REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P-364 of 2017
Claim No. CV2016-03333

BETWEEN

ALANA MARISA MOHAN

Appellant

And

PRESTIGE HOLDINGS LIMITED

1st Defendant

ISHWAR SEERAM trading as
MINI SHAK TRADING COMPANY

Respondent

PANEL: **A. Mendonça, CJ (Ag.)**
J. Jones, JA
P. Rajkumar, JA

APPEARANCES:

Mr. Masaisai for the Appellant
Mr. Bidaisee for the 1st Defendant
Mr. Sieuchand for the Respondent

DATE: June 25th, 2018

REASONS

Delivered by A. Mendonça, Chief Justice (Ag.)

1. On April 30th 2018 we allowed this appeal and indicated then that we would give our reasons for so doing at a later date. This we now do.

2. This is an appeal from the orders of the case management Judge, Kangaloo J., made on two applications that were before her. One application was that of Ishwar Seeram, trading as Mini Shak Trading Company (the second defendant), who is the respondent to this appeal, and which sought several orders to which we will refer below. The other was the application of Ms. Mohan, who is the appellant to this appeal and who we shall refer to as the appellant. The appellant by her application sought an order disapplying the relevant limitation period as against the second defendant. The applications were heard together by the Judge. The Judge dismissed the application of the appellant and granted the application of the second defendant, in effect dismissing the claim against the second defendant. The applications raise a number of issues, which we have endeavoured to treat with in this judgment. We however begin by setting out the relevant background facts in respect of which there is no dispute.

3. On October 5th 2012 the appellant on leaving a Subway restaurant of Prestige Holdings Limited (the first defendant) fell and suffered personal injuries.

4. On January 2nd 2013 attorneys-at-Law for the appellant sent a pre- action protocol letter to the first defendant in which they, inter-alia, identified on their instructions where, when and how the appellant fell, alleging that it occurred as

a result of the negligence of the first defendant and calling on it to contact their offices in an effort to settle the matter amicably.

5. The first defendant replied to the appellant's attorneys on January 10th 2013 acknowledging receipt of their letter and indicating that the letter was sent to its insurers "who will have the incident investigated and will respond". On January 21st 2013 the insurers wrote to the appellant's Attorneys indicating that they were in the process of conducting investigations and would respond in due course.

6. By April 10th 2014, no further word was heard from the first defendant or its insurers and on that date with the aim of saving time and costs, the appellant's attorneys sent a proposal to the insurers for the first defendant setting out the quantum of damages which in their view would be payable to the appellant. There was however no response from the insurers.

7. In August 2015 the appellant's attorneys called the insurers to speak to the person who signed the letter of January 21st 2013, however that person apparently was no longer in the insurers' employ. The insurers however could not then say who was handling the matter on their behalf and promised the appellant's attorneys that they would call them back with that information. The insurers, however, did not call and in or about October 2015, the appellant's attorneys again called the insurers to inquire as to their position. The attorneys were again told the insurers could not yet say who was handling the matter but they would call as soon as they had that information.

8. In or about February 2016 a claims officer in the employ of the insurers called the appellant's attorneys and requested that they hold their hands on filing any court proceedings as he would like to engage in further discussions to have the

matter amicably resolved. He requested until the end of March 2016 by which time he expected to send a full response to the appellant's attorneys' letter of January 2nd 2013.

9. On July 27th2016 the appellant's attorneys received a response from the first defendant's insurers requesting their proposals with supporting documentation.

10. On August 15th 2016 the appellant's attorneys sent a proposal to the first defendant's insurers. On September 16th the first defendant's insurers sent an email to the appellant's attorneys stating that they had received no documents in respect of the proposals for general and special damages and requesting the appropriate documentation. On September 20th 2016 the appellant's attorneys sent the documents to the insurers. However, there was no further response from the first defendant's insurers, and on October 4th 2016 these proceedings were commenced on behalf of the appellant and served on the first defendant.

11. In her statement of case the appellant pleaded that the first defendant was at all material times the owner and or landlord and or lessor of the building housing the first defendant's restaurant and that the appellant was a lawful visitor having gone to the restaurant to purchase a sandwich. After purchasing the sandwich she proceeded to exit the premises when she slipped and fell on wet tiles on the only walkway to the restaurant and suffered personal injuries. The appellant claimed that the injuries were caused by the first defendant's negligence and or breach of duty in failing, inter-alia, (a) to clean up liquid that was spilled on the tiles; (b) to fence off or otherwise demarcate the spillage; (c) to install non-skid outdoor tiles on the floor and (d) to provide hand and or safety rails on the walkway which was built on a gradient and was covered by indoor tiles instead of non-skid outdoor tiles.

