IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013CD00046

BETWEEN	**MULLINGS & CO. (A FIRM)**	**CLAIMANT**
AND	**FRANK I. LEE DISTRIBUTORS LIMITED**	**DEFENDANT**

Application to relist an application to set aside judgment in default - Four-year delay – Whether delay inexcusable – Whether instructions from client required before applying to relist – Overriding objective of CPR – Whether all circumstances including relative strength of each case to be considered.

Faith Gordon for Defendant instructed by Hugh Wildman & Co.

Hadrian Christie for Claimant instructed by HRC Law.

Heard: 13th, 17th & 31st July, 2020.

IN CHAMBERS: By ZOOM

Cor: Batts J.

[1] This is an application to relist an application to set aside a default judgment. It has come about in rather extraordinary circumstances. The Claimant (the Respondent to the application) is a firm of attorneys which represented the Defendant (the Applicant for relisting) in Claim No.CL I 044 of 2000 Industrial Sales Ltd v Frank I Lee Distributors Ltd et al (hereinafter referred to as the "2000 Claim"). That 2000 Claim ended successfully after a trial on the 12th October 2012. The Claimant commenced this action on the 27th March 2013, against the Defendant, for legal fees allegedly due and owing for work done in relation to the 2000 Claim. On or

about the 5th June 2013 the Claimant obtained a judgment in default of acknowledgement of service, in the sum of $2,434,268.71, against the Defendant. The default judgment was supported by an affidavit, of O'Dwayne Gavin filed 3rd April 2013, in proof of service by registered post on the Defendant.

[2] On the 14th June 2013 the Claimant filed a Notice of Application to have the amount, for which judgment in default was entered, deducted from an amount of $5,400,000 standing to the credit of the Defendant. That $5,400,000 represented sums collected by the bailiff in the 2000 Claim. In an affidavit filed on the 20th June 2013 Gillian Mullings attorney at law stated, among other things, that work on the 2000 Claim had gone on for over 13 years. Further that after a trial, which included expert and other evidence, a judgment was obtained in the Defendant's favour. At paragraph 7 of her affidavit Miss Mullings stated: -

> "*That there were two directors of the Defendant. Miss Sonia Lee-Franklin and John Franklin (now deceased). On several occasions I sent process servers to serve documents on the directors at their business place at 27 Manchester Street, Spanish Town in the parish of St. Catherine. Our process servers advised me and I verily believe that the directors refused to show themselves and no one at their business place would sign for the court papers. All court documents were thereafter posted to the registered address of the business at 27 Manchester Street, Spanish Town, in the parish of St. Catherine."*

[3] On the 1st July 2013 the Honourable Mrs. Justice Almarie Haynes (now a Judge of Appeal) made a provisional order for the charge and payment out, to the Claimant, of the judgment debt of $2,434,268.71. The Defendant was not represented at, and did not attend, that hearing. On the 22nd July 2013 this provisional order was made final. The application, for the final charging and payment out order, was

supported by affidavits of service by registered post sworn to by O'Dwayne Gavin filed on the 10th and 22nd July 2013.

[4] By Notice of Application, filed on the 29th August 2013, the Defendant applied to have the judgment in default, entered in this claim, set aside. The Defendant was represented by Hugh Wildman and Company. That firm also, by Notice of Change of Attorney filed on the 23rd July 2013, placed its name on record in the 2000 Claim. The application, to set aside the judgment in default, was supported by the affidavit of Sonia –Lee Franklin filed on the 29th August 2013. She stated that the Defendant company had been wound up 4 years earlier. She indicated that the judgment in the 2000 Claim was obtained, in the Defendant's favour, for "just under $40,000,000.00". She says that the Defendant had been first represented by Patrick Bailey & Company and that at the time of the change of attorneys to the Claimant, no fees were owed. The affidavit gives an account, largely based on information received, of money collected from the bailiff and of amounts withheld by the Claimant. She states in paragraph 19 of the affidavit,

> *"I could not believe this as at no time was I made aware of any court proceedings instituted by Ms. Mullings against the former company Frank I. Lee Distributors Ltd. or myself. Frank I Lee Distributors was wound up 4 – 5 years ago and is no longer in existence. Therefore, no proceedings could have been initiated against this former company. In fact, it was on Ms Mullings instructions that the company was wound up with her assistance. Further at no time was any document relating to any court Lee Distributors Ltd. or myself served on me by Ms. Mullings or anyone acting on his behalf. It therefore came as a complete surprise that Ms. Mullings could have obtained court order and served it on the Accountant General behind my back. I have instructed my Attorney to inquire into this matter to determine whether the said court order is genuine and to determine the circumstances in which it was obtained. It was only Friday August 23, 2013*

that we had Frank I Lee Distributors Limited revived as a company."

