IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/00400

B E T W E E N

SHAKARA KNOWLES

Claimant

AND

ISLAND HOTEL COMPANY LIMITED

Defendant

Before:	Assistant Registrar Jonathan Deal
Appearances:	Wilver Deleveaux for the Claimant
	Viola Major for the Defendant
Hearing dates:	17 December 2024, 23 January 2025, 6 February 2025 (Defendant's written submissions on costs)

RULING

ASSISTANT REGISTRAR DEAL

[1.] This is my ruling upon an application made by the Defendant by Notice of Application filed on 27 June 2024 for an Order pursuant to **Part 26.3(1)(c)** of the **Supreme Court Civil Procedure Rules, 2022** ("**CPR**") and/or the inherent jurisdiction that:

(i) the Claimant's Writ of Summons filed on 29 March 2017 be struck out;

(ii) the Statement of Claim filed on 12 March 2021 be struck out;

(iii) the Judgment entered on 20 September 2021 be set aside;

(iv) the action be dismissed; and

(v) the Claimant pay the Defendant's costs of the action, to be assessed if not agreed.

[2.] No appearance or acknowledgment of service has ever been filed by the Defendant in these proceedings. However, the Claimant took no issue with the standing of the Defendant to make its application and, instead, sought to argue that the Defendant's failure to enter an appearance was a factor that contributed to the delay in this matter.

[3.] The grounds put forward by the Defendant for the Order sought are:

(i) the Claimant has failed to prosecute the claim within a reasonable time or at all, resulting in an inordinate length of delay in the proceedings;

(ii) as a result of the inordinate delay which has occurred, the Defendant is now prejudiced in its ability to present its case as to the fair and proper assessment of damages;

(iii) the Claimant's conduct in failing to prosecute the claim is an abuse of the process of the Court; and

(iv) the claim should be dismissed for want of prosecution.

Background

[4.] The instant action for damages for personal injuries arises out of a workplace accident which occurred on 31 March 2014 involving the Claimant while in the employ of the Defendant. The Claimant claims that she suffered a concussion, severe headaches and unbearable pain in her head and right shoulder when a freezer door fell off its hinges and struck her on the left side of her head, face and right shoulder which developed into chronic migraine headaches, shoulder pain, back pain, and neck pain.

[5.] The steps taken to date in connection with the proceedings can be outlined relatively briefly:

(i) the Claimant's generally indorsed Writ of Summons was issued on 29 May 2017 and served on the Defendant at its registered office on 28 September 2017.

(ii) the Claimant's attorneys sent a letter dated 28th September, 2017 to Graham Thompson & Co enclosing the generally indorsed Writ of Summons and medical reports from Dr. Clyde Munnings, her then treating neurologist, and Dr. Robert Gibson, her then treating orthopedic doctor.

(iii) the Claimant filed a Statement of Claim on 12 March 2021 and served it on the Defendant on 19 March 2021.

(iv) the Defendant applied by Summons filed on 30 March 2021 to strike out the Writ of Summons due to irregularity (the "2021 Strike Out Summons").

(v) the 2021 Strike Out Summons was withdrawn on 6 September 2021, the day before it was due to be heard.

(vi) on 20 September 2021, the Claimant filed a "Judgment in Default of Appearance and Defence" (the "Default Judgment") under the **Rules of the Supreme Court** ("**RSC**").

(vii) on 4 May 2022, the Defendant filed a Notice of Payment into Court.

(viii) the Default Judgment was served on the Defendant on 31 August 2022 after the Claimant was invited to enter Default Judgment and to proceed to assessment.

(ix) the Claimant filed a "Notice for Appointment for Assessment of Damages" on 2 September 2022 and served it on the Defendant on 6 September 2022. On 12 September 2022, the Defendant's attorneys provided convenient dates.

(x) on 10 November 2022, the Claimant's attorneys wrote the Defendant's attorneys to request a meeting to attempt to settle the matter. The parties agreed to meet on 8 December 2022. The meeting did not take place.

(xi) the Defendant filed the application now under consideration on 27 June 2024.

