IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 59 of 2017

BETWEEN:

MICHELLE INGRAM

PLAINTIFF

-AND-

JULIAN TURNER

DEFENDANT

IN CHAMBERS

Before Hon Mr Justice Walters (Actg.)

Appearances: Mr Delroy Murray of Murray & Westerborg for the Plaintiff
Ms Alice Carver and Mr Colm Flanagan of Nelsons for the Defendant.

Date of Hearing: 27 January 2022

Draft Circulated: 23 February 2022

Judgment Delivered: 8 March 2022

HEADNOTE

Claim for personal injury, substantial delay, grounds upon which case may be struck out for want of prosecution pursuant to GCR O. 18, r. 19, whether notice given to insurers pursuant to section 15 (2) (b) Vehicle Insurance (Third Party Risks) Act (2012 Revision), whether failure to give notice is grounds for dismissal of claim GCR O. 18, r. 19 on the grounds that it is an abuse of process.

JUDGMENT

Summary of background

1. These proceedings relate to a claim for damages brought by the Plaintiff in relation to damage to her vehicle and injury alleged to have been suffered by her as the result of a road traffic accident involving a vehicle driven by the Defendant. The accident took place on 31 March 2014. Despite negotiating directly with the Defendant's insurance company, the Plaintiff's claim for personal injury was not settled and on 13 March 2017she retained attorneys, McGrath Tonner. Proceedings were issued on behalf of the Plaintiff on 29 March 2017, a few days before the expiry of the three year limitation period.

2. The accident appears to have involved the Defendant's vehicle colliding with the rear of the Plaintiff's vehicle. The Plaintiff's pleaded case (clarified in her reply to defence served over 3 years after the date of the accident) is that she was dazzled by the headlights of an oncoming vehicle and, as a result, "gently" applied her brakes as her view of the road was temporarily impaired. She says that the Plaintiff did not maintain a sufficient braking distance. The Defendant's case is that the Plaintiff braked without warning and a collision could not be avoided. Liability is disputed. There does not appear to be a police report and there were no witnesses whose contact details were taken.

3. The Plaintiff claims that she has suffered injury to her back and that the injury persists. The precise nature of the injury/ies has not been pleaded or disclosed and the claims for general and special damages have not been particularized. As part of his defence, the Defendant asserts that the Plaintiff had a pre-existing susceptibility or weakness that has caused or exacerbated her current condition.

4. There has been substantial delay to the proceedings and, despite the Plaintiff changing counsel, the matter has not progressed beyond the close of pleadings, the reply to defence being dated 18 September 2017.

5. The Defendant's current summons dated 28 October 2021 seeks an order striking out the Plaintiff's claim as an abuse of process and/or for want of prosecution by reason of inordinate/inexcusable delay.

6. In addition to the question of delay, the Defendant has raised the question of section 15 (2) (b) of the Vehicle Insurance (Third Party Risks) Act (2012 Revision) (the "Act"). I will come back to the detail of that section below but, in summary, it says that it is a condition precedent to liability of an insurer for an accident involving one its insureds that before or within 30 days after the commencement of proceedings relating to that accident, the insurer must be given notice of the bringing of proceedings.

7. The Defendant's insurer has taken the position that it was not given notice in accordance with the Act. It is asserted that this was the fault of the Plaintiff and her original attorneys. Failure to give notice means that the insurer has the option of declining to accept liability for the accident. It has not yet done so and the current attorneys for the Defendant are instructed by his insurer, but without prejudice to its right to decline liability if the proceedings continue.

8. The Defendant argues that it is an abuse of process for the Plaintiff to be allowed to continue with her claim in circumstances where as a result of her original attorneys' omission or failure, he may be left personally liable for any damages awarded in her favour as well as for his own legal costs and, potentially, those of the Plaintiff. When Ms Carver for the Defendant was making submissions in relation to the implications of the Act, it became clear from her analysis of the relevant English authorities dealing with the equivalent English statutory provision (Section 152 (1) (A) Road Traffic Act 1988) that those courts have looked at the factual background when considering if adequate notice to insurers has been given. As a result, during the hearing I asked counsel for the Defendant to obtain an affidavit from the Defendant's insurer setting out the contact that it had with the Plaintiff and her attorneys prior to the commencement of proceedings. The hearing was adjourned to allow that to happen and an affidavit dated 3 February 2022 was sworn by Ms Zinnana Ebanks the claims manager of the Defendant's insurer, British Caymanian Insurance Company Limited ("CG BritCay"). I have incorporated her evidence into the more detailed factual summary set out below.