12. On October 31st 2016 the first defendant filed its defence. The first defendant averred that the fall occurred on the tiled floor just outside the entrance to the restaurant. We do not believe that this is disputed and it seems to be common ground that the fall occurred on this tiled area which is located immediately outside the entrance to the restaurant. The first defendant averred that liquid was not spilled on the tiled floor but that rain was falling at the material time and joined issue on a number of other matters pleaded by the appellant. Of particular relevance to this appeal is the plea of the first defendant that it has no responsibility for the tiled area where the appellant fell. The first defendant averred that at all material times the second defendant was the lessor of the building. The first defendant says that in December 2011 it bought the restaurant from the then owner who at the time held a lease of the building from the second defendant. The lease expired in March 2012 and in November 2013 the first defendant consented to continue the lease on the same terms as the original lease. The first defendant has pleaded that under the terms of the lease the tiled area where the appellant fell does not form part of the demised premises and that it has no responsibility for that area and that it is only responsible for the area within the restaurant, which is all that comprises the demised premises. In essence, the contention of the first defendant is that it has no duty of care to the appellant in respect of the tiled area, the responsibility for which is that of the second defendant.

13. In an affidavit in support of her application, the appellant says that before the service of the first defendant's defence on October 31st 2016 she was not aware of the involvement of the second defendant. This had never been previously mentioned by the first defendant prior to the commencement of the proceedings and had that been done she would have taken the appropriate steps to join the second defendant as a party.

14. In view of the first defendant's defence the appellant was advised by her attorneys to seek permission to amend the claim form and statement of case to add the second defendant as a party to the claim. It was the appellant's attorneys' intention to seek permission to add the second defendant at the first case management conference which was scheduled for December 14th 2016. That case management conference was however re-scheduled by the Judge without a hearing to February 3rd 2017.

15. On January 27th 2017 the attorneys for the appellant filed an amended claim form and amended statement of case adding the second defendant as a party. In the amended statement of case the appellant pleaded that the second defendant was at all material times a company duly incorporated under the Companies Act and was at all material times the landlord or the lessor of the building in which the restaurant was located. The appellant did not amend the plea that the first defendant is the owner and or landlord and or lessor of the building. On the appellant's pleading, therefore, both defendants were alleged to be the landlord or the lessor of the building. But there is no dispute that the building is not owned by the first defendant and that it is the lessee of the building. The amended statement of case alleged that the appellant was a lawful visitor to the "defendant's premises" and the injuries were caused by the defendant's negligence. Particulars of the second defendant's negligence were added to the amended statement of case. The particulars of negligence pleaded in relation to the second defendant are similar to the particulars pleaded in relation to the first defendant.

16. The amended claim form and statement of case were served on the second defendant by leaving same with a Ms. Hamel on February 7th 2017. On February 20th 2017 attorneys for the second defendant entered an appearance. On the appearance form it was noted by the second defendant that he

received the amended claim form and statement of case on February 11th 2017 and that he intended to defend the claim.

17. On March 13th 2017 the second defendant requested an extension of time to file and serve his defence. The appellant consented to the extension, but instead of filing and serving its defence, on March 20th 2017 the second defendant filed his application seeking several orders namely (a) an order declaring that the court has no jurisdiction to try the case or if it has it should not exercise it; (b) an order setting aside service of the amended claim form on the second defendant; (c) an order that the second defendant cease to be a party as it is not desirable for him to be a party to this claim; (d) an order striking out the amended statement of case on the ground that the appellant failed to comply with relevant rules of the Civil Proceedings Rules 1998 (the CPR) and the practice direction on pre-action protocols dated November 15th 2005; (e) an order that the amended statement of case be struck out as it amounts to an abuse of process; (f) an order that the statement of case be struck out as it discloses no grounds for bringing the claim; or (g) alternatively an order that the time for the filing of the second defendant's defence be extended to fourteen days from the determination of the application

18. Among the grounds on which the second defendant relied in support of his application was that the claim of the appellant was commenced against the second defendant outside of the four year limitation period allowed by section 5 of the Limitation of Certain Actions Act (the Limitation Act) for the commencement of a claim in negligence or breach of duty claiming damages for personal injuries.

19. It is common ground that the limitation period expired on October 4th 2016 but the second defendant was only added as a party and served with the amended claim form and statement of case after that date.

20. On April 5th 2017 the appellant filed her application seeking an order that the second defendant's said application be dismissed and an order that the time within which the appellant can institute the proceedings against the second defendant be extended to the date of the filing of the amended claim form and statement of case on January 27th 2017.

21. The relief relating to the extension of time sought by the appellant's application is not felicitously worded. The appellant is in fact seeking the direction of the court pursuant to section 9 (1) of the Limitation Act that section 5 shall not apply to this claim in relation to the cause of action against the second defendant. The application, however, has been understood by the parties in that way.

22. The applications of the second defendant and the appellant were heard together before Kangaloo J. As we have mentioned the Judge dismissed the appellant's application and made an order on the second defendant's application dismissing the claim against the second defendant.

23. The Judge's reasons for the orders she made were given orally. It is not an easy task to follow the Judges' reasons. It however appears that the claim against the second defendant was dismissed because in general terms it was found to be an abuse of process and the appellant's application was dismissed because there was not a sufficient reason for the delay in pursuing the claim against the second defendant. The following are relevant extracts from the Judges' reasons:

> "What this court says initially, with respect to the application seeking to have the claim as against the second defendant struck out for issues of service contrary to the rules of the Supreme Court, and further to the way

or the manner in which the second defendant has been identified, and continued to be identified throughout the proceedings, this court is of the view that the second defendant, as named, is not an appropriate party to be joined in the proceedings and that he was not duly servedwith the proceedings as required by the rules of the Supreme Court….