[6.] The Claimant was initially represented in these proceedings by Mr. Troy Kellman, of Hanna, Kellman & Associates. However, on 8 February 2023, a Disciplinary Tribunal constituted under the **Legal Profession Act** ordered that Mr. Kellman be struck from the Roll (see **Troy Levan Kellman v The Bar Council** SCCivApp No. 53 of 2023 (23 January 2024) at [13]). Mr.

Deleveaux, who now represents the Claimant, is associated with Hanna, Kellman & Associates. According to him, he "came into the firm" sometime around mid-April 2024.

Evidence

The Defendant's evidence

[7.] The Defendant relied upon the evidence contained in the Affidavit of Sandra Fountain filed on 27 June 2024 in support of its application.

[8.] In her affidavit, Ms. Fountain set out the procedural history of the litigation and made the point that no steps have been taken by the Claimant to proceed with having the assessment of damages heard despite the fact that Ms. Camille Cleare provided Mr. Kellman convenient dates for a directions hearing in September 2022 and followed up with him with respect to having the matter set down on 6 October 2022 and on 1 March 2023.

[9.] Ms. Fountain also recounted unsuccessful efforts made on behalf of the Defendant between March 2024 and June 2024 to locate Dr. Gibson. Those efforts took the form of a telephone call by Ms. Cleare to the telephone number for Dr. Gibson's practice, whereupon Ms. Cleare spoke with someone who informed her that Dr. Gibson was no longer practicing, a new medical practice operated by Dr. Akin Minnis now operated from the space previously occupied by Dr. Gibson, and the person did not know where Dr. Gibson's patient records were moved to, and unanswered email communications to the email address associated with Dr. Gibson's practice, the Bahamas Medical Council, and the Medical Association of The Bahamas.

[10.] Ms. Fountain asserted that Dr. Gibson's viva voce evidence and his medical records are essential to the Defendant's ability to challenge the Claimant's claims and to the Court's ability to properly and fairly assess the appropriate quantum of damages, particularly because there is evidence the Claimant had a pre-existing injury to her right shoulder. In support of this contention, Ms. Fountain exhibited a letter dated 18 October 2012 from Dr. Winston Phillips, Consultant Surgeon in Orthopedic Services advising of the results of the Claimant presenting with complaints of right shoulder pain and tingling in her right hand on 12 July 2012 and 16 September 2012.

The Claimant's evidence

[11.] The Claimant relied upon the evidence contained in an affidavit sworn by her filed on 27 November 2024 in opposing the application.

[12.] In her affidavit, the Claimant stated that, after the March 2014 accident, she was attended by Dr. James Iferenta, Dr. Dane Bowe and Dr. Magnus Ekedede and underwent surgery on her right shoulder in late 2014, after which she could not return to work immediately. She was declared by Dr. Ekedede to be 30% disabled for life for the purposes of NIB in March 2015. In July 2015, her employment with the Defendant was terminated due to the "excessive period" she was away from work. She instructed Wells Legal in 2016 to pursue a claim against the Defendant but, according to her, she could not afford to continue using the firm as her only source of income at

the time was her NIB disability payments of $294.05 per month. Her industrial accident benefits expired sometime after her termination, and she had to pay out of pocket for additional therapy, medications and doctor visits, which made her financial situation worse.

[13.] The Claimant averred that the loss of her employment with the Defendant resulted in financial hardship because she had to cover essential expenses and medical treatments with limited means. In March 2017, the law firm of Hanna, Kellman & Associates agreed to represent her in spite of her impecuniousness. At the time, she was able to work for a few hours a day doing odd jobs. She has been working at Quality Supermarket since 2022 earning less than $350 per week. She maintained she has not been able to pay her attorneys or her doctors to progress the litigation faster. Most recently, she was unable to afford an updated medical report from Dr. Munnings.