At paragraph 23 she asserts:

"Up to the time of this court order was (sic) obtained by Ms. Mullings against Frank I Lee Distributors Limited or myself, no request for legal fees was submitted to me by Ms. Mullings."

[5] In effect therefore the Defendant was seeking to have the judgment in default, and all subsequent orders, set aside on the basis that the Defendant had not been served and indeed had not existed at the time.

[6] The Claimant, in reply to the application to set judgment aside, relied on an affidavit of Gillian Mullings filed on the 1st October 2013. In that affidavit Ms. Mullings went into great detail about the history of her relationship with the Defendant. She took issue with many factual assertions made by Mrs. Sonia Franklyn. At paragraph 26 Ms. Mullings states-

"26. That now produced to me and marked GM7 is a letter from the Registrar of Companies establishing that Frank I Lee Distributors Limited was not under receivership as asserted."

The letter from the Registrar of Companies is dated 1st October 2013 and states in part,

"the company has not made any application for receivership."

Miss Mullings also exhibits letters from Sonia Lee Franklyn, dated 22nd February, 2013, 14th February, 2013 and 16th July 2013, which all have 27 Manchester Street P.O. Box 510 Spanish Town St. Catherine as her mailing address. Number 27 Manchester Street Spanish Town St. Catherine is the address to which letters to the Defendant from the Claimant were allegedly mailed by registered post. The

letter, dated 22nd February 2013 addressed to the Claimant, is worthy of quotation in full (exhibit GM5 to the affidavit of Gillian Mullings filed on the 1st October 2013).

> "*This serves to acknowledge receipt of your letter dated 18th February 2013 along with two attachments (Bill – No./ 79 dated 18th Feb.-13 and Bill No/77 dated 30 Jan. – 13) which was received on 20th February, 2013.*
>
> *Please be informed that I am standing by the contents of my letters to you dated 14 February, 2013 and I wish to reiterate that Patrick Bailey & Co. Attorneys at law was retained and had conduct of the matters up to August 2018. This means that Frank I Lee et al are not liable to you for any fees during the period.*
>
> *You are well aware that my late husband, John Franklyn, never instructed you and therefore no fee structure was discussed and/or agreed with you. I repeat Patrick Bailey & Co. was instructed and not you. I am aware that you were an employee of the firm up to August 2008 and you tangentially assumed conduct of the matter after this date.*
>
> *I am yet to understand why you are billing all the parties, separately for the same activities. I have observed a number of duplications on the above-mentioned bills. Based on the glaring facts of the case and the date when you took conduct of the matter, kindly resubmit a bill reflecting the true and accurate services provided by you to Frank I Lee et al within 3 calendar days; failing which, we will seek the intervention of the Court and/or the General Legal Council to resolve this matter.*
>
> *I am extremely shock (sic) about the statements you have made in relation to my knowledge of your relationship with and instructions to the Bailiff, those statements are not true. I stand by what I have said in my letter to you dated 14 February 2013."* [emphases part of original text]

The letter of the 14th February 2013 advised the Claimant with "immediate effect" to cease and desist the collections of any further debt on behalf of Frank I Lee

Distributors Ltd. in the 2000 Claim. She indicated that she had also advised the attorneys for Industrial Sales Ltd. (the judgment debtor) of her decision.

[7] Ms. Mullings' affidavit, filed on the 1st October 2013, had other attachments. There was the Formal Order, of 12th October 2012, stating that after a trial of the action judgment was entered in the Claimant's favour in the 2000 Claim for $5,098,640 with interest at 34% per annum from the 4th December 1998 to 28 September 2012. That affidavit also attaches the letter, dated 18th February 2013, to which Mrs. Franklyn replied in her letter quoted in paragraph 6 above. The letter gave a detailed account of the matter and stated in part:

> *"The following sums have been paid to us by Industrial Sales Limited on account of the judgment debt:*
>
> 1. *On the 14th December 2012 - $5,098,650.00. Out of this sum a total of $4,100,000 was paid to you.*
>
> 2. *The sum of $2,115,446.69 was received on the 29th January 2013. We have collected a portion of our fees from the sums sent to us totalling $3,114,086.69*
>
> *A total of $2,385,913.31 remains outstanding in relation to Frank I Lee Distributor Limited."*