Facts

9. Further to the initial summary above, on 2 April 2014, three days after the accident, the Plaintiff met with CG BritCay and advised it that she had received minor injuries to her lower back and had pains in the head area. She said that her doctor had advised that she had sore muscles from the accident and would have to return in 3 days for him to re-examine her.

10. On 16 April 2014, the Plaintiff called CG BritCay and confirmed that she was back at work but still in pain. Ms Ebanks of CG BritCay confirms in her affidavit that CG BritCay explained to the Plaintiff the relevant "statute" (I assume the Limitation Act) and injury claim procedure.

11. Contact between the Plaintiff and CG BritCay continued during 2015, 2016 and into 2017. It appears from Ms Ebanks' affidavit that the Plaintiff continued to keep the insurer updated in relation to her condition and treatment. It also appears that the insurer told her repeatedly that she needed to obtain and provide it with her medical records in order to resolve her claim. CG BritCay also appears to have reminded the Plaintiff repeatedly of the relevant limitation period.

12. The note from CG BritCay's records for 14 March 2017 set out by Ms Ebanks in her affidavit states that:

"[The Plaintiff] came into office last week w/med records, then called in to the office to say she will be seeking add'l [treatment] as still in pain. Advised of statute coming up and would need to file writ to push claim past statute. Have now received notice of representation from McGrath Tonner."

13. The same day, it appears that Ms Ebanks spoke with Mr Tonner, the Plaintiff's counsel who was enquiring about progress with settlement. Ms Ebanks confirms that she told Mr Tonner that there had been no discussion about settlement of the Plaintiff's personal injury claim (it appears that the Plaintiff's claim in relation to damage to her vehicle was settled) as the Plaintiff said that she would be seeking additional treatment. Mr Tonner advised her that he would follow up with her later in the month in relation to settlement.

14. Ms Ebanks exhibited to her affidavit a number of emails from Mr Tonner dated 13 March and 28 March 2017. The first confirms that McGrath Tonner had been retained on behalf of the Plaintiff and asking for the call that took place on 14 March 2017. He requested a prompt response given the date of the accident but made no mention of an intention to bring proceedings. The second email requested the make, model and registration of the Defendant's vehicle. That information was provided to Mr Tonner and he acknowledged receipt.

15. Ms Ebanks confirms the position of CG BritCay which is that it was not given any "*formal written notice*" of the bringing proceedings and nothing was sent to it by registered post to that effect.

16. Ms Ebanks confirms that, in accordance with her standard practice, on 27 March 2017 she advised the Defendant that if he was served with a writ he should provide a copy to CG BritCay as soon as possible.

17. As mentioned above, the writ was issued on 29 March 2017. The writ was addressed to the Defendant and it was endorsed with the following:

"And as a Noticed Party to:
British Caymanian Insurance Company Limited
BritCay House, 236 Eastern Avenue,
George Town

P.O. Box 74
Grand Cayman KY1-1102"

18. For some unexplained reason, the writ was not initially served on either the Defendant or CG BritCay. Instead, Mr Tonner wrote to the Defendant on 6 June 2017 (the "Letter Before Action") (well outside the period of 30 days as prescribed by the Act) in the following terms:

> *"We act on behalf of the above named (the "**Client**") who was the driver of a Toyota Corolla involved in an accident with a vehicle driven by you on the 31st March 2014.*
>
> *The circumstances of the accident are that on the above date our Client was travelling on Smith Road from the direction of George Town in an easterly direction. In the vicinity of Pond Road your vehicle collided with the rear of our Client's vehicle.*
>
> *Our Client alleges that you caused the accident and that you admitted to having done so (shortly after the accident, at the scene).*
>
> *On our Client's behalf we are alleging that you were negligent and in breach of your duty of care to other road users, namely our Client, in that you:*
>
> *a) Failed to keep any or any proper look out;*
> *b) Failed to adequately control your vehicle;*
> *c) Failed to see the vehicle our client was driving, whether in time or at all;*
> *d) Failed to apply your brakes; whether in time of at all,*
> *e) Res ipsa loquitor.*
>
> *Our Client received damage to her vehicle as a result of the accident. We understand that your insurer, Britcay, has paid for the necessary repairs to our Client's vehicle.*
>
> *Our Client also received physical injuries caused by the accident, which have in turn resulted in financial losses to her.*
>
> *Our Client is claiming damages including, but not necessarily limited to:-*
> *(a) Pain Suffering and Loss of Amenity*
> *(b) Cost of Medical Treatment*
> *(c) Cost of Medication*
> *(d) Care*
> *(e) Loss of Earnings*
> *(f) Travel Expenses*