The court notes that she undertook no pre-action engagement with the parties which may have revealed to her the identity of another defendant at that time and prior to the commencement of her litigation, and she chose, for whatever reason, not to embark upon that and rather, perhaps because there was a clock ticking, and perhaps ticking against her, that she chose to file a claim without so doing.

There has been, of course, the application to extend the time for the limitation period for the filing of the amended Statement of Case and, that is in relation to the second defendant…. I would deal with it albeit that I have already made my ruling in relation to the second defendant having looked at the affidavit in support of that application, too, the court finds that it is woefully bereft of sufficient details and lacking in terms of its chronology to demonstrate that serious efforts were made as required by the Acting terms of reasons for the delay in pursuing the claim as against the second defendant and it cannot be for reasons I have set out before in relation to why pre-action protocol manoeuvres are so important that the claimant can say that it was when…only revealed by the first defendant that she became aware of the presence and possible blameworthiness of the second defendant. For those reasons, the court would not have been minded to extend the limitation period, it failing to satisfy section 9 (3) of the Limitation Act in that regard…

In all those circumstances the court considers that the [appellant] must, in the circumstances, fail in its claim to pursue the second defendant and, holistically, the court can view the same and finds the same to be an abusive process of this court, bearing in mind in particular the failure to comply with the Civil Proceedings Rules, the pre-action protocol, the issue of the service and a lack of sufficient detail in providing the court with a reason for the delay under the Limitation of Certain Actions Act. In those circumstances the court finds that the claim against the second defendant in this matter is dismissed….”

24. The appellant has appealed contending that the Judge erred in striking out the claim against the second defendant and in not disapplying section 5 of the Limitation Act and allowing the claim to proceed against the second defendant.

25. The appellant and the second defendant made submissions before this Court. So too did the first defendant. The first defendant's concern was however in relation to costs, namely that an order as to cost should not be made against it in relation to the appeal. It is of course the case that whatever the outcome of this appeal, the appellant's claim will proceed against the first defendant.

26. We shall first consider the basis on which the court appears to have granted the second defendant's application and then if it is necessary, consider the appellant's applications under the Limitation Act to disapply section 5 of that Act.

27. From the reasons of the Judge there were five matters that appeared to form the basis for the granting of the second defendant's application. First, there were issues as to service of the amended claim form; second, the manner in which the second defendant has been identified or sued in these proceedings; third, the failure of the appellant to comply with the pre-action protocols; fourth, the failure to comply with certain rules of the CPR and fifth, the claim against the second defendant was statute barred.

28. The first matter with respect to service of the amended claim form, which was referred to by the Judge as "issues of service contrary to" the CPR, appears to be in relation to the ground in the second defendant's application that there was improper service of the amended claim form and statement of case on the second defendant. This ground was advanced on the basis that the second

defendant was not personally served. The evidence was that the amended claim form and statement of case were served on a Ms. Hamel on February 7th 2017. She was the person the process server employed by the appellant found at the address for service which he had for the second defendant. Ms. Hamel was said to be the Manager of Mini Shak Trading Company. The process server inquired of her whether she would accept service for "Mini Shak Trading Company/Ishwar Seeram" and she answered in the affirmative.

29. The general rule is that the claim form must be served personally on the defendant. The CPR, however, provide that the claimant may choose an alternative method of service (see rule 5.10) in lieu of personal service. Where an alternative method has been adopted, and the court is asked to proceed to take any step on the basis that there has been service, the claimant must file an affidavit setting out the matters at rule 5.10 (2) of the CPR. The intention of that rule is to satisfy the court that is being asked to proceed on the basis that there has been service, that the alternative method of service adopted would have brought the contents of the documents to the defendant. That however, is not an issue in this case as the second defendant has filed an appearance acknowledging that he received the amended claim form on February 11th 2017, four days after the amended claim form and statement of case were left with Ms. Hamel, and before any further step was taken in this matter against the second defendant.

30. In those circumstances the absence of personal service provides no basis for complaint in this matter and cannot support the ground of abuse of process.

31. The second issue the Judge referred to is the manner in which the second defendant has been identified. The Judge was of the view that he was not an appropriate party because of the way or manner in which the second defendant has been identified in the proceedings.

32. The second defendant is named as “Ishwar Seeram trading as Mini Shak Trading Co”. He has been described in the amended statement of case as a duly incorporated company. That is clearly an error and it is now common ground that Mini Shak Trading Co. is a partnership comprising of three partners and Ishwar Seeram is one of them

33. It is not in contention between the parties that the premises housing the first defendant’s restaurant are owned by the partnership and that they have been leased to the first defendant which operates a Subway restaurant at the premises. It is also not in contention that the appellant fell on a tiled area immediately outside the restaurant. This tiled area, the first defendant contends, is not part of the demised premises and the responsibility for its maintenance is that of the second defendant. The second defendant admits that he is the first defendant’s landlord but says this is as a result of his involvement in the partnership which comprises three partners but only one has been sued, not the partnership. The second defendant submitted that there is no entity that exists in fact or in law by the name of Ishwar Seeram trading as Mini Shak Trading Co. In those circumstances the second defendant contended that he is not a proper party and it is inappropriate to allow the claim to continue against him.