[8] The letter ends with a threat of legal action to recover fees and stated that, once the outstanding fees were paid, the files would be handed over to herself or her new attorneys. This letter is addressed to "27 Manchester Street, Spanish Town, St. Catherine." It enclosed with it a bill dated 30 January 2013 to the Defendant in the total amount of $6,127,853,40 in respect "*Claim CLI044of2000 Industrial Sales Ltd. v Frank I Lee Distributors Ltd."*

[9] By an affidavit, filed on the 2nd October 2013, Gillian Mullings attaches a corrected version of the letter from the Registrar of Companies. This letter says in part,

"*There is no record of the company being in receivership".*

The Registrar's letter also states the registered office of the company as 27 Manchester Street, Spanish Town.

[10] In a second affidavit of Sonia-Lee Franklyn, in support of the Defendant's application to set aside judgment, it is reiterated that the Defendant had been wound up. On the 7th November 2013 the Defendant filed another notice of application to set aside the default judgment. Permission was granted to withdraw the earlier application (see minute of the court's order dated 7th October, 2018). An affidavit of Sonia Lee Franklyn was filed, on the 7th November 2013, in support of this refiled application. The affidavit is quite similar to that filed on the 29th August 2013 and referenced at paragraph 5 above. In an affidavit, filed on the 18th December 2013 in reply, Gillian Mullings references and adopts her earlier affidavit filed on the 1st October 2013 and responded to other allegations.

[11] The Defendant's application, to set aside default judgment, came on for hearing before Sykes J (as he then was) on the 20th December 2013. It was adjourned on several occasions until the 4th December 2014. The Order on that occasion reads:

> 1. *This court determines that an Acknowledgement of Service is a mandatory requirement in Civil Proceedings pursuant to rule 9.2 (1) of the Civil Procedure Rules.*
>
> 2. *Leave to Appeal is granted to the Applicant in relation to the finding on the mandatory nature of filing an Acknowledgement of Service*
>
> 3. *Leave to Appeal is granted to the Respondent in relation to this Court's finding that the present application is not a nullity and should not be struck out pursuant to the court's finding at paragraph 1 above.*
>
> 4. *Costs to date to the Respondent*
>
> 5. *Leave to appeal the costs award is granted to the Applicant*

6. *This matter is adjourned pending the determination of the appeals for which leave has been granted."*

[12] In the result both parties appealed the ruling of Sykes J. The Court of Appeal delivered its decision, on the matter, on the 12th February 2016. The Court of Appeal's judgment is referenced as ***SCCA No. 98/2014 Frank I Lee Distributors Ltd. V Mullings & Co (a firm)*** and ***SCCA No. 99/2014 Mullings & Co. (a firm) v Frank I Lee Distributors Ltd. [2016] JMCA Civ. 9 (12th February 2016***). It was a procedural appeal which was considered on paper. The court allowed the appeal of Frank I Lee Distributors Ltd. (SCCA98/2014) but dismissed the appeal of Mullings & Company (A firm) SCCA99/2014. It was decided that there is no mandatory requirement for the entry of an acknowledgement of service, in order for a defendant to apply to set aside a default judgment, where the ground of the application is that the defendant has not been served, see paragraphs 54 and 55 of the judgment of Justice Williams JA (Actg.) (as she then was). The Court of Appeal also decided that in the circumstances *"there should be a hearing of the application to set aside the default judgment."* (Paragraph 60 of the judgment).

[13] The Court of Appeal having given its decision, on the 12th February 2016, nothing further transpired in this action until the 13th day of February 2020. On that date the Defendant filed an Application to Relist its application to have the default judgment set aside. This is the application now before me.

[14] In support, of the application to relist, the Defendant filed an affidavit of Sonia Lee Franklin on the 13th February 2020. The Claimant filed, on the 1st June 2020, an affidavit of Gillian Mullings in answer. On the 17th June 2020 the Defendant filed a further affidavit of Sonia-Lee Franklin. In response to that Ms Gillian Mullings filed a further affidavit on the 24th June 2020. I will reference the facts alleged in these affidavits only to the extent necessary to explain my decision.

[15] The Defendant's counsel filed a bundle of written submissions and authorities on the 10th July 2020. The Claimant's Counsel was content to rely on oral argument

made on the date of hearing. I am grateful to them both and, as will be evident in this judgment, found their contributions to be of assistance.