[14.] The Claimant indicated that her attorneys have informed her that they are "ready to proceed to the conclusion of the matter immediately without any further delay". In response to the Defendant's complaints of prejudice, the Claimant offered to have the Defendant's own expert witness examine her and give evidence as to how any pre-existing injury may have caused an acceleration of her symptoms or degenerative changes. She also dismissed the alleged "pre-existing" shoulder injury as an injury of "a minor degree". She claimed that she returned to work after it and was assigned lighter duties for about 2 weeks before regaining full use of her shoulder. According to the Claimant, the injury was also a result of the Defendant's negligence.

[15.] The Claimant exhibited medical reports from Dr. Gibson dated 22 August 2017 and 23 May 2022 and a medical report from Dr. Munnings dated 4 May 2017. Those medical reports summarize the Claimant's treatment for complaints of various sequelae she attributes to the March 2014 accident including right shoulder pain, back pain, neck pain and headaches. Dr. Gibson found that the Claimant's shoulder injury had healed by the time that he prepared his 22 August 2017 report. Both Dr. Gibson and Dr. Munnings identified chronic issues.

The Defendant's submissions

[16.] Counsel for the Defendant contended that the Claimant's failure to prosecute this claim, including the assessment of damages, within a reasonable time or at all, has resulted in inordinate delay, and that it would be unfair to proceed with the assessment at this stage.

[17.] Mrs. Major submitted that the test to have a matter struck out for want of prosecution remains the same under the **CPR** as it was under the **RSC** and referred the Court to **Peace Holdings Limited v FirstCaribbean International Bank (Bahamas) Limited** 2012/CLE/gen/01592 (27 April 2023) for the applicable principles. Mrs. Major submitted that this is a "category (ii)" case (i.e. one not based on intentional or contumelious default).

[18.] Mrs. Major submitted, relying on **Watson v Woodhouse** [1999] Lexis Citation 4327, that a clai]mant such as the Claimant who waits until the end of the limitation period before issuing proceedings must act expeditiously to avoid the risk of their action being struck out for want of

prosecution. Counsel submitted that the total length of the Claimant's delay is now almost 11 years. Mrs. Major divided the overall delay in this matter into 3 periods of delay: (i) before the action; (ii) between the filing of the Writ of Summons and the Statement of Claim; and (iii) after the withdrawal of the Defendant's Summons filed on 30 March 2021.

[19.] Mrs. Major submitted that the Claimant was responsible for the entire 11-year period of delay in this matter except for the approximately 6-month period between the filing and the withdrawal of the 2021 Strike Out Summons. Mrs. Major submitted that, in relying on impecuniosity to justify her delay, the Claimant failed to provide a reasonable excuse because (i) she has been steadily employed since April 2022, (ii) she could have applied for an interim payment, and (iii) (according to Mr. Deleveaux) her attorneys have been acting pro bono so there was no financial burden preventing her from setting the matter down for assessment. Mrs. Major submitted that Mr. Kellman's disbarment does not provide a reasonable excuse for delay prior to it.

[20.] Relying on the decision of the Court of Appeal in **Darlene Allen-Haye v Keenan Baldwin & Anr** SCCiv App No. 186 of 2019, a case which Mrs. Major acknowledged related to an application for an extension of time and not an application to dismiss for want of prosecution, Counsel submitted that mere delay can amount to prejudice and that there is inevitably always some element of prejudice inherent in any delay, including the further delay which will arise if the application is granted. Counsel submitted that there has been inherent prejudice in the significant delay in this matter and there will be prejudice in the further delay that will be occasioned if the application is granted.

[21.] Mrs. Major further submitted that there is "direct and clear" evidence of specific prejudice to the Defendant as a result of the Claimant's failure to prosecute her claim. Based on the Defendant's enquiries, Dr. Gibson cannot be located and is no longer available to give evidence in the matter and his records cannot be found. The Defendant is therefore handicapped in its ability to challenge the Claimant's medical evidence and to contest the issue of causation in relation to the Claimant's alleged injury to her right shoulder. Counsel drew the Court's attention to **Hornagold v Fairclough Building Limited** [1993] Lexis Citation 1615 and to dicta concerning the willingness of the Court to find prejudice where an important witness has died or is no longer traceable since the date the action should have been set down.