Please indicate in writing whether or not you admit liability within 21 days.
Please also disclose to us of all relevant documents material to the issues outlined above as soon as possible.
Although we have copied your insurer into the correspondnece, you should contact them yourself, to discuss this letter and the matter generally without delay."

19. On the same day, the Letter Before Action was sent by McGrath Tonner by email to Ms Ebanks. Ms Ebanks replied indicating that the limitation period had expired on 31 March 2017 and that CG BritCay had not received a copy of any writ. She asked if a copy could be forwarded to her. Mr Tonner replied saying that a copy would be served on CG BritCay after the Letter Before Action had been served on the Defendant and asked Ms Ebanks for confirmation of his address. Otherwise, he gave no more information about the Plaintiff's claim or the date when the writ was issued.

20. The writ and statement of claim were served on the Defendant on the evening of 24 July 2017. The Defendant has said in his affidavit sworn on 7 December 2021 in connection with this application that he provided CG Britcay with a copy of the writ and statement of claim but does not know if they were served on CG BritCay by the Plaintiff.

21. Following service of the proceedings on the Defendant, CG BritCay, instructed attorneys to defend the claim on his behalf who filed a notice of intention to defend on 7 August 2017.

22. On 21 August 2017, a defence was filed.

23. On 18 September 2017 (following a request for a 2-week extension of time) the Plaintiff filed a reply to defence.

24. On 23 May 2019, the Plaintiff terminated her engagement with McGrath Tonner.

25. On 11 June 2020, a Notice of Acting was filed by the Plaintiff's current attorneys.

26. On 25 March 2021 the Defendant's attorneys wrote to the Plaintiff's attorney indicating an intention to obtain a declaration that CG BritCay will not be liable for any judgment as a result of a failure of the Plaintiff to give sufficient notice to CG BritCay of the proceedings. Ultimately, this was not pursued by way of a separate application but is still an issue in the proceedings.

27. On 10 September 2021, a Notice of Intention to proceed was served.

28. The current summons was issued on 28 October 2021.

The tests to be applied on an application to strike out

29. The court has power to strike out pleadings pursuant to GCR O.18, r.19 which states:

> *" (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

30. In ***Birkett v James*** **[1978] A.C 297** Lord Diplock set out the principles applicable on an application for dismissal for want of prosecution (which have subsequently been applied in the Cayman Islands in a number of cases including by Williams J in *Messam v Kirk Market (*GC 65 of 2017, unreported):

> *"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 amounting to an abuse of process; 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".*

31. The Defendant submits that this case falls into the second category in which the court may exercise its power to dismiss.

32. In ***Shtun v Zalejska*** **[1996] 3 All ER 411 at 417,** referring to *Birkett v James,* Peter Gibson LJ elaborated further on the test to be satisfied.

32.1 In a case in a case where there has been no contumelious conduct by the plaintiff, if it is to strike out an action for want of prosecution [it] must be satisfied (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.

32.2 The delay that must be shown to have caused such risk or such likelihood of prejudice is the delay after the issue of proceedings.

32.3 But where the plaintiff delays in issuing proceedings and by such delay causes prejudice, the additional prejudice which must be shown to justify dismissal of the action need not be great, provided that it is more than minimal.

32.4 Further, once the plaintiff is guilty of further delay, the prejudice caused by the totality of the period of his delay can be looked at (see ***Roebuck v Mungovin*** **[1994] 1 All ER 568 at 575, [1994] 2 AC 224 at 234 per Lord Browne-Wilkinson**).

32.5 The prejudice may take a variety of forms, but one recognised form is the impairment of the memory of witnesses. Another form consists of the prejudice to the defendant through having a serious claim hanging indefinitely over him. But the court should only in exceptional cases treat the anxiety which accompanies all litigation as alone being sufficient to justify dismissing an action.

