[2017] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 33/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
A N D	**ARLENE MARTIN**	**RESPONDENT**

Written submissions filed by the Director of State Proceedings for the appellant

Written submissions filed by Kinghorn & Kinghorn for the respondent

31 July 2017

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MORRISON P

[1] I have read in draft the judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing useful to add.

F WILLIAMS JA

[2] I too have read the draft judgment of P Williams JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

P WILLIAMS JA

[3] This is an appeal against the order of Master R Harris, dated 16 March 2016, in which she refused the appellant's application that the claim form and particulars of claim filed by the respondent, be struck out. The master at that time also granted leave to appeal.

Background

[4] Miss Arlene Martin, the respondent, bought a motor car from Mr Clive Adjudah in 2001. At the time, she was advised that the car was a 1999 model vehicle and that she was the first purchaser of the vehicle, which had been imported into the island. In or around July of 2005, she sold the motor vehicle. Upon examination of the vehicle at this time, the purchaser learnt that the vehicle was in fact a 1998 model. The purchaser reported the matter to the police. The respondent was subsequently arrested and charged with the offences of uttering forged documents, forgery, conspiracy to steal motor vehicle, receiving stolen property and simple larceny.

[5] Upon her arrest, the respondent was placed in custody for three days between 9 and 12 August 2005. Prior to the arrest, she gave the police a statement in which she outlined how she had come to be in possession of the motor vehicle.

[6] The matter was placed before the Resident Magistrate's Court for the Corporate Area, Criminal Division (as it was then known), on 17 August 2005. On 27 September 2006 a *nolle prosequi* was entered by the Director of Public Prosecutions, whereby the court was advised that the Crown did not intend to continue the proceedings against

the respondent on any of the named charges. On the document, it was noted that the *nolle prosequi* was "entered solely that [the Respondent] may appear as a witness for the prosecution in the case of *Regina v Clive Adjudah* in the Saint Andrew Resident Magistrate's Court".

[7] On 4 October 2006, the acting clerk of court of the Resident Magistrate's Court for the Corporate Area, Criminal Division, issued a letter addressed "To Whom It May Concern", in which she advised of the manner in which the matter had been disposed on 27 September 2006.

[8] In February 2008, the Director of Public Prosecutions wrote a letter "To Whom It May Concern" advising that the respondent was "a witness for the prosecution in the case of *Regina v Clive Adjudah* for larceny etc. before the Corporate Area Resident Magistrate's Court". He also indicated, "she is not an accused before the Court, and will only be called to give evidence at the trial".

[9] On 27 November 2009, the matter was again before the court at which time no evidence was offered in relation to all the offences. On 22 February 2010, the Director of Public Prosecutions wrote to Mr Raphael Codlin about the matter involving the Respondent. In the letter the following was stated:

> "I acknowledge receipt of your letter dated January 7, 2010 in respect of the above captioned matter.
>
> In light of your request our findings indicate that no evidence was offered in the Corporate Area Resident Magistrate's Court by Her Honour Mrs. S. Jackson Haisley on the 27th day of November, 2009 in relation to all the

> offences with which your client was charged. This information was received from the Corporate Area Resident Magistrate's Court."

[10] In July of 2013, the respondent commenced proceedings in the Supreme Court by filing a claim form with accompanying particulars of claim. The defence was filed in October 2013. An amended claim form and particulars of claim were later filed in September 2014.

[11] In her amended claim the respondent contended that she was arrested, charged and prosecuted for over four years by the Crown, and that this was done maliciously and without reasonable and/or probable cause by the servants and/or agents of the Crown. She also asserted that there was negligence on the part of the members of the Jamaica Constabulary Force. She claimed, inter alia, damages inclusive of aggravated damages and vindicatory damages.