[22.] Mrs. Major rejected any suggestion that the prejudice alleged to have been caused to the Defendant by the delay could be compensated for in costs when addressing whether it could be remedied by some means short of dismissing the action. Mrs. Major submitted that the burden of proof also could not adequately address the prejudice, unless the Court were prepared to say that it would not make a finding on the Claimant's alleged shoulder injury. In response to a question from the Court about whether the Court could strike out the Claimant's claim so far as it related to the alleged shoulder injury, Mrs. Major submitted that it would be challenging for the Court to do so because of the inter-related nature of the Claimant's claim.

[23.] Invoking the overriding objective, Counsel for the Defendant submitted that the overriding objective requires that this matter should be dismissed for want of prosecution. Counsel submitted that the overriding objective is not limited to the "smaller" party but that dealing with cases fairly applies to both parties and it would not be fair for the matter to proceed to an assessment of damages as the Defendant cannot properly challenge the Claimant's medical evidence. Counsel further submitted that the Defendant has always sought to have this claim dealt with in a manner which is cost-effective, expeditious and fair, whereas the Claimant has not.

[24.] Mrs. Major submitted that if the Defendant had not made this application, the matter would still be lying dormant and the Claimant would not have made an attempt to move to assessment. Relying on **Rose Island Beach Harbour Club Limited & Anr v LRLA Rose Island & Anr** 2019/CLE/gen/00276, Mrs. Major submitted that a costs order should be made in the Defendant's favour regardless of the outcome of the application. Counsel estimated the Defendant's costs of the action stood at $15,410.10 and its costs of the application stood at $10,348.50 and explained how those figures were arrived at in cost submissions dated 6 February 2025.

The Claimant's submissions

[25.] Counsel for the Claimant asked the Court to permit the action to continue to the stage of assessment. Counsel submitted that the length of the delay was justified, that the Claimant had a reasonable explanation for the delay, that the delay had been occasioned by both parties, and that the Defendant had not been prejudiced by the delay. Counsel submitted that neither party should be sanctioned for the delay, and that an "unless order" should made under **Part 26.4** of the **CPR**.

[26.] Mr. Deleveaux submitted that striking out is appropriate only in plain and obvious cases and that those cases which require prolonged and serious argument are unsuitable for striking out. Counsel referred to **Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd** [1986] AC 368 decided under the **RSC** and **Three Rivers District Council v Bank of England (No. 3)** [2001] 2 All ER 513 decided under the English **Civil Procedure Rules 1998**. Counsel submitted, relying on **Partco Group Ltd v Wragg** [2002] EWCA Civ 594, that the Claimant's claim is "winnable on the merits" and, therefore, the case is not suitable for striking out.

[27.] Mr. Deleveaux placed heavy reliance on the overriding objective of the **CPR**. Citing **Brown v Central Bank of Belize & Anr** Civil Appeal No. 6 of 2007, Mr. Deleveaux submitted that the overriding objective is the overarching principle which governs the **CPR** and technicalities have given way to the Court dealing with matters justly. Mr. Deleveaux further submitted, relying on **Henderson v Dorset Healthcare University Foundation Trust** [2018] EWCA Civ 1841, that when considering fairness between the parties, the Court must take a "more searching look" than it once did at the prejudice that a party will suffer. Mr. Deleveaux cited **Maltez v Lewis** (1999) The Times, May 4, 1999 with respect to the parties being on equal footing.

[28.] Counsel submitted that, whereas the Claimant is "very impecunious", the Defendant is "a company with great financial resources". In addition to the parties being on unequal footing, there

is a "vast" amount of money in dispute and the matter is very important to the Claimant. Counsel submitted that the overriding objective demands that the Claimant's claim be heard and that there be an assessment of damages. Counsel submitted that the Court ought to take into account the circumstances of the delay. Counsel argued that it would be unfair to strike out the Claimant's claim, which is a claim that is not frivolous, scandalous, vexatious or an abuse of process, and also that, because the Claimant is impecunious and is not solely responsible for the delay, the Claimant should not be penalised.