32.6 Save in exceptional cases, an action will not be struck out for want of prosecution before the expiry of the relevant limitation period.

33. It is for the Defendant to satisfy the Court that the delay either puts at risk a fair trial or, alternatively, that it has caused or is likely to cause serious prejudice to the Defendant or the Defendant and a third party (See *Shtun v Zalehska* [1996] 3 All ER 411 [12]).

Inordinate and Inexcusable Delay

34. The Defendant contends that the inordinate and/or inexcusable delay on the part of the Plaintiff in prosecuting this action has caused him serious and unfair prejudice as well as affecting his rights to effective justice and a fair trial. The amount of time that has passed since the accident (now almost 8 years) means that memories fade and to the extent that there are factual questions that need to be resolve in connection with liability, there is a risk of prejudice to him.

35. As Ms Carver also submitted the Defendant is prejudiced in his ability to challenge the Plaintiff's claim for general damages. In particular, in the absence of any medical records, it is impossible for the Defendant to pursue his argument that the Plaintiff had a pre-existing susceptibility or weakness that has caused or exacerbated what she claims is her current condition. The absence of medical records also precludes the particularization of the Plaintiff's injures, assessment of any damages to which she might be entitled and the ability of the Defendant to instruct his own medical experts to provide an opinion on the condition of the Plaintiff. There was no suggestion or evidence that the problem with access to medical reports is going to change in the near future or at all. Indeed, during the course of the hearing Mr Murray indicated that he did not anticipate obtaining the medical reports in the near future and apparently the Plaintiff does not now recall the names of the doctors by whom she was treated.

36. The Defendant says that the Plaintiff has failed to progress or engage in these proceedings in any meaningful way since the filing of her reply in September 2017.

37. As Williams J put it in **Messam**, the Plaintiff had and has:

> "*...a responsibility to progress the case in a manner consistent with the Overriding Objective in the Grand Court Rules. This is particularly so as the writ was issued late, just before the expiry of limitation. If a Plaintiff delays issuing proceedings towards the end of the period of limitation, as noted in* ***Birkett v James****, she is then under an obligation to proceed with the case with reasonable diligence.*"

38. The Defendant says that in the Plaintiff's affidavit sworn 17 December 2021 no explanation is given whatsoever for her failure, or that of her attorneys, to progress the case with reasonable diligence. He says that she has not grappled with delay at all save to say that the delay is not her fault and, is at least partly to blame on her attorneys. Further the Defendant says that in accordance with the test in ***Birkett v James*** whether an inordinate and inexcusable delay is the fault of the Plaintiff or her lawyers is immaterial as both can give rise to dismissal. In the latter case the Plaintiff would not be prejudiced as the remedy would be against her attorneys (and their insurance).

39. The Defendant says that the only conclusion must be that the delay is inexcusable.

40. In her affidavit of 17 December 2021 the Plaintiff explains that she retained McGrath Tonner in 2017 and signed a fee agreement with them. Her understanding was that the arrangement was that

McGrath Tonner would receive 25% of whatever damages they recovered on her behalf as their fee for representing her, otherwise she would have to pay nothing.

41. Frustrated by lack of any action in connection with her claim she decided to change attorneys and, on or around 10 June 2020, instructed Murry & Westerbourg.

42. This prompted McGrath Tonner to send the Plaintiff an invoice for CI$25,093.50 which she says that she was and is unable to pay. McGrath Tonner also exercised a lien over their files which they continue to assert. McGrath Tonner has sued the Plaintiff for the amount of their fees.

43. In the absence of payment of the invoice or the provision of a professional undertaking from Mr Murray's firm to meet the amount claimed, the Plaintiff's current attorneys have been unable to obtain the files from McGrath Tonner. They issued a summons seeking an order that the files should be handed over but there were delays on the part of the court getting the summons listed and it was never heard.

44. Supported by Murray & Westerbourg, the Plaintiff made an unsuccessful application for legal aid in March 2021. In support of the application, the Plaintiff produced copies of some of her 2020 payslips. She was working as a domestic providing household services and her pay slips show a deduction for her share of her monthly health insurance premium. It is also notable that her statement of means form accompanying her application for legal aid states that as at 16 March 2021 she had savings of CI$7,701.76.

45. In Mr Murray's written submissions, he confirms that there has been correspondence between the Plaintiff's current and former attorneys. The latter have been put on notice of the alleged failure to notify CG BritCay with notice of these proceedings. It seems that the claim by them against the Plaintiff in respect of unpaid fees has not progressed far.