[12] In the amended defence filed in September 2014, the appellant disputed the claim, denied that the claimant was arrested and charged unlawfully and asserted that the arrest, charge and prosecution were based on reasonable and probable cause and were not malicious. Further, the appellant asserted that the respondent was not prosecuted for over four years as the *nolle prosequi* brought her prosecution to a legal end in 2006. In regards to the negligence, it was asserted that the servants of the Crown did not owe the respondent a duty of care in relation to the conduct of the investigation or the respondent's arrest or prosecution. Further, the appellant stated that the entire claim could not be sustained and was barred by statute as it was not

filed within the relevant limitation period required by section 3 of the English Limitation Act of 1623 21 James 1 Cap 16.

[13] In August 2014, the appellant filed a notice of application seeking to have the claim form and particulars of claim struck out, and to have mediation dispensed with. In January 2015, the respondent filed a notice of application also seeking to have mediation dispensed with. The master heard the two applications on 17 December 2015.

[14] The grounds on which the appellant sought to have the claim and particulars of claim struck out were as follows:

> "1. The Court is empowered to strike out a statement of case which is an abuse of the process of the court pursuant to Rule 26.3 (1) (b) of the Civil Procedure Rules.
>
> 2. The Court is empowered to strike out a statement of case which discloses no reasonable grounds for bringing a claim pursuant to Rule 26.3 (1) (b) of the Civil Procedure Rules.
>
> 3. The claim for damages for malicious prosecution, false imprisonment and negligence was not filed within the six (6) year period required by section 3 of the English Limitation Act of 1623 21 James 1 Cap 16 and was accordingly statute barred at the time of filing. The entire claim is therefore an abuse of process, frivolous and vexatious and there are no reasonable grounds for bringing the claim.
>
> 4. There are no reasonable grounds for bringing the claim in negligence as there is in law no duty of care in relation to the conduct of an investigation, arrest or prosecution."

The decision of the master

[15] The master commenced her consideration of the matter by attempting to come to an understanding of what she termed "three of the basic terms that are the common thread in this case: the terms are limitation period, abuse of process and *nolle prosequi*".

[16] She, then, in considering whether the action was statute barred, looked at the issue of whether the *nolle prosequi* had brought a "final end" to the proceedings. She appropriately acknowledged the basis of the power of the Director of Public Prosecutions to discontinue criminal proceedings as being that of the Constitution under section 94(3)(c). She also recognised that the Criminal Justice (Administration) Act section 4 provides for how the Director of Public Prosecutions may enter or direct that a *nolle prosequi* be entered.

[17] Ultimately, the master identified the questions to be answered and concluded as follows:

> "[30] Did the nolle prosequi bring a final end to the determination of the matter? Was the matter finally concluded in the claimant's favour? Was she in danger of having been brought back before the court on the same charge?...
>
> [31] Could the claimant have instituted civil proceedings in circumstances when she was a witness in a related matter and she was unsure of her own fate?
>
> It appears to me that those are matters best dealt with at a trial of the matter. To bring the matter to an end on the basis of the 2006 pronouncement would be premature. It seems apparent at least from

> the correspondence that a final order made on the case was no further evidence offered in 2009. If a final order was made in 2009, then that is the operative date from which time would start to run. Any further evidence to the contrary would certainly be borne out by having a trial of the case and all relevant issues brought out into the glare of public scrutiny."

[18] The master, in considering whether the claim for malicious prosecution was statute barred, appreciated that the question for her consideration, concerned the issue of when the prosecution was determined in the respondent's favour. She posited the following questions:

> "Was the 'no further evidence offered' a final determination in favour of the [respondent], notwithstanding the nolle prosequi? Should the Claimant be shut out of the legal process in circumstances where there are apparently two different notations on the court file with intervening periods of three years?"

[19] The master found that those were matters which would best be determined by a tribunal of fact after weighing the factual and documentary evidence. She went on to state the following:

> "[35] In the instant case, the no further evidence offered was preceded by the nolle prosequi some three years earlier. To engender justice the court is prepared to accept that the latter date of 2009 is when the matter was brought to a determination in favour of the Claimant. This then paved the way for the malicious prosecution and the false imprisonment claim."