[16] These then are the circumstances in which the application to relist has come before me. The single ground stated in the Defendant's Notice of Application is as follows:

> *"That the matter came up before Justice Bryan Sykes and a point of law was taken on both sides; the matter went to the Court of Appeal and the Court ruled in favour of Frank I Lee Distributors Limited."*

[17] Mr. Christie, on behalf of the Claimant, resists the application to relist. In short he submits that too much time has passed. The delay, says he, between the decision of the Court of Appeal and the bringing of the application to relist, is such that in all the circumstances of this case the application should be refused.

[18] The kernel of the Defendant's arguments, for relisting the application, is to be found at paragraph 16 of their written submissions:

> *"We submit that the Court's primary concern is to do justice which includes, but is not limited to, ensuring that cases are dealt with expeditiously. Where the aim of the overriding objective contrasts the need to achieve justice then the court balances the contradiction so as to achieve justice. In these circumstances, the aim to do justice supersedes the need to act expeditiously, see* ***Brown v Central Bank of Belize and Provident Bank and Trust Bank Belize BZ 2007 CA5.*** *[Civil Appeal no. 6 of 2006 unreported judgment dated 8th March, 2007]."*

[19] I daresay there is no court in the world that would disagree with that submission. The Brown case out of Belize, cited in its support, was a decision by an appellate panel consisting of Carey JA, Morrison JA, and the Lord President Mottley. That court pointed out that under the "new" Civil Procedural Rules the overriding objective is to deal with cases justly. The facts were that the applicant, for leave to apply for judicial review, filed an affidavit in support which was witnessed by a

Notary Public resident in the USA. However, the affidavit had "Belize City" noted as the place where it was sworn. Counsel who appeared explained that the affidavit, although prepared in Belize city, was sent off to be executed in the United States without the words "Belize City" as the place of execution being deleted. The judge, who heard the application, regarded the irregularity as "gross" and dismissed the application for leave on that basis.

[20] The Court of Appeal of Belize set aside the judge's decision. Although done with the concurrence of counsel on the other side, who agreed to allow the appellant time to file a corrected affidavit, Carey JA felt the need to re-emphasise the paramount import of the overriding objective of the rules. In paragraph 4 of his judgment he stated:

> *"…. Technicalities have given way to the "overriding objective" of the Rules which is to enable the court to deal with cases justly. In the early part of this judgment I adverted to two of the considerations which affected dealing with cases justly, namely, saving expense and dealing with cases expeditiously. The application for permission to bring judicial review was heard in June 2006, now after an appeal, hence delay and costs thrown away, the applicant has not moved appreciably towards a resolution of his grievance. There can be no doubt that the overriding objective was not a consideration when the application was dismissed."*

[21] The overriding objective, and hence the need to deal with this case justly, is central to my determination. Justice is an ideal that philosophers have written about and, in vain, attempted to define. I will therefore not attempt to outline its components. It suffices, for present purposes, to say that justice is all about being fair. Fairness is often recognised when achieved but, save to say it involves carefully considering the pros and cons of all sides, it is most difficult to prescribe. Rule 1.1(1) and (2), of the Civil Procedure Rules 2002, offers guidance:

> *"(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*
>
> *(2) Dealing justly with a case includes -*

(a) ensuring ,so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;

(b) saving expense

(c) dealing with it in ways which take into consideration -

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

I am mandated by Rule 1.2 to give effect to the overriding objective when interpreting the rules or, when exercising *"any powers under these rules*".

[22] In this case the Defendant concedes that the 4-year delay, between the decision of the Court of Appeal that the application to set judgment aside should proceed and the filing of this application to relist, is inordinate (see paragraph 20 of Defendant's written submissions filed 10th July 2020). The Defendant contends however, and correctly so, that each case must be determined on its own facts. They demonstrate, by reference to decided authority, that delays of 4 years and more have been excused by the courts, see ***First Caribbean International Bank (Jamaica) Ltd. Et al v. Meade SCCA No96/2004 (unreported Judgment 29th July 2005 and, Holmes v Kildare City Council [2017] IEHC 790 (judgment delivered 10th October 2017)***. It is, submitted counsel, important to consider the excuse for the delay.

[23] The excuse, proffered by the Defendant, is to be found in the further affidavit of Sonia Lee Franklin filed on the 17th June 2020 in support of the application to relist.