46. On behalf of the Plaintiff, Mr Murray's position is that any delays are not the fault of the Plaintiff. She has not delayed deliberately or breached any orders of the court. He is hamstrung in pursuing the Plaintiff's case without access to the files held by McGrath Tonner and without any medical evidence. Apparently the Plaintiff has been and is unable to obtain any of her medical records from any of the doctors by whom she has been treated both in the Cayman Islands and in Jamaica where she now lives. Based on comments from Mr Murray at the hearing, it seems that this is because she has been unable to pay for either her treatment or the records themselves. This is despite the fact that, as set out above, it appears that between 2014 and 2017 she was receiving regular medical

treatment in the Cayman Islands which she must presumably have been paying for or which was covered at least in part by her health insurance and that she has access to her savings.

47. Mr Murray relied on the cases of *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543 approved in *Birkett v James* and accepted in *Sandcroft v Reliable Industries Ltd* [2019 (1) CILR 77] in which Williams J declined to dismiss the plaintiff's claim in part because:

> *"I am satisfied that there has been delay and that P has not prosecuted her claim with diligence. At this stage, I do not conclude that the delay has been inordinate, or in other words as stated in* Birkett *v.* James *"materially longer than the time usually regarded by the profession and courts as an acceptable period." Even if the delay could be regarded as being inordinate and inexcusable, I am not convinced that, at this time, there is substantial prejudice caused to D. Accordingly, I am not satisfied that, at this time, a dismissal is warranted."*

48. Instead of dismissing the plaintiff's claim in that case the judge gave a series of directions, some in the form of unless orders in order to ensure that the case progressed expeditiously.

49. Mr Murray has urged the same approach here; namely that the Defendant's summons should be dismissed and, instead, unless orders made for the future conduct of the proceedings.

50. The Defendant argues that the lack of medical records could have been remedied by the Plaintiff seeking further copies from the relevant authorities and medical professionals and copies of pleadings and/or inter parties' correspondence from the Court Office and/or the Defendant's attorneys. The Defendant says that there cannot be a fair trial as a result of the delay and its impact on the parties' memories.

Abuse of Process

51. The Defendant submits that in addition to the Plaintiff's failure to adhere to the automatic directions fixed by the court rules, or to comply with the requirements of the overriding objective to deal with this matter in an expeditious way, the Plaintiff has caused severe injustice to the Defendant by failing to give notice of proceedings to CG BritCay, such that the CG BritCay is no longer liable to satisfy any judgment in accordance with section 15 of the Act.

52. As mentioned earlier, the Act provides that it is a condition precedent to a liability to indemnify on the part of an insurer that that before or within 30 days after the commencement of proceedings notice of the proceedings must have been provided.

53. Section 15(1) of the Act provides:

> *"If, after a certificate of insurance has been issued under section 4(3) in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 4(1) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any law relating to interest on judgments."*

54. However, Section 15(2) provides that:

> *"(2) No sum shall be payable by an insurer under subsection (1)-...*
>
> *...(b) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; such notice to be deemed to be given by the posting of a registered prepaid envelope containing the notice to the address of the insurer given in the certificate of insurance and such notice being deemed to have reached the insurer within fourteen days of the time at which it was posted"*

55. Section 16 of the Act states that:

> *"The Clerk of the Court shall, within ten days of the commencement, by a third party injured or whose property has been damaged by a vehicle required to be insured by this Law, of proceedings in any such Court, give notice to the insurer if such proceedings: Provided that every insurer shall notify the Clerk of the Court of his address and shall inform the Clerk of the Court of any change therein.".*

56. The Act does not make it an express condition that the plaintiff in an action must provide notice to the insurer pursuant to section 15 (2) (b). It provides that notice shall be deemed to have been given by the posting of a registered prepaid envelope containing the notice to the address of the insurer given in the certificate of insurance. This is distinct from the wording of and process provided for by section 16 which does not provide for notice to be given in any particular way, refers to different

time periods and does not refer to the address of the insurer by way of reference to the certificate of insurance.

