THE COURT OF APPEAL

CIVIL

[2024] IECA 23

Court of Appeal Record Number: 2023/207

High Court Record Number: 2010 No. 7478P

Costello J.
Allen J.
O'Moore J.

BETWEEN/

CATHERINE SHEEHAN

PLAINTIFF/
APPELLANT

- AND -

CORK COUNTY COUNCIL

DEFENDANT/
RESPONDENT

JUDGMENT (*ex tempore*) of Ms. Justice Costello delivered on the 22nd day of January 2024

1. For the reasons given in a written judgment on 13 February 2023 ([2023] IEHC 46) Simons J. in the High Court found that these proceedings should be dismissed on the grounds of inordinate and inexcusable delay. The case was listed thereafter on 28 February 2023 to address the questions of costs and on that date Ms. Sheehan *("the appellant")* indicated that she was seeking to set aside the principal judgment. On 7 June 2023 Simons J. delivered a further written judgment ([2023] IEHC 295) where he held that

the appellant had failed to establish that there were grounds for setting aside the principal judgment. On 17 July 2023 the High Court ordered the appellant to pay Cork County Council's *("the respondent")* costs of the motion and of the application to set aside the principal judgment. The appellant, who is acting as a litigant in person, appealed the two decisions of the High Court. This is my judgment in respect of the appeal.

Background

2. The appellant was and is an employee of the respondent. She instituted personal injuries proceedings on 6 August 2010 alleging that she endured significant emotional suffering as a result of a flawed disciplinary investigation carried out by the respondent between March 2006 and May 2008 which resulted in personal injury for which she sought damages by way of compensation. The trial judge set out the key events in the chronology in tabular form in para. 10 of the principal judgment which I reproduce here for convenience:

CHRONOLOGY

April / May 2006	Disciplinary investigation commences
28 April 2008	Letter setting out findings sent to appellant
6 May 2008	Appellant absent from work on "*stress leave*"
4 August 2009	Appellant returns to work
6 August 2010	Personal injuries summons issued
25 August 2010	Appearance entered by respondent
7 October 2010	Respondent's notice for particulars
27 May 2011	Replies to notice for particulars
28 September 2011	Order extending time for delivery of defence
7 November 2011	Defence delivered
9 April 2013	Respondent's motion for discovery
4 June 2013	Order for discovery against appellant
27 August 2013	Notice of trial served by respondent

27 September 2013	Appellant's affidavit of discovery
9 October 2013	Appellant's supplemental affidavit of discovery
2 March 2017	Respondent's motion re: expert reports
31 March 2017	Schedule of witnesses delivered by appellant
3 April 2017	Motion re: expert reports struck out
11 September 2018	Notice of change of solicitor on behalf of appellant
17 December 2021	Respondent files motion to dismiss proceedings
21 March 2022	Order allowing appellant's solicitor to come off record
30 January 2023	Hearing of motion to dismiss proceedings

3. The proceedings were ready for trial by October 2013. As Simons J. observed, but for the delay on the part of the appellant, *"it might have been anticipated that the action would have been heard within twelve months of that date."*

4. The respondent's application to dismiss the claim for inordinate and inexcusable delay issued on 14 November 2021. The appellant filed a replying affidavit sworn on 22 April 2022. On 12 May 2022 the motion was assigned a hearing date of 30 January 2023. This afforded the parties eight months to prepare for the hearing. The motion was heard on 30 January 2023. In accordance with the standard practice, the moving party, the respondent, lodged papers in the List Room on the Thursday preceding the scheduled hearing date to enable the judge assigned to hear the matter read the papers in advance. The booklet lodged by the respondent was incomplete and omitted the respondent's notice of motion and grounding affidavit. However, the booklet included the affidavit filed by the appellant in response to the motion.

5. Simons J. realised on the Friday preceding the hearing that the papers were incomplete and arranged to take up the case file from the Central Office of the High Court. The case file included the documents filed by both sides during the course of the proceedings, commencing with the appellant's personal injury summons.

6. At the hearing of 30 January 2023 counsel for the respondent indicated that a further error had occurred in preparing the booklet of papers for the court in that a notice of tender had been included in the booklet filed by the respondent which ought not to have been included. This was removed unread by the trial judge from the papers. The inclusion of the notice of tender was brought to the attention of the trial judge by counsel. The judge indicated that if either party was uncomfortable with him dealing with the matter because he had seen the notice of tender, he would not do so. He carefully explained to the appellant the significance of the error and said that if she wished, he would arrange for a different judge to hear the case. Both sides confirmed that they did not wish him to do so.