According to her the delay, in applying to relist, was due to (a) her family crises (b) her own ill health and (c) that she had to be constantly traveling overseas with their daughter and grandson for medical treatment. These factors ,she stated, prevented her giving *"my attorney instructions to continue the matter."*

[24] The Defendant argues that, in contrast to the severe prejudice to her if she is not permitted to relist her application, the Claimant has put forward no evidence of prejudice consequent to the delay of 4 years. The application to set judgment aside should be relisted as there is no evidence, dependent on failing memories, to be considered. It is argued that the all or nothing approach, of dismissing for delay or not as the case may be, should give way to the more nuanced approach of the Civil Procedure rules 2002. The court has power to impose sanctions and make orders or give directions to properly deal with cases of delay. ***Annodeus Entertainment Limited & Others v Gibson & Others*** [*2000] Lexis Citation 2664* (Judgment delivered 2nd February 2000) was relied upon.

[25] In considering the Claimant's response, to the question of the excuse for the delay, it suffices I think to reference in detail the affidavit of Gillian Mullings filed on the 22nd July 2020:

> *"3. I cannot say with certainty whether Ms. Franklin was involved with healthcare of her daughter and grandson. While I sympathise with her situation, it is not sufficient to explain the Defendant's delay of exactly four years to revive this claim which is now seven years old. It begs many more questions than it answers:*
>
> *a. how often was Ms. Franklyn away from Jamaica*
>
> *b. during her visits in Jamaica what prevented her from writing or calling her attorneys to instruct them to proceed with this application to relist?*
>
> *c. Since her affidavit that was filed on 13 February 2020 states no materially new information from her previous affidavits filed October 2013, what*

would have prevented her attorneys from proceedings with this application sooner?

d. When did Ms. Franklyn instruct her attorneys to proceed with this application?

e. When did the health crisis of Ms. Franklyn's daughter and grandson cease to allow her to instruct counsel.

f. How was Ms. Franklyn able to discuss the issue of costs with her attorney, but not this application,

4. As it concerns the issue of costs, Ms. Franklyn's attorneys and I have not been able to agree on same. To date I am not in breach of any order for costs, as those costs have not been assessed or agreed.

5. I wish to also add that I do not doubt that Ms. Franklyn's daughter has had health issues, I recall her mentioning these issues and her need to attend to them while I represented her and the Defendant. However, I continued to receive instructions from Ms. Franklyn by phone or she would have letters delivered to my office by her bearer/employer."

[26] In other words, the Claimant is contesting the causative relationship between the delay of 4 years and the proffered explanations for that delay. In the course of submissions, I asked Defendant's counsel a question to which I received no satisfactory reply. The question posed was: Why was there a need for instructions before making the application to relist? The Court of Appeal had stated that the application to set aside should be heard. This could only happen if the application was relisted. The Defendant's counsel need only have penned a letter to the Registrar of the Supreme court, perhaps attaching a copy of the Court of Appeal's judgment, requesting that the application be relisted. Even if a formal Notice of Application was deemed necessary the only evidence required in its support would be the decision of the Court of Appeal. An attorney might easily swear to that as it is evidence of a formality. I therefore fail to see the causative relationship between, the explanation proffered by the Defendant and, the 4-year delay in making the application.

[27] There is no evidence, nor has it been suggested, that any relational divide existed between the Defendant and her attorney. It has not been suggested, for example, that fees were owed and unpaid. The evidence is the attorney needed instructions but we are not told exactly what instructions were required. The evidence, pertaining to the application to set judgment aside was already before the court. All that was required was a resumption of the application in accordance with the decision of the Court of Appeal. It was the attorney's duty to take steps to have it set down. If having done so the client indicated a change of heart, or other difficulties emerged, it could be withdrawn prior to being served, or at the hearing itself. The Defendant had successfully appealed and, in the absence of a contrary intent from the client, the Court of Appeal's decision ought to have been given effect. I for all these reasons, do not consider the explanation for the 4-year delay adequate, reasonable, valid or (to use the words of Rule 26.8 in the context of a relief from sanctions) "good".

[28] The failure to adequately explain delay is not the end of the matter. I agree with the submission that, in order to deal justly with a matter of this nature, all the circumstances must be considered. This includes, but is not limited to, the prior history of the matter, the relative strengths of each party's case on the application and the potential for prejudice to either side. These considerations will help to determine whether and how, for example, expense may be best saved as well as the best allocation of the court's resources and all other factors, listed in Rule 1 .1, which pertain to the just exercise of the court's powers.