[29.] Mr. Deleveaux submitted the delay in this case was occasioned by both parties because (i) the Defendant failed to enter an appearance for 3 years prior to the Claimant serving a Notice of Intention to Proceed in 2020; (ii) the Defendant filed the 2021 Strike Out Summons; (iii) the Defendant filed a Notice of Payment into Court and later withdrew it (an allegation that is unsubstantiated); and (iv) the Defendant failed to respond to a settlement offer, thereby prolonging the matter. Mr. Deleveaux also sought to attribute some of the delay to the Claimant's impecuniosity and to Mr. Kellman's disbarment, factors outside of the Claimant's control.

[30.] Counsel for the Claimant contended on the issue of prejudice that the Defendant should make further efforts to communicate with Dr. Gibson with deadlines. Counsel submitted that any prejudice to the Defendant could be compensated by "costs thrown away". Counsel further submitted that, even if Dr. Gibson is no longer available to give evidence, the Defendant is not prejudiced because Dr. Gibson's medical reports are available and another physician can look over those reports and state their opinion; there are other doctors who treated the Claimant available to give evidence such as Dr. Munnings and Dr. Ekedede; and the Defendant's own physicians can examine the Claimant.

[31.] Counsel for the Claimant did not lodge written submissions on the issue of costs pursuant to the directions of the Court given at the hearing of the application on 23 January 2025.

Dismissing proceedings for want of prosecution

[32.] **Rule 26.3(1)(c)** of the **CPR** provides:

> "(1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —
>
> ...
>
> (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;"

[33.] **Rule 1.2** of the **CPR** mandates that the Court must seek to give effect to the overriding objective of dealing with cases justly and at proportionate cost when exercising any power or discretion under the **CPR**. The requirement to deal with cases "justly" requires a "necessarily objective and even-handed approach": **Al-Zahra (PVT) v DDM** [2019] EWCA Civ 1103 per Haddon-Cave LJ at [72].

[34.] Fraser Snr J reviewed the law surrounding applications to dismiss proceedings for want of prosecution under the **RSC** in **Peace Holdings Limited v FirstCaribbean International Bank (Bahamas) Limited** 2012/CLE/gen/01592 (27 April 2023), at [17] to [23]. Fraser Snr J revisited those principles under the **CPR** in **Pamela Heastie (Personal Representative of the Estate of Herbert Heastie) v Linda Symonette (Personal Representative of the Estate of Ruth Ingraham)** 2019/CLE/gen/00076 (25 June 2024).

[35.] In summary:

(i) the power of the Court to strike out under **Part 26.3(1)(c)** is discretionary.

(ii) striking out is considered a draconian action, to be taken cautiously.

(iii) an application to strike out is a summary procedure meant for plain and obvious cases.

(iv) one of the types of dismissal that may arise is where there has been inordinate and inexcusable delay in the prosecution of the action by the claimant or their lawyers and such delay will give rise to a substantial risk that it is not possible to have a fair trial, or has caused, or is likely to cause, serious prejudice to the defendant.

[36.] "Inordinate" delay is delay which is "materially longer that the time usually regarded by the profession and Courts as an acceptable period": **Re Harris** [1998] BHS J. No. 182 at [40]. There is, most recently, delay in having this matter set down for the assessment of damages. There is no prescription in the **RSC** or the **CPR** concerning the time within which an assessment of damages must take place. Nonetheless, there can be "inordinate" delay and want of prosecution even where no specific time-limit is prescribed by rules of court for the taking of a particular step: **Rogers v Rhys Evans (a firm)** [2000] All ER (D) 433.

[37.] Where there has been inordinate delay, until a credible excuse for the delay is made out, the natural inference is that it is inexcusable: **Allen v Sir Alfred McAlpine & Sons Ltd** [1968] 2 QB 229 at page 267. The burden is on the claimant to adduce a credible excuse for the delay: **Austin Securities Ltd v Northgate & English Stores Ltd.** [1969] 1 WLR 529 at page 534. An excuse will only be acceptable if it is genuine and it reasonably explains his failure to proceed. The reason given for the delay must also be considered with regard for the position of the defendant: **Willison v Welch** [1986] EWCA Civ J-0714-4.