7. Then counsel for the respondent handed in a core booklet which contained the papers in the application to dismiss together with the motion papers and the order made on an earlier application by the appellant's solicitor to come off record. A copy of the core booklet was given to the appellant. The appellant then handed into the court in loose format copies of the exhibits to her replying affidavit. Simons J. explained in his supplemental judgment, that a copy of the exhibits had been included in the respondent's core booklet but did not form part of the Central Office case file.

8. Counsel for the respondent did not prepare written submissions and none were handed up or relied upon during the hearing. Counsel relied solely on oral submissions. Counsel referred to case law and copies of the cases were provided to the appellant during the hearing. The trial judge reserved judgment and delivered a written judgment on 13 February 2023 *("the principal judgment").*

The principal judgment

9. The High Court set out the nature of the proceedings and the key events in the chronology as I have set out above. The trial judge identified the legal principles governing applications to dismiss proceedings on the grounds of inordinate and

inexcusable delay, referring to the leading judgment of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and the more recent decisions of this court in *Sweeney v. Keating* [2019] IECA 43, *Gibbons v. N6 (Construction) Limited* [2022] IECA 112 and *Cave Projects Limited v. Kelly* [2022] IECA 245. He identified that the court must address three issues in sequence:

> *"(1) has there been inordinate delay;*
>
> *(2) has the delay been inexcusable; and*
>
> *(3) if the answer to the first two questions is in the affirmative, it then becomes necessary to consider whether the balance of justice is in favour of or against allowing the case to proceed."*

10. He noted that the judgment of Collins J. in *Cave Projects* reiterated that an order dismissing proceedings should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed. He quoted from para. 36 of the judgment:

> *"The court's assessment of the balance of justice does not involve a free-floating inquiry divorced from the delay that has been established. The nature and extent of the delay is a critical consideration in the balance of justice. Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. A defendant cannot rely on matters which do not result from the plaintiff's delay."*

11. Collins J. concluded at para. 37 stating:

> *"…All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances,*

it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant."

12. Simons J. stated that he was applying these principles to the application before him.

13. He found that there was inordinate and inexcusable delay and he noted that the appellant had conceded on affidavit and again at the hearing of the motion that the delay was both inordinate and inexcusable. He then proceeded to consider the balance of justice.

14. He noted that the proceedings were ready for trial by October 2013 and, had the appellant set the proceedings down for trial, it might have been anticipated that the action would be heard within twelve months of that date. At the time of writing, he said it was unlikely that the trial could take place until the end of 2023 so that the additional delay of eight to nine years must be assessed.

15. He then addressed the factors in favour of dismissing the proceedings. First, he said, the capacity of the court of trial to adjudicate fairly on the claim had been compromised by the delay. It would be necessary for the trial judge to examine events which occurred during the period 2006 to 2008 where the outcome of the proceedings would turn, in large part, on oral evidence. He said that the court was entitled to take judicial notice of the fact that the recollection of witnesses fades over time and the ability of witnesses to recall events some fifteen years ago will be limited. The quality of any trial which would now take place would be *"inferior"* to that which would have taken place in 2014 but for the inordinate and inexcusable delay on the part of the appellant.

16. Secondly, he held that the respondent's ability to defend the proceedings was further prejudiced by the fact that one of the key protagonists, the former personnel officer, was at that time retired and was not in good health.

17. On the other side of the scales, he accepted that to dismiss the proceedings without any adjudication one way or the other on the merits of the claim would deprive the

appellant of the opportunity to pursue a claim for damages for personal injuries. While he accepted that this engaged the appellant's constitutional right to litigate, he held:

> *"However, the right to litigate is not absolute: it must be balanced against other rights, including, relevantly, the right of defence. This is reflected, in part, by the imposition of limitation periods. It also underlies the inherent jurisdiction to dismiss proceedings on the grounds of delay."*

18. He acknowledged that the loss to a plaintiff of the opportunity to pursue a claim for damages is a significant detriment but held *"it does not automatically trump the countervailing rights of a defendant."*

19. At para. 23 he held:

> *"A defendant does not have to establish that it will be impossible for him to have a fair trial in order for the proceedings to be dismissed in circumstances where a plaintiff is responsible for inordinate and inexcusable delay. More moderate prejudice may tip the balance of justice against allowing the proceedings to continue. Whether moderate prejudice will warrant the dismissal of a given claim, or whether something more serious must be established, will depend on all of the circumstances, including the nature and extent of the delay involved, the nature of the claim and of the defence to it and the conduct of the defendant (Cave Projects Ltd v. Kelly* [2022] IECA 245 *(at paragraph 36))."*