34. The effect of the second defendant’s submissions is that when a partnership comprises two or more partners but not all partners have been sued, the claim is bad and must fail, but that is not so. Under the Rules of the Supreme Court, 1975 O. 78 r 1, it was possible to sue two or more partners in the name of their firm, if any. We have not noticed a similar rule in the CPR, but it seems to us that in view of the provisions in the CPR with respect to service of a claim form on a firm or partnership (see rule 5.7), and the enforcement of a judgment against a firm or partnership (see rule 44.9) that the CPR contemplate that the

partners may be sued in their firm name, if any. But the rule under the Rules of the Supreme Court, 1975 was permissive and not mandatory. So that two partners, A and B, carrying on business as X firm may have been sued as A and B trading as X firm. We do not see anything in the CPR that would alter that position.

35. In the case of a partnership, the partnership may therefore be sued in the firm name, if any, or the individual partners may be sued in their names trading as the firm name, if any. Further where the tort, as in this case, is imputable to the firm, an action in respect of it may be brought against all or any of the partners ***(***see ***Lindley on Partnership (15th ed at p. 452).*** This follows from the fact that the liability of the partners, where the firm is liable in tort, is a joint and several liability ***(***see section 14 of the Partnership Act***).*** In those circumstances where only one of two or more partners has been sued, it seems to us that that partner should be able to seek an indemnity or contribution from the others.

36. In our judgment therefore, it is permissible for the claim to be brought only against Mr. Seeram trading as Mini Shak Trading Co. and the fact that that has been done does not make the claim bad. In so far as the Judge may have thought that the way in which the second defendant has been identified makes the claim defective or somehow an abuse of process, she fell into error.

37. The third matter to which the Judge referred is the failure of the appellant to comply with the pre-action protocol procedure. It is not disputed that prior to the filing and service of the amended claim form and statement of case on the second defendant, the appellant did not seek to follow the practice direction relating to pre-action protocols. It is however relevant to place that in the context of this matter.

38. According to the appellant, the first time she became aware of the possible involvement of the second defendant in these proceedings is when the first defendant's defence was served alleging that its restaurant was located in premises that were rented from the second defendant and that he as landlord was responsible for the tiled area where the appellant fell. By the time of the service of the defence, the claim against the second defendant was already time barred, and what soon became apparent was that the second defendant intended to take the limitation point and that it was necessary for her to make an application under the Limitation Act for the Court to direct that the limitation period should not apply to this claim. Before the Court may make such an order, as we will mention later, the length of the delay and reasons for the delay on the part of the claimant are factors to be considered. The application should therefore be made urgently.

39. It is expressly provided for in the practice direction relating to pre-action protocols that there are matters where the parties would not be expected to observe the pre-action protocols. Among such matters are included urgent claims and claims where the limitation period is about to expire and the period between the expiration of the limitation period and the date the claimant instructs an attorney-at-law to act on his behalf in relation to the proposed claim is too short to allow for compliance with the pre-action protocols. In our view where the limitation period has already expired that is an a fortiori case. That is this case and in any event this claim would fit the bill as an urgent claim in the circumstances.

40. Further, we do not think that failure to observe the pre-action protocols in this case provides any real basis for complaint. That might have been the case if the second defendant incurred costs or suffered some other prejudice that he may not have incurred or suffered had he received prior notice of the intended claim by way of a pre-action letter. That is certainly not the case here. The

second defendant has shown every intent to resist liability and has taken the steps he sees as appropriate to avoid liability. We cannot say that a pre-action letter would have altered the second defendant's position and if that were the case that would have affected nothing more than costs and could not sustain a claim to strike out the claim as against the second defendant.

41. The fourth matter relates to the failure of the appellant to comply with rules of the CPR. This appears to relate to the complaint by the second defendant of the appellant's failure to serve with the amended claim form the documents outlined at rule 8.15 (which include an appearance form and a defence form) which failure, we believe, is admitted. That complaint however has a very hollow ring in this case when within a matter of days of being served with the amended claim form and the amended statement of case, the second defendant retained Attorneys who entered an appearance on his behalf, sought an extension of time to file a defence and then proceeded to file an application to dismiss the claim. We see nothing in that complaint in the context of these proceedings.

42. Lastly, is the matter referred to by the Judge that the claim is timed barred. That is indeed so as the appellant's fall occurred on October 5th 2012 and the second defendant was sued after the expiration of four years, which is the limitation period as provided for in section 5 of the Limitation Act. Whether that is a sufficient ground on which to dismiss the claim depends on whether the Judge was correct to dismiss the appellant's application for a direction overriding the limitation period and allowing the claim to proceed. It is to that application we now turn.

43. As we have mentioned, it is common ground between the parties that the limitation period applicable to this claim is four years from the date on which the

cause of action accrued. This is the effect of sections 5 (1) and (2) (a) of the Limitation Act. These sections provide as follows:

> "5. (1) Subject to sub-section (6),this section applies to any action for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or any enactment or independently of any contract or any such enactment where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
>
> (2) Subject to sub-section (3), an action to which this section applies shall not be brought after the expiry of four years from –
>
> (a) the date of which the cause of action accrued;"

(Neither subsection 6 nor subsection 3 of section 5 is applicable to these proceedings.)