[38.] Where a claimant waits until the end of the limitation period before issuing proceedings, they are under a duty to act expeditiously to avoid the risk of the action being struck out: **Watson v Woodhouse** [1999] Lexis Citation 4327. Long pre-action delay has the effect of any post-commencement delay being looked at more critically by the Court than would be the case if the action had been commenced shortly after the accrual of the cause of action. If the defendant has suffered prejudice as a result of the pre-action delay, the defendant need only show minimal

prejudice as a result of the delay since the commencement of the action to justify striking out: **Department of Transport v Chris Smaller (Transport) Ltd** [1989] AC 1197 at page 1208.

[39.] Prejudice is "a matter of fact and degree". It is not confined to prejudice affecting the actual conduct of the trial. The onus is on the defendant to establish serious prejudice or a substantial risk to a fair trial. A bald assertion of prejudice or a risk to a fair trial is not enough. There has to be some indication of prejudice or some evidence to support an inference of prejudice. The effect of the lapse of time on the memory of witnesses or, in the course of such time of their death or disappearance are the most usual factors. Their importance depends upon the circumstances, the issues and the other evidence that can be given. See **Re Harris** [1998] BHS J. No. 182 at [42].

Want of prosecution when liability is not in dispute

[40.] The basic principles concerning the dismissal of proceedings for want of prosecution do not differ when liability has been admitted or has been resolved. In **Anderson v Bain** [2007] 5 BHS J. No. 14, Lyons J struck out a claim despite the fact that liability was not in dispute because the claimants had lost interest in the matter, bringing the action within **Grovit v Doctor** [1997] 1 WLR 640, and the matter also satisfied the test for dismissal for want of prosecution in **Birkett v James** [1978] AC 297.

[41.] While the Court was not referred to the **Supreme Court Practice** in connection with the jurisdiction to strike out a claim for want of prosecution when liability is not in dispute, **note 25/1/8** in the **Supreme Court Practice** contains helpful commentary (the quote below is taken from the **Supreme Court Practice 1997**):

> "(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 (Gloria v Sokoloff [1969] 1 All E.R. 204, C.A.; Martin v Turner [1970] 1 W.L.R. 82; [1970] 1 W.L.R. 1310; [1971] 3 All E.R. 370). Sometimes justice can best be done by giving the plaintiff a last chance to accept the money in Court."

[42.] The Court is "reluctant" to dismiss an action for want of prosecution where liability is not substantially in issue. However, the Court will do so if the delay has made it "impossible" or "very difficult" to assess the damages (as in **Paxton v Allsopp** [1971] 3 All ER 370). The Court will also do so if the delay has given rise to substantial new claims of loss (as in **Watson v Woodhouse** [1999] Lexis Citation 4327). The Court may, if it thinks fit, allow the claimant a last chance to accept any money paid into Court.

Discussion and analysis

[43.] In order to attract a favourable exercise of the Court's discretion, the Defendant must establish: (i) that there has been inordinate delay; (ii) that the inordinate delay is inexcusable; and (ii) that such delay has given rise to a substantial risk that it is not possible to have a fair trial of the issue of the quantum of damages or is such as has caused serious prejudice or is likely to cause serious prejudice to the Defendant. These issues are considered in turn.

[44.] There has clearly been inordinate delay in this matter. The Defendant correctly called attention to the fact that there has been an overall period of delay of some 11 years since the March 2014 accident. Focusing upon the post-writ delay, viewed macroscopically, a period of nearly 8 years to resolve a reasonably straightforward personal injuries action since the issue of the writ is an unacceptable period of delay. The position is little improved if focus is instead placed upon the specific steps in the litigation. There has been delay throughout. Most notably, the Claimant delayed 3 years and 5 months between serving her Writ of Summons and serving her Statement of Claim; 11 months between entering the Default Judgment and serving it; and 1 year and 9 months after filing her Notice for Appointment for Assessment up to the date the present application was filed.