20. His decision was set out in paras. 25 and 26 as follows:

> *"25. Here, the plaintiff has had more than ample opportunity to pursue her claim for personal injuries. The plaintiff had the benefit of professional legal representation and her claim had been ready for hearing by October 2013. For reasons which have never been properly explained, the plaintiff did not pursue the matter to hearing and ceased to provide instructions to her then solicitor. The plaintiff was expressly*

warned, as early as February 2020, of the risk that the defendant would seek to strike out the proceedings for want of prosecution. Despite all of this, the plaintiff took no steps to bring the action on for hearing. Even now, the plaintiff has not indicated any intention to take such steps.

26. The balance of justice points firmly to the dismissal of the proceedings. The operative delay has compromised the capacity of the court of trial to adjudicate fairly on the personal injuries claim for the reasons explained at paragraphs 18 to 21 above. The plaintiff only has herself to blame for the loss of the opportunity to pursue her claim."

Events post 13 February 2023

21. The appellant was informed that the matter would be listed before Simons J. to decide the issue of costs on 28 February 2023. On that occasion the appellant argued that she had not been provided with material presented to the court by the other side prior to the hearing or given a right to respond. She indicated that she was seeking to set aside the principal judgment. In order to identify the specific documents which the appellant said she did not have at the time of the hearing and the nature of the additional submissions which the appellant would have made had those documents been available to her, Simons J. directed the respondent to provide the appellant with a tabbed, indexed booklet containing a full set of the pleadings in the proceedings. He directed the appellant to file a written submission within four weeks explaining what additional arguments, if any, she would have advanced at the hearing if the (supposedly) missing documents had been available to her.

22. The appellant chose not to do so. When the proceedings were again listed before Simons J. on 17 April 2023 she was given a further opportunity to file her written submission along the lines directed on 28 February 2023. She filed a written submission

within the four week period allowed which did not address the issues identified by Simons J. but rather addressed the principles of law applicable to applications to dismiss proceedings on the grounds of delay generally.

23. The hearing to revisit/review the principal judgment took place on 18 May 2023. Simons J. reserved his judgment and delivered a written judgment on 7 June 2023 rejecting the application. In his review judgment, Simons J. set out the procedural history of the application and the exceptional jurisdiction of a court, particularly a court of first instance, to revisit or review its judgment. He referred to *Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514 and *Student Transport Scheme Ltd. v. Minister for Education and Skills* [2021] IESC 35. The latter established that the party seeking to have a final order set aside must clearly establish a fundamental denial of justice against which no other remedy, such as appeal, is available and secondly, that the exceptional jurisdiction does not exist to allow a party to reargue an issue already determined. He noted that the Court of Appeal had confirmed in *Bailey v Commissioner of An Garda Síochána* [2018] IECA 63 that a court of first instance has jurisdiction, prior to the order envisaged by the judgment having been drawn up and perfected, to revisit an issue decided in a written judgment. The High Court must be satisfied that there are *"exceptional circumstances"* or *"strong reasons"* which warrant it doing so. He noted that the principles were usefully summarised in the judgment of McDonald J. in *HKR Middle East Architects Engineering LLC v. English* [2021] IEHC 376. He observed that between the extremes of correcting a minor, peripheral mistake, on the one hand, and an obvious and very serious error which would inevitably result in a successful appeal and remittal to the court of first instance for rehearing, on the other, an aggrieved party will normally be expected to avail of their right of appeal rather than seeking to have the judgment revisited by the court of first instance. He stated that the limitations on the jurisdiction to reopen a first instance judgment are not designed to deny

an aggrieved party a remedy; rather they simply restrict the remedy, in most cases, to a right of appeal.

24. He then addressed the various arguments advanced by the appellant to set aside the principal judgment. Her initial application was based on the argument that the proceedings had been determined by reference to documents which were not available to her at the time of the hearing on 30 January 2023. Despite having been invited to do so, she had failed to identify any such document. Simons J. noted that the booklet of pleadings lodged in the List Room on the Thursday before the motion was listed for hearing on Monday 30 January 2023 omitted the respondent's notice of motion and grounding affidavit. However, as the appellant had filed an affidavit in response to the motion and grounding affidavit in April 2022, it was clear that she had received these documents well in advance of the hearing of the motion.

25. Simons J. explained how he had obtained the case file from the Central Office of the High Court to ensure that he could read a complete set of the motion papers in advance of the hearing. He describes how a notice of tender had been inserted in error into the booklet which had been lodged in the List Room but that he had not read the notice and it was removed from the papers furnished to him.