[20] In relation to the claim of negligence the master had this to say:

> "[39] The court recognises that in **Hill v Chief Constable of West Yorkshire**, 1989 AC 53 the House of Lords denied a duty of care was owed by police to a victim of a serial murderer. The case was interpreted as immunity from negligence actions for police when involved in the suppression and investigation of crime. Recent cases in Australia and the United Kingdom have confirmed that while blanket immunity from negligence actions for police involved in investigatory functions does not exist, plaintiffs alleging negligence will face considerable difficulties establishing a duty of care was owed. A trial would best decide whether the Police in this instance are immune from the duty of care and whether this case constitutes any exceptional circumstances that would cause the court to derogate from the general rule."

The grounds of appeal

[21] By its notice of appeal, filed on 29 March 2016, the appellant challenges the orders made on the following grounds:

> "1. The learned master erred in the exercise of her discretion by failing to consider the effect of section 3 of the English Limitation Act of 1623 21 James 1 Cap 16 on each of the causes of action in the claim.
>
> 2. The learned master erred by failing to appreciate that the limitation period runs from the earliest time at which an action could be brought.
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> 3. The learned master erred in law by treating a final end as being required for a claim for malicious prosecution when that cause of action merely requires the existence of a legal end to the prosecution.
>
> 4. The learned master erred by treating the entry of the nolle prosequi as being relevant to the cause of action

of false imprisonment when it was only relevant to the cause of action of malicious prosecution.

5. The learned master erred by failing to consider whether the law recognizes a duty of care in relation to arrest and prosecution as distinct from investigation.

6. The learned master by failing to properly apply the overriding objective which includes dealing with cases justly by saving expenses and ensuring that cases are dealt with expeditiously and fairly."

[22] The appellant now seeks the following orders:

"1. The appeal is allowed and:

(i) The decision of Master Ms. R. Harris of March 16, 2016 is set aside and the Claim is struck out;

(ii) Costs of the appeal to the Appellant to be agreed or taxed;

or alternatively,

2. The appeal is allowed in part and:

(i) The Claim is struck out as it relates to the causes of action of false imprison-ment and negligence;

(ii) 2/3 of the costs of the appeal to the appellant to be agreed or taxed."

[23] The grounds are closely related in some respects and it is therefore convenient that they be consolidated and dealt with together.

The submissions

For the appellant

[24] The underlying thrust of the submissions made on behalf of the appellant was that the learned master's exercise of her discretion was based on a misunderstanding of the law and that she did not act judicially in reaching her decision. Counsel for the appellant pointed out that section 3 of the English Limitation Act of 1623 21 James 1 Cap 16 provides, inasmuch as is relevant, that tortious actions must be brought within six years of the cause of action. It was submitted that the principle appropriate to this matter was that a defendant may apply to strike out a claim if, on the face of it, it appears the limitation period has run. Further, it was submitted that such a claim may, in those circumstances, be struck out as an abuse of process, if the defendant indicates an intention to rely on the Limitation Act if the claim proceeds to trial. The case of **International Asset Services Limited v Edgar Watson** Claim No 2009 HCV 03191 delivered 25 October 2010 was relied on in support of this submission. It was noted that the decision was affirmed by this court in **International Asset Services Limited v Watson** [2014] JMCA Civ 42.

[25] It was submitted that in the instant case the claim is based on three causes of action and it would therefore have been necessary for the learned master to consider whether the limitation period had expired in relation to each. It was contended that it was essential to determine when the cause of action arose in order to determine whether the action is statute barred. Reference was made to **Construction**

Developers Association Limited v Urban Development Corporation Claim Nos 2008 HCV 02213 and 2008 HCV 02214 delivered 23 March 2010.

[26] In relation to the claim of false imprisonment, it was noted that the respondent stated she was in custody for three days in August 2005. Thus, the appellant contends, the limitation period would have expired in August 2011 and the claim brought in July 2013 was almost two years outside the limitation period and should have been struck out.

[27] As regards the action in negligence, it was submitted that the tort is established and complete where there is a duty of care, a breach of that duty and when the particular breach results in damage. It was noted that the respondent had asserted that her arrest and charge took place in August 2005. It was submitted that the earliest time in which the claim in negligence could have been brought was at that time, and the claim would have been barred in 2011.