In view of section 5 (1) and 5 (2) (a) as the cause of action accrued on October 5th 2012 the limitation period expired on October 4th 2016.

44. It is also common ground that as the second defendant was only sued when he was added as a party by the amended claim form filed on January 27th 2017, that he was sued after the expiry of the limitation period and the action would therefore be statute barred as against the second defendant. The Limitation Act, however, gives the court a discretion to disapply section 5 and allow the claim to proceed, even though the limitation period stipulated in that section has expired. This is to be found in section 9 of the Limitation Act, which provides as follows:

> 9 (1) Where it appears to the Court that it would be inequitable to allow an action to proceed having regard to the degree to which –

(a) the provisions of section 5 or 6 prejudice the plaintiff or any person whom he represents; and

(b) any decision of the Court under this subsection prejudice the defendant or any person whom he represents,

The Court may direct that those provisions shall not apply to the action or to any specified cause of action to which the action relates.

It has been held that the word "inequitable" in section 9 (1) is a drafting error and renders the meaning of the section absurd and irrational and that for the word "inequitable" should be substituted the word "equitable" ***(see Civil Appeal 32 of 2015 Hagley and another v Babwah***). That is plainly correct. Section 9 (1) therefore gives the court a discretion to direct that a claim to which section 5 (or section 6 which is not applicable to this appeal) proceed if it appears to the court that it would be equitable to do so having regard to the degree to which section 5 prejudices the claimant or any person whom he represents and the degree to which any decision of the court under section 9 (1) would prejudice the defendant or any person whom he represents.

45. The discretion given by section 9 (1) to disapply the limitation period and to allow the claim to proceed is an unfettered one. It requires the court to look at the matter broadly. The Court must balance the prejudice of the claimant and the defendant. The burden is on the claimant to establish that it would be equitable to allow the claim to proceed having regard to the balance of prejudice.

46. In exercising its discretion under section 9 (1), section 9 (3) of the Limitation Act provides that the Court must have regard to all circumstances of the case

and in particular to the matters set out at section 9 (3). This section is as follows:

> "9 (3) In acting under this section the Court shall have regard to all the circumstances of the case and in particular to –
>
> (a) the length of and the reason for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 8 or, as the case may be, section 9;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action; or
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the defendant's act or omission to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of such advice he may have received."

47. It has been held that this sub-section (9) (3) "is not intended to place a fetter on the discretion given by sub-section (1), this is made plain by the opening words 'the court shall have regard to all the circumstances of the case', but to focus the attention of the court on matters which past experience has shown likely to call for evaluation in the exercise of the discretion and which must be taken into

consideration by the judge" ***(****see* ***Donovan v Gwentoys Limited [1990] 1 WLR 472 at 477-8).***

48. The appellant's appeal from the judge's dismissal of her application to disapply section 5 of the Limitation Act is an appeal from the exercise of the Judge's discretion. It is well settled that before an appellate court will interfere with the exercise of the Judge's discretion it must be satisfied that the Judge was plainly wrong. This in essence means that the Court must be satisfied that the Judge took into account irrelevant considerations, or failed to take into account relevant ones, or exercised her discretion under a mistake of law, or the decision is against the weight of the evidence or cannot be supported having regard to the evidence or the decision is outwith the generous ambit within which reasonable agreement is possible.

49. In this case from a perusal of the transcript of the Judges' reasons it is apparent that beyond the issue of the delay the Court did not consider any of the other factors outlined at section 9 (3) and all the circumstances of the case as mandated by that section. In those circumstances it is fair to say that the Judge failed to take into account relevant considerations and exercised her discretion under a mistake of law. This Court must therefore look at the matter afresh and exercise its own discretion.

50. The first consideration at section 9 (3) (a) is the length of and the reasons for the delay on the part of the claimant. The delay here referred to is the delay after the expiry of the limitation period and not the total delay from the time when the cause of action arose.

51. The limitation period expired on October 4th 2016. It was the appellant's attorneys' intention to add the second defendant as a party at the case

management conference which was scheduled for December 14th 2016. That case management conference through no fault of the parties was re-scheduled to February 3rd 2017. When that occurred the amended claim form and statement of Case were subsequently filed on January 27th 2017 and served shortly thereafter. That is a delay of approximately four months before the second defendant became aware that a claim was being made against him. On March 20th 2017 the second defendant filed his application seeking an order to strike out the claim on the ground, inter-alia, that the claim was statute barred The appellant's application to disapply the limitation period was filed approximately two weeks thereafter.

52. The explanation advanced by the appellant is that she only became aware of the possible involvement of the second defendant when the first defendant's defence was filed on October 31st 2006. That was the first time that there was any mention by the first defendant that the tiled floor immediately outside the restaurant where the appellant fell may be the responsibility of the second defendant and not the first defendant. Indeed, from the communication between the appellant's attorneys and the first defendant and its insurers there was no reason to think that any party other than the first defendant may have any liability in the matter.