26. He referred to the fact that at the commencement of the hearing, counsel for the respondent handed in a core booklet containing the motion papers together with the motion papers in respect of the appellant's then solicitor's application to come off record. He said that the digital audio recording of the hearing confirmed that a copy of the core booklet was given to the appellant.

27. He referred to the fact that the appellant had handed into court, in loose format, the originals of the exhibits to her replying affidavit and that a copy of the exhibits had been included as part of the core booklet. He confirmed that counsel for the respondent had

read aloud passages from the respondent's grounding affidavit which set out the key dates in the chronology of the proceedings.

28. He concluded, at para. 27, that having regard to this procedural history, there was no basis for the objection made by the appellant that she had been somehow taken by surprise at the hearing on 30 January 2023. The grounding affidavit set out the key dates in the chronology of the proceedings and it was clear that the appellant had had a copy of the affidavit as she had filed a replying affidavit, and she did not dispute the accuracy of any part of the chronology. He noted that she had expressly accepted that the delay in the proceedings had been both inordinate and inexcusable.

29. He held that the appellant was not put at any disadvantage by the fact that the court had reviewed the case file in advance of the hearing and that her concerns in this regard were entirely misplaced. It was simply incorrect to suppose that he thereby viewed material which had not also been furnished to her (or her solicitors).

30. The judge likewise rejected the appellant's complaint that she had not had the opportunity prior to the hearing on 30 January 2023 to hand into court the exhibits to her affidavit. The exhibits were included as part of the booklet of motion papers handed in by the respondent at the hearing of 30 January 2023 and a second set was handed in by the appellant herself. The trial judge said that the exhibits were thus before him at the time he prepared his reserved judgment.

31. He then addressed the appellant's further complaint that she did not have an opportunity to present case law at the hearing. On the review application, the appellant had filed a written submission setting out a detailed summary of case law on the dismissal of proceedings for delay, but she did not explain her failure to refer to this case law at the hearing on 30 January 2023 in circumstances where the hearing date had been fixed on 12 May 2022 and she had a period of eight months to prepare for the hearing. Furthermore,

the appellant did not argue by reference to the case law upon which she belatedly relied that the principal judgment was wrongly decided. At para. 32 Simons J. held:

> *"The outcome of the application to dismiss turned, instead, on whether or not the balance of justice lay in favour of the dismissal of the proceedings. In this regard, the principal judgment applies the approach set out in detail by the Court of Appeal in* Cave Projects Ltd v. Kelly *[2022] IECA 245. This approach is as generous to a claimant as that in any of the earlier case law now relied upon by the [appellant]. The outcome of the application to dismiss would have been precisely the same even had this earlier case law been cited. There is nothing in that case law which is more favourable to the [appellant] than the judgment of the Court of Appeal."*

32. Simons J. distinguished the instant case from the two authorities the appellant sought to rely on. In *Naudziunas v. OKR Group* [2020] IEHC 566 – in contrast to this case – the court actually held that the delay was excusable. The second case was *Peakovic v. Ford Motor Company of Canada*, 2019 ONSC 6763, a decision of the Superior Court of Justice of Ontario, where the issues of delay are dealt with under very different procedural laws. The Ontario Superior Court held that there had been an acceptable explanation for the delay, yet it nonetheless dismissed the proceedings. Simons J. observed that given the radically different nature of the legal frameworks, the judgment was of little assistance and that there was no similarity between the circumstances of that case and those of the present case.

33. He concluded that the appellant had failed to establish that the hearing of the motion to dismiss the proceedings was unfair, still less that it involved a fundamental denial of justice against which no other remedy, such as appeal, is available. He held that there was no reasonable basis for suggesting that the appellant was taken by surprise at the hearing of the motion to dismiss. Insofar as the appellant sought belatedly to rely on the case law

cited in her written submission of May 2023, no justification had been offered as to why she could not have done so at the hearing on 30 January 2023. Moreover, the appellant had not sought to suggest, by reference to this case law, that the principal judgment was wrongly decided and accordingly the application to set aside the principal judgment was refused.

Notice of appeal

34. By her notice of appeal the appellant claims that she has been denied her right to a fair trial as guaranteed by Article 38.1 of the Constitution and Article 6 of the Irish Human Rights and Equality Commission Act 2014 – which I take as a reference to the right to a fair trial set out in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – because, prior to the hearing, she was not furnished with copies of the documents presented by the respondent or with copies of the case law it intended to rely upon. She argues that prior to the hearing on 30 January 2023 the respondent should have provided her with a copy of the documents it submitted to the court to facilitate her right of reply and her preparation for the hearing. She also complained that the exhibits were not seen by the judge in advance of the hearing.