[28] Further, it was noted that the damage or injury that was pleaded is psychiatric in nature. In the psychiatric evaluation report of the doctor who assessed the respondent, it was stated:

> "It appears from [the respondent's] self report that the symptoms associated with this disorder began immediately following the reported incident and the timing and content clearly suggest that they are related."

[29] This, it was submitted, further supported the contention that the tort would have been completed in 2005 and would have been statute barred when brought in July 2013.

[30] It was further submitted that, in all the circumstances, the master erred by failing to consider when each cause of action would have arisen and further, whether each cause of action was barred by the Statute of Limitations.

For the respondent

[31] In the submissions made on behalf of the respondent, this court was reminded of the basis on which we are to interfere with the exercise of the discretion of a lower court judge as outlined in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042.

[32] It was submitted that it is trite law that where the court is called upon to strike out a statement of case, such an application ought to be granted in what are plain and obvious cases. Reference was made to **Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd** [1986] AC 368 and **Three Rivers District Council and others v Bank of England** (No 3) [2001] 2 All ER 513**.** It was contended that the legal principle enshrined in these cases is simply that where a party has a legal right of access to the court, it is rarely that such a party will be barred from proceeding, as striking out based on abuse of process should not be lightly done. The submission continued that where triable issues exist, the court would be reluctant to grant the application to strike out a claim.

[33] The learned master, it was contended, was not under a misunderstanding of the law. It was submitted that the fact that the *nolle prosequi* was entered with a conditional note indicating that it was being entered for the sole purpose of the respondent giving evidence in another matter, and the Crown's subsequent action to offer no evidence against the respondent made it evident that the criminal proceedings were not brought to an end until November 2009.

[34] It was therefore submitted that, with these facts present before the learned master, it would have been less than judicious to strike out a claimant's case when there are clear issues to be tried, one of those issues being the date when the criminal proceedings are said to have been concluded.

Discussion and analysis

[35] The master, in approaching this matter, commendably acknowledged the observations of Lord Griffiths in **Donovan v Gwentoys** [1990] 1 WLR 472 at page 479:

> "The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal."

[36] Although the defence that a limitation period has expired is a procedural defence, it is one that usually has to be raised as such and be resolved at trial. However, it is permissible for the defendant to apply to have the claim, or the relevant

parts of it struck out as being an abuse of process. This however will only be allowed in a case where the expiry of the limitation period is clearly established and unanswerable.

[37] The master in her reasons, once again commendably, recognised the correct principle in relation to this issue. At paragraph [36] of her reasons she stated:

> "...The case of **Riches v Director of Public Prosecutions** [1973] 2 All ER 935 is authority for the principle that the Statement of Claim can be struck out as an abuse of the process of the court. Almost nine years later, that principle was affirmed in the case of **Ronex Properties Limited v John Laing Construction Limited** [1982] 3 All ER 1983 [sic]. In that case the court considered a claim for contribution between tortfeasors. Stepenson L J said:
>
> > 'There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiff's claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute barred. Then the plaintiff and court know that the Statute of Limitation will be pleaded; the defendant can, if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process.' "

[38] The decision is actually found at [1982] 3 All ER at page 961 and the observations of Stephenson L J are found at page 968.

[39] The correct approach to be taken when calculating the limitation period was usefully discussed in **Blackstone's Civil Practice 2012** at paragraph 10.13:

> "The rules on accrual fix the date from which time begins to run for limitation purposes. Lindley LJ in **Reeves v Butcher** [1891] 2 QB 509 said: 'it has always been held that the statute runs from the earliest time at which an action would be brought.' In **Read v Brown** (1888) 22 QBD 128 Lord Esher MR defined 'cause of action as encompassing every fact which it would be necessary for the [claimant] to prove, if traversed, in order to support his right to the judgment of the court. In other words, time runs from the point when facts exist establishing all the essential elements of the cause of action."

[40] There can be no dispute that the claim before the master in the instant case gave rise to three distinct causes of action. Although the application was for the claim to be struck out, there had to be a determination of whether each cause of action had been brought within the limitation period. There is no dispute, that each cause of action had a limitation period of six years.