[45.] Some but not all of the inordinate delay that has occurred is inexcusable. I do not accept that the delay has been occasioned by both parties. It is fair to attribute the 6 month delay between the filing and withdrawal of the 2021 Strike Out Summons to the Defendant but, otherwise, the Defendant's post-writ conduct has never prevented the Claimant from proceeding. I also do not accept that the inordinate delay has been wholly excused by matters outside of the Claimant's or her attorneys' control. This matter could have been prosecuted more expeditiously even accepting, as I do, the Claimant's impecuniosity. The Claimant has had medical reports since 2017, her attorneys have, as I understand it, been acting pro bono, and it has always been open to the Claimant to seek an interim payment. Mr. Kellman's disbarment is irrelevant to any antecedent delay and there was excessive delay by the Claimant in serving her Statement of Claim, entering the Default Judgment, and serving the Default Judgment between 2017 and 2021.

[46.] While there has been inordinate and excusable delay, I am not satisfied that the delay in this matter has given rise to a substantial risk that it is not possible to have a fair trial of the issue of the quantum of damages or is such as has caused or is likely to cause serious prejudice to the Defendant. Having regard to **Hornagold v Fairclough Building Limited** [1993] Lexis Citation 1615, it is insufficient for the Defendant to rely on the prejudice inherent in delay. The Defendant's reliance upon the alleged unavailability of Dr. Gibson and his notes as evidence of specific prejudice is also inadequate. I find the efforts made by the Defendant to trace Dr. Gibson and his notes detailed in the Affidavit of Sandra Fountain to be uncompelling. Although I have no reason to doubt that Dr. Gibson has retired, I am not prepared at this time to find that both Dr. Gibson and his notes are untraceable. I agree that further efforts should be made.

[47.] However, even if Dr. Gibson and his notes will not be available at the assessment, that does not, in and of itself, establish a substantial risk that it is not possible to have a fair trial of the issue of the quantum of damages or serious prejudice. Placing to one side the question of the extent to which the Claimant could take advantage of Dr. Gibson's medical reports if he does not attend court to give evidence as a witness, Dr. Gibson's medical reports are available for other orthopedic doctors to review and comment upon. There is no evidence at this time that other doctors who have attended the Claimant, including Dr. Bowe, an orthopedic surgeon, and Dr. Winston Phillips, the orthopedic surgeon who examined the Claimant in connection with her alleged pre-existing shoulder injury in 2012, are unavailable or unwilling to give evidence, or that they could not

provide expert opinions of assistance to the Court on the matters in question between the parties based upon all of the material that it is possible to make available to them.

[48.] Bearing in mind the overriding objective, it is relevant to step back and consider whether dismissal would be a proportionate response to the Claimant's delay. I am not satisfied that it would be. The ends of justice are better served by permitting the matter to proceed to assessment on the clear understanding that further delays will not be tolerated. The Court is reluctant to deprive a claimant of a remedy where judgment on liability has been entered. The Claimant has lived with uncompensated injuries and has a realistic prospect of recovering damages. The Defendant was prepared to proceed to assessment in the fall of 2022. The subsequent progress of the matter up to a few months before the filing of the present application was derailed by Mr. Kellman's disbarment. That was no fault of the Claimant's.

Conclusion

[49.] For the foregoing reasons, the Defendant's application is dismissed. No specific rule or court order has recently been breached and **Part 26.4** contemplates an application by the non-defaulting party. For those reasons, I decline to act on the Claimant's invitation to make an "unless order" pursuant to **Part 26.4**. The Claimant must apply forthwith to the Listing Office to set the matter down for the assessment of damages. In the event of further delay, the Defendant is at liberty to apply once more to have the matter dismissed for want of prosecution.

[50.] **Part 72.26** stipulates that the Court must decide who is to pay costs, assess the amount of costs and direct when they are to be paid. The general rule is that costs follow the event but the Court has a wide discretion. The Claimant did not contest the Defendant's reliance on **Rose Island Beach Harbour Club Limited** or the quantum of costs it sought. I agree with the Defendant that it would not be appropriate for costs to follow the event here. I award the Defendant its costs of the application, fixed in the sum of $10,348.50, to be paid at the conclusion of the action.

Dated the 11th day of April, 2025

Jonathan Deal
Assistant Registrar