53. We do not consider the delay to be inordinate and we regard the reason for it as a cogent one. Quite simply the appellant was unaware that there was any possible liability on the part of the second defendant. She acted with reasonable dispatch to make the second defendant a party once his potential liability was discovered. When it became apparent by second defendant's application that he intended to take the limitation point, the appellant acted fairly quickly to file her application under consideration.

54. Section 9 (3) (b) refers to the extent to which, having regard to the delay, the evidence adduced or is likely to be adduced is or is likely to be less cogent than if the action had been brought within the time allowed "by section 8 or, as the case maybe, section 9".

55. The reference to sections 8 and 9 in section 9 (3) (b) seems to us to be another drafting error. Sections 8 and 9 of the Limitation Act set no time limits so considering whether the cogency of the evidence has been impacted because the action has not been brought within the time limited by sections 8 and 9 is nonsensical. The equivalent provision of the English legislation refers to sections 11 and 12 of their legislation. The equivalent sections in our legislation to sections 11 and 12 are sections 5 and 6 and those in our opinion are the sections to which Parliament intended to refer in section 9 (3) (b). What the Court must therefore consider under section 9 (3) (b) is the extent to which the evidence adduced or is likely to be adduced by the claimant and the defendant is or is likely to be less cogent than if the claim had been brought within the timed allowed by sections 5 and 6.

56. We have already noted section 6 is not relevant to these proceedings. So the consideration here is to what extent, having regard to the delay the evidence likely to be adduced by the claimant or the second defendant is likely to be less cogent than if the claim had been brought within the period of four years allowed by section 5 to do so.

57. Here again, under section 9 (3) (b) the focus is on the period of delay after the expiration of the limitation period stipulated in section 5, that is to say the period after October 4th 2016. No one has said that the evidence of the claimant would be less cogent. The focus has been on the evidence of the second defendant. Here it is relevant to note that while the ultimate burden is on the claimant to show that under section 9 (3) that it would be equitable for the court to disapply the limitation period and allow the claim to proceed, the evidential burden of showing that the evidence that the defendant is likely to

adduce is likely to be less cogent having regard to the delay is on the defendant ***(see Burgin v Sheffield City Council [2015] EWCA Civ. 482 at para23).***

58. Nothing that the defendant has said suggests that the evidence he is likely to adduce will be less cogent having regard to the delay after October 4th 2016. The second defendant does say he would be prejudiced by the delay and gives reasons for so saying but nothing in those reasons suggest that had the proceedings been commenced on October 4th 2016, which the appellant could have done without any complaint by the second defendant, he would have been in any different position and that the evidence he is likely to adduce would be rendered less cogent by the delay occurring after October 4th 2016.

59. Section 9 (3) (c) looks at the conduct of the defendant after the cause of action. The sections make specific reference to the defendant's conduct in responding to requests made by the claimant for information or inspection for the purpose of ascertaining facts which are or might be relevant to the claimant's cause of action against the defendant. There is no evidence that any such requests were made. So that aspect of section 9 (3) (c) is not relevant to this case. But the section looks at the defendant's conduct generally after the cause of action arose. In that regard there is a statement by the second defendant in one of his affidavits which is as follows:

> "I recall that I, in my capacity as a representative of the partnership, was informed by a representative of the first defendant sometime before my collection of the claim papers [i.e. the amended claim form and statement of case] that someone had fallen outside the subject premises but I do not know if that information referred to the claimant nor did I receive details about that incident."

60. The second defendant does not say whether he acted on this communication and the reasonable inference to be drawn is that he did not. Indeed in his submissions before this court the second defendant refers to the communication as “a superficial comment by a representative of the first defendant”. It therefore seems that the second defendant regarded the communication as insignificant or trivial and having no real relevance to him. But it was made to him in his capacity as a representative of the partnership by a representative of the first defendant. It does not appear to have been intended as a passing or throwaway communication. In the circumstances we do not believe that it was prudent on the part of the second defendant to treat the communication as trivial or insignificant and to pay no attention to it. Had he made appropriate inquiries he may have learnt of the appellant’s fall and the circumstances surrounding it well before the date he received the amended claim form and statement of case.

61. Section 9 (3) (d) is not relevant to this matter.

62. Section 9 (3) (e) deals with the extent to which the claimant acted promptly and reasonably once she knew whether the second defendant’s act or admission might be capable of giving rise to an action for damages. We have referred to the date when the appellant first learnt that she may have a cause of action against the second defendant and the steps she took thereafter. We do not think that the appellant can be criticised for failing to act promptly and reasonably having learnt that she may have a cause of action against the second defendant.

63. Lastly section 9 (f) looks at the steps by the claimant to obtain medical, legal and other expert advice and the nature of any advice she may have received.

64. There is no issue with respect to the medical advice received. The appellant sought medical attention within a very short time after the fall. The medical reports she received over the years have been annexed to the statement of

case. Her medical advice should not present an obstacle to the exercise of the discretion of the court whether to disapply section 5 of the Limitation Act and allow the claim to proceed.