[41] The master considered the effect of the entering of the *nolle prosequi* in 2006 as against the offering of no evidence, which occurred three years later. She was then prepared to accept 2009 as when the matter was brought to a determination in favour of the respondent and thus found that this paved the way for the malicious prosecution and the false imprisonment claims.

[42] The question of when the matter was determined in favour of the respondent was only relevant for the malicious prosecution claim. It is well settled that a claimant is required to prove the following ingredients in a malicious prosecution claim:

> a) that the proceedings were instituted or set in motion against the claimant on a charge of a criminal offence;
>
> b) that the proceedings were determined in favour of the claimant;
>
> c) that the proceedings were commenced without reasonable or probable cause;
>
> d) that the institution of the prosecution was done maliciously;
>
> e) that the claimant suffered damage.

[43] The requirement that the matter was determined in the claimant's favour is accepted to mean, not that there is judicial determination of innocence, but, that there is no judicial determination of guilt. The editors of **Clerk and Lindsdell on Tort**, in discussing this matter at paragraph 15-19 of the 17th edition, made the following comments:

> "So long as proceedings are pending no action lies on the ground that they have been wrongfully instituted...It must appear that the proceedings were brought to a 'legal end'... The end; however, need not be a final and conclusive one."

[44] The constitutional power of the Director of Public Prosecutions to discontinue, at any stage before judgment is delivered, any criminal proceedings instituted or

undertaken by himself or any other person or authority, is very wide (see section 94(3)(c)). The power to enter a *nolle prosequi* is codified by statute. Section 4 of the Criminal Justice (Administration) Act provides inter alia:

> "It shall be lawful for the Director of Public Prosecutions or for the Deputy Director of Public Prosecutions by his direction in writing, in any criminal proceedings whatever before Justices, or before any court having criminal jurisdiction at any time, and whether the person accused has been committed or bound over for trial or not, to enter a *nolle prosequi* to such proceedings, by stating in open Court to such Justice or Court where the proceedings are pending, or by whom the accused has been committed or bound over for trial, or by informing in writing the Clerk or other proper officer, of such Justice or Court that the Crown intends not to continue such proceedings, and thereupon the proceedings shall be at an end."

[45] It would seem to me that the wording of the legislation makes it clear that the entry of a *nolle prosequi* is one means by which proceedings are brought to a legal end. This entry can therefore be regarded as one means by which proceedings are determined in favour of a claimant.

[46] Having appreciated the effect of the entry of the *nolle prosequi*, the master posited the following questions:

> "Did the nolle prosequi bring a final end to the determination of the matter? Was the matter finally concluded in the claimant's favour? Was she in danger of having been brought back before the court on the same charge?"

[47] The master, to my mind, fell into error when she brought into consideration questions of this nature. There was no need for there to have been a "final end" or for the matter to have been "finally concluded". What was required was that the matter was determined in favour of the respondent. The *nolle prosequi* which was entered clearly stated, "the Crown does not intend to continue the proceedings against [the respondent] on the aforementioned charges". There was no indication that the matter would commence *de novo* if the respondent did not appear as a witness for the prosecution although it was stated that the *nolle prosequi* was entered solely for that reason.

[48] It is unfortunate that, as the respondent asserted in her affidavit, she was advised that the halting of the prosecution against her in 2006 was of no bearing to these proceedings, as the Director of Public Prosecutions could have opted to resume prosecuting her at any time. Once the *nolle prosequi* was entered, the respondent was at liberty to commence her claim as the entry represented a determination in her favour.

[49] It is useful to note that whatever doubts may have been entertained ought to have been allayed when the Director of Public Prosecutions wrote the letter in February 2008 indicating that the respondent was a witness and not an accused before the court. In any event, the offering of no evidence would only have been conclusive if a formal verdict of not guilty was thereafter entered on the indictment that would have had to be preferred. There is no indication that this was done.