[29] I start with the observation that if an application to relist is unnecessary then even this hearing need not have taken place. I could, even now, simply direct the Registrar to relist the application for continuation. That is after all the decision of the Court of Appeal. However, neither party invited me to take that course. They did not do so even after I expressed the view that a letter of request to the Registrar might have sufficed. Full arguments and submissions on the delay, and its impact, were heard. There may be a good reason for this because, had the Registrar set it down without a formal application to relist, a similar argument about delay would

be made. The Claimant would be entitled to argue that the default judgment ought not to be set aside because the Defendant waited too long after the Court of Appeal's decision to have it set down for hearing. The rules make it a relevant consideration whether the application has been made "as soon as reasonably practicable" see Civil Procedure Rule 13.3 (2). Deciding the matter, at this application to relist, will save costs time and expense.

[30] In considering the question, of the delay and the consequences to flow from it, I therefore bear in mind that the application to set aside the default judgment is not before me. It is no part of my remit to say whether or not the judgment in default ought to or will be set aside. However, the fact of that application, and the basis on which it is brought, form part of the circumstances I must consider. The Defendant is alleging that it has never been served with legal process in the suit. If that is established the judgment in default will be set aside as of right without the need to consider the merits of the claim. It is only after that judgment is set aside that the merits of the claim, being whether legal fees are due and owing, will be decided.

[31] In considering, whether the unexplained delay of 4 years is to be excused, I ask myself what does the justice of this case require. The relative strengths of each party's case, on the application to set aside as well as on the merits, is relevant. I ask myself, would it be fair, after such a delay, to allow the Defendant to proceed if its case is on balance far weaker than the Claimant's. I reference therefore the detailed history of this litigation outlined at paragraphs 1 to 13 above. Given all that has transpired is it fair to allow the Defendant, at this late stage, to proceed with this application?

[32] In answering these questions, I adopt the litmus test of the ordinary man who, as we know, is presumed to be reasonable. Would he, for example, not be concerned that correspondence mailed to the address of the company was received and responded to, but that the legal process was allegedly not received? Would he not be puzzled by the assertion, on affidavit, that the Defendant company had been in liquidation and yet the Registrar of Companies seemed unaware of it.

[33] Would not the reasonable man also be concerned that setting the judgment aside after such a delay would mean a trial about whether legal fees had been properly billed for work done in the period 1999 to 2012. It is a fee note the Defendant denied receiving until a letter was produced in which its receipt was acknowledged in 2013. It is also a matter of concern that the Defendant, notwithstanding knowledge about the mode and manner of contesting, never did challenge the fee in the available fora. Despite the threat, to do so, the Defendant did not initiate process or make a report to the General Legal Counsel. In this regard Mr Christie pointed to section 24 of the Legal Profession Act which allows a maximum of 12 months, from the date a bill is served, for a challenge to be made. Section 22 (2) be it noted says the challenge, by referral to the taxing master, should occur within one month of service of the bill. These sections reflect an intent by the policy makers that issues, related to legal fees, be resolved with dispatch.

[34] The reasonable man might even consider that the Claimant commenced work on the suit prior to the year 2000.The suit itself progressed for over 10 years and ended, after a trial involving the calling of expert evidence, in success. It bears noting that Ms Mullings has given evidence of changes to her practice in the period. She stated that the business "Gillian Mullings & Co" is now closed and so are its accounts (see her affidavit filed on the 24th June 2020 at paragraph 6). Is it probable, in all the circumstances outlined, that a fee note of $5,400,000 will be set aside? Are the merits, in terms of the alleged excess and unreasonableness of the fee note, such that this court should allow this application to relist and overlook the delay in applying.

[35] Fairness involves considering all sides of an issue and, having done so, the giving of a decision which does right by all parties. The Defendant says it was not served with a claim and wishes the judgment set aside so it can challenge the fee charged. The Claimant says the matter was already of some vintage and the court ought not to allow an additional 4 years. I do not think, and I suspect the reasonable man will agree with me, that the delay of 4 years should be overlooked when all the circumstances of this case are considered. The resources available to the court

are not unlimited. They are to be efficiently utilised. A party utilising these resources must bear the limitations in mind. Litigants have a duty to act with alacrity. More so, one who is challenging a legal fee note, issued 7 years ago, for work commenced twenty years ago. The delay of 4 years, after the Court of Appeal's decision in its favour, has not been adequately explained. The prospect of injustice to the Claimant, consequent on a waiver of the delay, is real. Conversely given the relative strength of each case, in both the application to set judgment aside and the legal claim, the Defendant is less likely to suffer an injustice if the matter ends here. It is the fair and just result to refuse the application.

[36] In all the circumstances, and for the reasons stated above, the Defendant's application to relist is refused. Costs will go to the Claimant to be taxed or agreed.

David Batts
Puisne Judge.