65. With respect to the legal advice obtained by the appellant, the second defendant has argued that the advice given to the appellant was bad or at least negligently given in that the appellant's attorneys failed to make any or proper inquiries to ascertain within the limitation period who were the appropriate parties. It is submitted that had the appellant's attorneys acted diligently and conducted inquiries as to the ownership of the property where the first defendant's restaurant is locate an early stage, they would have learnt that the premises were owned by the partnership and that the partnership is a proper party well before the expiry of the limitation period. We do not agree.

66. The submissions seem to be based on two premises. The first is that this case is about ownership of the area where the appellant fell. It is not. It is about negligence or breach of duty arising out of the physical control of the area. Even if the attorneys' knew that the premises were owned by the partnership it would not matter unless they knew or had reason to believe that the owner was in physical control of the tiled area where the fall occurred. This is a point that we will return to shortly. The second premise is that the fault of the appellant's lawyers should be attributed to the appellant. But there is no rule of law that the fault of the claimant's attorneys should be visited upon the claimant in this type of application. Indeed delay caused by conduct of the claimant's attorneys may be excusable in that context ***(see Corbin v Penfold Metallising Co. Ltd. [2000] ALL ER (D) 2060).*** However, even if poor conduct of attorneys can be visited upon their client, we are not of the view that the appellant's attorneys can be criticised in this case for failing to conduct inquiries as argued by the second defendant.

67. The appellant had obtained legal advice at a very early stage and the attorneys had written to the first defendant. It is clear from all the circumstances that the

advice given to the appellant by her attorneys was to proceed against the first defendant. The first defendant and its insurers engaged the appellant's attorneys but at no point made any mention of the possible liability of the second defendant or that any other person might be involved. There is no reason to think from the communications between the parties prior to the service of the first defendant's defence that this was a matter involving anyone other than the appellant and the first defendant.

68. Photographs of the demised premises were annexed to an affidavit before the Court. What they show is that the first defendant's restaurant, is not a very large building, and immediately outside the restaurant is the tiled area where the appellant fell. Looking at the photographs it would not have occurred to any reasonable attorney that the tiled area would be under anyone's physical control other than the restaurant's owners or operators.

69. In the circumstances, given that (a) up until the service of its defence, the first defendant did not seek to deny liability at all on the basis that it was the fault of anyone else, (b) that the tiled floor where the appellant fell was immediately outside the restaurant and would not reasonably suggest to anyone that someone other than the first defendant, which owned and operated the restaurant, was in control of that area, (c) that the claim against the first defendant was essentially for the breach of duty or negligence of those in physical control of the tiled area in failing to providing a safe means of access to and from the restaurant, and (d) that even on a perusal of the lease of the premises, it is not entirely clear that the lessor has sole responsibility for any area outside the demised premises, or in fact whether the area leased ended before where the appellant fell, we are not prepared to say that the appellant's attorneys were negligent in failing to conduct inquiries to determine whether there was anyone other than the first defendant in control of the area where the appellant fell.

70. As we mentioned earlier in exercising its discretion under section 9 of the Limitation Act, the Court is involved in a balancing exercise and the task of the court is to determine whether or not the prejudice to the claimant outweighs the prejudice to the defendant. The burden is on the claimant to establish that having regard to the balance of prejudice it would be equitable to disapply the limitation statute and allow the claim to proceed. Refusing to exercise the discretion in favour of a claimant who brings a claim outside the limitation period will necessarily be prejudicial to the claimant as he loses the chance of establishing the claim. On the other hand, in the case of a defendant the prejudice is not the deprivation of the limitation defence but the prejudice on the merits of the case caused by the delay. In other words in relation to the defendant it is the prejudice to his ability to defend the claim. The matters specifically referred to at section 9 (3) (b) of the Limitation Act are relevant to the balancing exercise. On our analysis of those factors as above they point unerringly to the conclusion that the prejudice to the appellant in not allowing the claim to proceed outweighs the prejudice to the defendant. But those factors are only part of the Court's consideration as it is the duty of the Court to have regard to all the circumstances of the case.

71. With respect to the other circumstances of the case, the second defendant has contended that if the claim is allowed to proceed he will suffer prejudice. He has given several reasons for so saying. He says that the claim arises from an alleged incident which occurred more than four years ago (as at the time the amended claim form and statement of case were served) and of which the second defendant was unaware. As a consequence the second defendant claims that he has been denied the opportunity of identifying and or contacting relevant witnesses, and the opportunity to compile timely evidence, and this includes evidence regarding the state, condition, appearance and or design of the location where the fall occurred which may have changed materially over the years. He has also been denied the opportunity of challenging the appellant's medical evidence and conducting an independent medical

examination. The second defendant further says that he has been denied the opportunity to make representations to the owners and/or insurers of the premises in the hope of being indemnified as well as he has been denied the opportunity to benefit from sound legal advice during the limitation period such as might have directed him to make timely inquires of the appellant and others.

72. As we mentioned earlier the matters raised by the second defendant do not refer to the period occurring after the expiry of the limitation period. The defendant does not allege that as of October 4th 2016 when the claim could have been brought by the appellant against the second defendant without any complaint by him, his position would have been any different. Although in weighing the prejudice suffered by a defendant it must always be relevant to consider when he first had notification of the claim and thus the opportunity he would have to meet the claim at the trial if he is not permitted to rely on the limitation period, the fact that the defendant would be in no better position had the claim been commenced on October 4th 2016 and within the limitation period, must be a factor also to be considered and this would be a factor that goes against the second defendant.