[50] The question the master had to resolve was at what point facts existed establishing all the relevant ingredients for the claim of malicious prosecution. The earliest time would have been in 2006 when the *nolle prosequi* was entered. Time began to run at that point. The offering of no evidence may well be viewed as yet another point where time began to run however for the purposes of calculating the date from which time began to run for limitation purposes it is the earliest time at which action would be brought that was relevant. The master therefore erred when she determined that this was a matter which ought to properly be resolved at a trial.

[51] It has already been noted that the master decided that the entry of the *nolle prosequi* was relevant to the cause of action of false imprisonment. This conclusion seems to have been arrived at by the accepting of the respondent's assertion that the claim for the several torts could not run until 2009 when the matters for which she had been charged were resolved in her favour.

[52] The tort of false imprisonment arises where there is the complete restraint and deprivation of one's liberty, however short, without lawful justification. The tort is complete when the restraint or detention of the person ceases.

[53] In the instant case, there is no dispute that the respondent was in the custody of the police for three days in 2005. The actions giving rise to the claim for false imprisonment were complete in 2005. Any claim arising out of this action ought to have commenced within the six years following this event. This claim was independent of any claim relying on a determination of the matter in favour of the claimant. The

master fell into error when she linked the action for malicious prosecution with that for false imprisonment, thus concluding that the latter was not statute barred.

[54] The respondent alleged negligence on the part of the members of the Jamaica Constabulary Force for the manner in which she was arrested, charged and prosecuted for over four years by the Crown. It is undisputed that the arrest and charge of the respondent occurred in 2005. The clear terms of the *nolle prosequi* were sufficient to indicate that the proceedings were brought to an end in 2006. There was no need for any consideration of whether the matter had come to a "final end" for the purposes of determining whether the claim in negligence could have been brought.

[55] The master did not consider specifically the issue of whether the claim of negligence had in fact been brought within the time for commencing such an action. She focused her consideration on whether the police in fact owed a duty of care to the respondent in the exercise of their duties. She decided that a trial would be best for such a determination to be made. The master ought to have considered the question of the limitation period for bringing the claim in negligence before determining that the matter was best resolved at trial.

[56] As far as the claim for negligence in the arrest and charge of the respondent was concerned, the limitation period would have commenced from the time the acts complained of occurred, which was clearly in 2005. The respondent was not prosecuted for four years from 2005 to 2009. At the most, the prosecution would have lasted from the time the matter was first before the courts to the time there was an

indication that the Crown did not intend to continue the proceedings. This would have been when the *nolle prosequi* was entered in 2006.

Conclusion

[57] This court has discussed and distilled, in several cases, the factors which will guide it in determining whether to interfere with a judge's exercise of discretion (see for example, **Attorney General of Jamaica v John McKay** [2012] JMCA App 1; **Consetta Edwards et al v Joan Valentine et al** [2012] JMCA Civ 61, and **Peter Hargitay v Ricco Gartmann** [2015] JMCA App 44).

[58] In **Consetta Edwards et al v Joan Valentine et al**, Phillips JA usefully summed up the matter as follows:

> "[39].....It is clear therefore that this court will only interfere with the exercise of the decision of the judge sitting in the court below, if he has not considered relevant material or has considered irrelevant material, or has failed to apply the correct principles or his decision was just plainly wrong."

[59] In the instant case, the learned master identified the correct principles applicable to the matter before her. She was however plainly wrong in failing to appreciate that each cause of action in the claim had to be considered separately in determining if the particular action was statute barred. In so doing, she fell into error in deciding that the claims for false imprisonment and negligence had been commenced within the period set by statute for commencement. Further, the manner in which she treated the entry of the *nolle prosequi* was based on a misunderstanding of the fact that such an entry

was sufficient as a determination in favour of the respondent and the time that it was entered was the time when the claim for malicious prosecution commenced. Ultimately, the master erred in concluding that the entire claim was not statute barred.

[60] I would therefore uphold the appeal and order that the decision of Master Harris of 16 March 2016 be set aside. Further, the claim should be struck out. Costs of this appeal to the appellant to be agreed or taxed.

MORRISON P

ORDER

Appeal allowed. The decision of Master Harris of 16 March 2016 is set aside. The claim is struck out. Costs of the appeal to the appellant to be agreed or taxed.