57. Section 15 (2) (b) is not mandatory but does protect the position of an insurer in default of notice being given within the requisite period. In *Woods v Thompson and Saxon Motor & General Insurance Company Ltd* [2016 (2) CILR 1] Mangatal J commented on the effect of section 15 (2) (b) by saying:

> "*There are also certain conditions that the Law sets out, for example in s.15(2)(b) where it is stipulated that no sum shall be payable by the plaintiff on a judgment unless the plaintiff has given the insurer notice of the proceedings brought, either before or within 30 days after the commencement of the proceedings. The court also has to have regard to the insurer's rights and interests, and not just those of the third party.*"

58. Mangatal J referred above to the plaintiff giving the requisite notice. I am not sure that she was saying that when drawing a distinction between sections 15 (2) (b) and 16. However, it seems to me that sections 15 (2) (b) and 16 are separate and distinct and provide for separate methods for an insurer to be given notice of the bringing of proceedings. In view of the terms of section 15 (2) (b), I am of the view that it is the responsibility of a plaintiff and, if instructed, their attorneys to ensure that notice is given pursuant to section 15 (2) (b). As seems to be the situation in this case, the Clerk of the Court may fail to give notice or notice may be given but may be delayed. In my view, it cannot be right that a plaintiff can simply assume that the Clerk of the Court will give notice pursuant to section 16 and that that will suffice for the purposes of section 15 (2) (b).

59. If a plaintiff or their attorneys fail to give the requisite notice then the consequences are clearly set out in section 15 (2) (b).

60. The Defendant referred to the English case of *Wake v* Page [2000] All ER (D) 2413 which involved a breach of the equivalent English statutory provision (section 152 (1) (A) which has a 7 day notice requirement). In that case, the accident occurred on 29 December 1993. The defendant's insurers, SMP were first contacted about the claim on 26 June 1995. SMP requested medical evidence on 7 November 1995 and received a preliminary medical report on 11 April 1996. On 28 November 1996, about one month before the expiry of the three year limitation period the plaintiff's solicitors

issued a writ. On 3 February 1997 they wrote to SMP asking it to nominate solicitors to accept service of the proceedings. The writ was served in March 1997.

61. In *Wake* Rix LJ (p 8) summarized the authorities in relation to the question of notice:

> *"... it seems to me that certain conclusions can be drawn from the authorities.*
>
> *(1) To show that the insured had notice of the bringing of the proceedings there must be more than evidence of a casual comment to someone who at times acted as an agent for the insurers.*
>
> *(2) Any notification relied upon must not be subject to a condition which may or may not be fulfilled... but if the condition is one which required action from the recipients which they choose not to take then by making that choice they render the notice unconditional and thus effective.*
>
> *(3) The notice can be oral, and it need not even emanate from the claimant. It can be given before proceedings have commenced, and it need not be specific as to the nature of the proceedings, or the court.*
>
> *(4) Whether in any given case it is shown that the insurer had notice of the bringing of the proceedings (as opposed to the making of a claim) is a matter of fact and degree.*
>
> *(5) The essential purpose of the requirement of notice is to ensure that the insurer is not suddenly faced with a judgment which he has to satisfy without having any opportunity to take part in the proceedings in which that judgment was obtained."*

62. Referring to the facts of that case, he went on to say that:

> *"The insurers were kept in the picture form the start, and were never in danger of being faced with a judgment which they had to satisfy without having had an opportunity to take part in the proceedings, but that does not of itself entitle the claimant of the court to ignore the statutory requirement which makes it a condition precedent to liability that "before or within 7 days after the commencement of proceedings ... the insurer has notice of the bringing of the proceedings"……*
>
> *"There may well be other cases in which contact, even an informal contact, shortly before the commencement of proceedings would put the insurer in the position of having notice of the bringing of the proceedings – everything would depend on the facts of the case, but a prudent solicitor would be well advised to ensure that the insurer received written notice within 7 days after the commencement of proceedings. There can be no room for argument."*

63. It was held by the court of appeal in that case that the notice had not been given to the insurers in accordance with the legislation. It was also held that the insurers were entitled to defend the action on behalf of the defendant right up to judgment, and then, when the judgment was entered and the claimant turned to them to recover, to raise for the first time the statutory notice point.

64. The Defendant also referred the court to the cases of *Capital Insurance v Fraser* [1996] 71 WIR 382 in which the Court of Appeal of Trinidad and Tobago held that the local equivalent of section 15 (2) (b) had to be *"pretty strictly fulfilled"*. The insurers had to be given notice of proceedings before or within seven days after proceedings were commenced. *"If given before, the notice had to express a clear intention to bring proceedings; if given after, the third party had to show that insurers had notice of those proceedings within seven days of issue."* The court of appeal made it clear that words such as *"may be taken" or are "likely to be taken"* are insufficient to constitute notice.