73. In so far as the second defendant suggests that he was unaware of the claim, his conduct to which we have referred earlier in paying no heed to the notification by a representative of the first defendant that someone had fallen outside of the premises, is also a factor to be taken into account against the second defendant.

74. In any event the prejudice alleged by the second defendant is not supportable on the evidence.

75. In the first place this case is about the physical control of the area where the appellant fell. This is a matter to be determined in this case by reference to whether the tiled area forms part of the demised premises that the partnership

has leased to the first defendant. There is no allegation that the dimensions of that area has changed over the years. The condition of the floor as at the time of the fall is of course relevant. The appellant complains of the absence of witnesses and being denied an opportunity to collate relevant evidence, but it is apparent from the first defendant's defence that the first defendant knows of witnesses as to the condition of the floor at the relevant time and the circumstances surrounding the fall. The second defendant has not stated that he has tried to determine who these witnesses are but he has been unable to locate them and that they cannot recall the circumstances surrounding the fall or the condition of the floor, or that they are not prepared to co-operate with the second defendant. Indeed, from the first defendant's defence there is no reason to think that would be the case. The fact is that from the affidavits before the court a fair inference is that the second defendant has made no attempt to ascertain who the witnesses are and whether they are available and whether they can provide useful and reliable information. That makes the complaint of the second defendant that he cannot identify relevant witnesses and collate relevant evidence very hollow.

76. With respect to the second defendant being denied an opportunity to have the appellant medically examined, the second defendant has placed no evidence before the court that would suggest that the appellant cannot now be examined to good effect. The appellant has annexed medical reports to the proceedings and has apparently at one point in time had an MRI scan done. There is no evidence suggesting that the second defendant's medical experts cannot now review the reports and the results of the scan and give appropriate medical advice to the second defendant.

77. With respect to the allegations that the second defendant was denied the opportunity to make representations to his insurers about the incident in the hope that he would be indemnified, the second defendant has not said that he has notified his insurers and that they have denied liability because of the late

notification of the claim and that they have legal grounds to do so not withstanding that the claim against the second defendant was only recently made. We can attach no importance to this complaint.

78. Similarly with respect to the allegation that the second defendant was denied an opportunity to make representations to the owners of the premises, we fail to see the relevance of this. He has not said that the other partners have refused to contribute to the costs of the claim or any award of damages that might be made in favour of the appellant. In any event as we mentioned earlier the third defendant would be in a position to seek an appropriate indemnity from the other partners if he so chooses.

79. With respect to the allegation of the second defendant being denied an opportunity to obtain legal advice to make timely and pertinent inquiries, again there is no mention of what these inquiries might have been and how he is prejudiced by the passage of time.

80. In view of the above it is difficult to say that the second defendant would suffer any prejudice by the late commencement of these proceedings against him. He has not demonstrated with any degree of probability that his ability to defend the claim on its merits has been adversely affected by the delay.

81. Even if it can be said that the second defendant will suffer some unfairness that may usually follow from the effluxion of time it is appropriate to bear in mind what was said in ***Cain v Francis [2008] EWCA Civ 1451 (at para 73)*** which is as follows:

> "It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly

of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so an excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones."

The reason for the delay is therefore relevant and may affect the balancing exercise in that it may be equitable that the action should proceed despite some unfairness to the defendant due to the delay. We regard that as this case and we consider the excuse for the delay a good one. If therefore the second defendant may have suffered some unfairness that may usually occur with the passage of time, the reason for the delay is sufficient to temper such unfairness caused by the delay.

82. For the above reasons we allowed this appeal and we made the following order

1. The appeal is allowed and the orders of the Judge made on November 27th 2017 below are set aside;

2. Section 5.2 (a) of the Limitation Act shall not apply to the claim by the appellant against the second defendant for damages for personal injury arising out of the negligence/breach of duty of the second defendant;

3. The application of the second defendant filed on the 20th day of March 2017 is dismissed with costs in the court below to be paid by the second defendant to the appellant, such costs to be assessed by the Judge;

4. In relation to the application filed on the 5th day of April 2017 by the appellant pursuant to section 9 of the Limitation Act there shall be no order as to costs both here and in the Court below;

5. The second defendant shall pay to the appellant one half (1/2) of the assessed costs of the appeal from the Judge's decision in relation to the application of the second defendant filed on March 20th 2017;

6. Pursuant to Paragraph 5 hereof the costs of the appeal are assessed in the amount of Two Thousand, Nine Hundred Dollars ($2, 900) and therefore the second defendant shall pay to the appellant half of such costs of the appeal, which is One Thousand, Four Hundred and Fifty Dollars ($1, 450.00);

7. There shall be no order as to costs as between the appellant and first defendant both here and in the court below; and

8. The time for the filing and service of the defence of the second defendant is extended to the 7th day of June 2018.

A. Mendonça,
Chief Justice (Ag.)

J. Jones, JA
Justice of Appeal

P. Rajkumar, JA
Justice of Appeal