision. It is likely the failure to take this into account which would have caused him to believe that the appellants could defend the case despite the length of time which has passed. He also erred when he failed to take into account the fact that, due to the length of time that has passed, finding witnesses may well be nigh impossible, and even if found, they may not prove reliable because of failing memories, and in this particular case, the absence of documents from which to refresh their memories. The judge further failed to consider the actual prejudice to the appellants in just having the action hanging over their heads for this interminable period (see Lord Denning's opinion on this in the case of **Bliss v Lambeth, Southwark and Lewisham Health Authority** (1978) 2 All ER).

[98] The judge having taken account of irrelevant matters, and having failed to take into account relevant considerations, fell into error. Therefore, for those reasons, grounds (a) to (e) succeed, and his decision cannot stand.

Disposition

[99] I would allow the appeal and set aside the orders of Daye J made on 13 February 2018, and I would dismiss the respondent's claim for want of prosecution with costs to the appellants here and in the court below.

F WILLIAMS JA

ORDER

(1) The appeal is allowed.

(2) The order of Daye J made 13 February 2018 is hereby set aside.

(3) The claim brought by the respondent against the appellants is hereby dismissed for want of prosecution.

(4) Costs to the appellants here and in the court below to be agreed or taxed.