65. In the case of *Nawaz and another v Crowe Insurance Group* [2003] EWCA Civ 316, an oral statement to a legal secretary that "*we are now issuing [proceedings]*" was held to be sufficient notice.

66. Ms Carver submitted that in the absence of such notice having been provided to CG BritCay under the terms of the Act, CG BritCay is not required to satisfy a judgment against the Defendant, should one be obtained.

67. It is argued that this leaves a real risk to the Defendant that should the action proceed, CG BritCay will rely on section 15 (2) (b) leaving him personally liable for any judgment, despite having paid for his insurance. Ms Carver says that this serious risk is as a direct result of the failings of Plaintiff, or her former attorneys, by not giving notice to CG BritCay in compliance with the Act and it is an abuse of process to seek to continue an action having exposed the Defendant to the risk that he will not be indemnified in the event the action succeeds.

68. Ms Carver referred to the case of ***Grovit and others v Doctor and others*** **[1997] 2 All ER** that confirms the court has power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse, irrespective of whether the test for want of dismissal is satisfied.

69. The respective positions of the parties on this issue are unsurprising. The Plaintiff argues that the insurer was aware of the accident and had been in correspondence with the Plaintiff about that. The insurer was contacted by McGrath Tonner in relation to the claim and Mr Murray contends that the insurer must have known that a claim was imminent and was aware of the likely nature of the claim. He argues that any reasonable insurer would have put in place a reserve and CG BritCay was not prejudiced. On behalf of the Defendant it is argued that, in reliance on *Wake v Page,* notice of the bringing of proceedings was only given after the requisite period in section 15 (2) (b) had expired. Prior to that there had been no unambiguous and explicit communication to the insurer either orally or in writing, formal or informal giving the requisite notice.

Analysis and conclusion

70. Applying the principles set out in *Birkett v James,* I turn first to the question of whether the Plaintiff's claim should be dismissed for want of prosecution. There is no doubt that there has been substantial delay in this case. Not only were proceedings issued just before the expiry of the limitation period but an additional five years have since elapsed with the case not progressing beyond close of pleadings. Having considered all of the evidence, I do not think that this is a case where there has been intentional or contumelious default by the Plaintiff. The question then is whether there has been inordinate and inexcusable delay. Williams J referred in *Sandcroft* to the question of whether delay is inordinate by reference to *Birkett v James* in which it was stated that inordinate means *"materially longer than the time usually regarded by the profession and courts as an acceptable period."*

71. As Williams J said in **Messam,** the Plaintiff had and has:

> *"...a responsibility to progress the case in a manner consistent with the Overriding Objective in the Grand Court Rules. This is particularly so as the writ was issued late, just before the expiry of limitation. If a Plaintiff delays issuing proceedings towards the end of the period of limitation, as noted in* ***Birkett v James****, she is then under an obligation to proceed with the case with reasonable diligence."*

72. I do find on the facts of this case that there has been an inordinate delay on the part of the Plaintiff. A period of 5 years after the expiry of the limitation period is, in my view, unacceptable. In my view, this should be a relatively straightforward case and should have been concluded well before now.

73. Whilst the Plaintiff seeks to blame her former attorneys for lack of access to documents and medical records there is no explanation as to what efforts, if any, the Plaintiff has taken to obtain copies of those records. The Plaintiff appears from her payslips to have been working in the Cayman Islands in February 2021, having instructed her current attorneys in June 2020. There has been a suggestion that she could not obtain them because she had not paid for her treatment or could not afford to pay for the reports. There is no evidence to that effect. Whether she would have been charged for copies of her medical records is not clear but there is evidence that she did have over CI$7,000 in savings when she made her application for legal aid in March 2021.

74. It is also the case that in the absence of files from McGrath Tonner the Plaintiff's current attorneys could have obtained copies of the court file and could have requested copy document from the Defendant's attorneys. There is no explanation why this was not done. In the circumstances, I also find that the delay on the part of the Plaintiff was inexcusable.

75. The next question is whether the Defendant has suffered prejudice as a result of the delay. It has been suggested by the Defendant that the amount of time that has passed means that memories of the accident may fade and that there is no chance of finding witnesses. Although the facts in relation to the accident are relatively simply there is a risk that memories will have faded. Mr Murray submitted that in his experience, insurers would have taken statements and made investigations at the time that the accident occurred. That may be the case but in my view there is still likely to be a degree of risk that the delay has caused details of the accident to fade from memories.

76. In my view, of greater concern is effect that the delay has had on the Defendant's ability to challenge the Plaintiff's claims about her injuries and in particular to review her pre-accident medical records in relation to any pre-existing susceptibility or weakness that she may have had. Combined with that is what I regard as the unusual situation in which the Plaintiff appears unable to obtain copies of any of her medical records whether from the Cayman Islands or, more recently, Jamaica and where it seems that there is no realistic prospect of her being unable to do so. Indeed, as mentioned above Mr Murray suggested during the hearing that the Plaintiff no longer recalls the names of the doctors who have treated her. This can only be a result of the delay on her part.

77. In *Shtun* reference was made to prejudice to a Defendant in having a serious claim hanging indefinitely over him or her. It was suggested that it should only be in exceptional cases that the court should treat the anxiety which accompanies all litigation as alone being sufficient to justify

dismissing an action. In view of the situation in relation to the Plaintiff's medical records and there being no suggestion or evidence that that positon will change, I do find that he is and will be prejudiced as a result of this action potentially hanging over him for an indeterminate period of time, albeit that this is not the only prejudice.

78. In the circumstances, I am satisfied that not only has the Plaintiff's delay been inordinate and inexcusable but it has also caused prejudice to the Defendant and it will continue to do so to the point at which I am also satisfied that there is a substantial risk that it will not be possible to have a fair trial.

79. I have taken into account Mr Murray's submissions about the approach of Williams J in *Sandford* by deciding against dismissal in favour of giving strict directions in the form of unless orders. Even setting aside what I have already found, I cannot see how such an approach would be feasible in this case where there appears to be no basis on which matters can proceed in any useful way and certainly not expeditiously.

80. I am satisfied therefore that the Defendant has established that there are grounds for the Plaintiff's claim to be dismissed for want of prosecution and I make that order.

81. The next issue for consideration is the question of section 15 (2) (b) of the Act and whether notice of the commencement of proceedings was given. The facts in this case are similar to those in *Wake*, certainly in so far as they relate to the contact and communication between the plaintiff and insurer prior to proceedings being issued and immediately thereafter.

82. In his written submissions on this issue, Mr Murray is quite categorical in his view that the communication between the Plaintiff, McGrath Tonner and the insurer was sufficient to constitute notice for the purposes of section 15 (2) (b). I am afraid that I disagree. This question is one of fact. I do not find that at any time prior to the exchange of emails on 6 June 2017 did the Plaintiff or McGrath Tonner give CG BritCay clear unequivocal notice whether written or oral, formal or informal that proceedings were being commenced or had been commenced. In my view, neither the Letter Before Action nor Mr Tonner's email of 13 March 2017 gave such notice, The exchange of emails on 6 June 2017 did give CG BritCay notice for the first time that a writ had been issued but why the Plaintiff's attorneys decided not to provide a copy to the insurer at that point is not clear. Regardless, it was outside the 30 day period specified by the Act.

83. That being the case, CG BritCay does have the option to decline to satisfy any judgment that might be entered against the Defendant in this case. That is not the fault of the Defendant. In my view in the absence of a waiver from CG BritCay of its rights to decline to indemnify the Defendant it is an abuse of process for the Plaintiff to be allowed to continue with this action in circumstances where the Defendant has lost his right to be indemnified by his insurance company as a result of a failure by the Plaintiff's attorneys to give the requesting notice under section 15 (2) (b). Therefore, pursuant to the court's inherent jurisdiction under GCR O18, r.19 (1) (d), I also dismiss the Plaintiff's case on that basis.

84. I gave counsel for both parties the opportunity to make proposals for how to deal with costs. Counsel for the Defendant has accepted that, despite being the successful party, in view of the circumstances of this case and in view of the financial position of the Plaintiff the appropriate order is no order as to costs. Counsel for the Plaintiff agrees and I also think that that is the appropriate result. Therefore, there is no order for costs made.

Hon Justice Alistair Walters (Actg.)
Judge of the Grand Court