The appellant's written submissions

35. By her written submissions the appellant contends that she was not afforded fair procedures on 30 January 2023. First, it is said, the principle of *audi alteram partem* was not adhered to as the appellant was not provided with *"a copy of the Respondent's submissions prior to the hearing and therefore not afforded the right of reply"*. Secondly, it is said that the hearing of 30 January 2023 breached the principle *nemo iudex in causa sua "in such circumstances where the Appellant wasn't copied [with] the Respondent's submissions prior to [the] hearing date and therefore deprived [her] of the right to respond, contribute to the Chronology submitted and submit copies supporting and where*

this had occurred the hearing then in consequence, was held in terms of the Respondent's narrative, grounding and chronology."

36. She also requested the court set aside the review judgment on the basis that Simons J. in effect carried out a *de facto* appeal hearing of his own judgment of 30 January 2023 and thus infringed the maxim of *nemo iudex in causa sua*.

37. In oral submissions the appellant emphasised that she was entitled to her good name and the courts were required to observe the principles of natural justice to ensure that her good name was vindicated. She said that she was not informed that the judgment Simons J. delivered after the hearing on 30 January 2023 would be published before the question of costs was resolved or that it had been published after it was uploaded onto the courts' website. This resulted in a discussion of the case in the *Echo* online publication which, she said, affected her good name.

38. She reiterated that she had not been provided with the small booklet in advance of the hearing which was handed into the trial judge. She said that she was entitled to be provided with a copy of this booklet in advance of the hearing of the motion in order to vindicate her right to respond to the respondent's submissions. She acknowledged that Simons J. ensured that she was provided with copies of the two authorities upon which the respondent's counsel relied. She complained that the trial judge referred to other cases and that this provided the respondent with an unfair advantage at the review hearing and especially on this appeal.

39. The written submissions filed on behalf of the respondent identify the five complaints advanced by the appellant as follows:

(a) The appellant believes that the respondent *"submitted documents to the Court" "prior to the hearing on 30th January 2023"* and these were not copied to her.

(b) The appellant asserts that she was prevented from replying to these documents and this impacted on her *"preparation for [the] hearing"*.

(c) The appellant also refers to exhibits to her affidavit dated 22 April 2022 having *"not been seen by [the] Judge"*.

(d) More generally, the appellant alleges that she was *"not provided fair procedures with reference to the hearing on 30 January 2023 both in terms of* audi alteram partem *(hear the other side) and* nemo iudex in causa sua *(no one can be a judge in his case[])]"*.

(e) The claim relating to *nemo iudex in causa sua* relates to the allegation that *"Judge Simons in effect carried out a de facto appeal hearing, on his own 30 January judgment and also in circumstances that the Appellant was not aware of this and believed, in good faith, that it was a continuation of the original 30 January hearing."*

Discussion

40. I shall deal with the question of the appeal from the review judgment of 7 June 2023 first. The trial judge correctly identified the relevant principles, and the appellant does not suggest otherwise in either her notice of appeal or her written or oral submissions. Accordingly, it is not necessary to repeat what Simons J. set out in that judgment. He engaged with the test referred to in *Student Transport Scheme* and concluded that there were no reasonable grounds for reopening his judgment and that the high threshold had not been met: the appellant had failed to establish that there had been a fundamental denial of justice against which no other remedy was available.

41. There is no evidence that the respondent submitted documents to the court prior to the hearing on 30 January 2023 which had not been copied to her previously. She clearly had been furnished with the notice of motion and grounding affidavit as she furnished a

replying affidavit. The appellant does not contend that she was not furnished with the notice of motion by her former solicitor to come off record, together with the grounding affidavit supporting that application, which were included in the core booklet presented to Simons J. on 30 January 2023. When asked to do so by Simons J. and this court, she could identify no document which was submitted to the court prior to the hearing of 30 January 2023 which had not previously been furnished to her. She confirmed that she had not opened the parcel from the respondent furnishing her with copies of all of the documents in the proceedings which Simons J. had directed should be provided to her to enable her to identify any such document. Her explanation for failing to open and consider the full set of papers was that it would affect her ability to appeal. Specifically, the respondent did not prepare a separate document setting out the chronology which was handed into court in advance of the hearing, as she had originally asserted. As Simons J. confirmed, he prepared the chronology himself from the narrative in the grounding affidavit.

42. In the circumstances, the trial judge was correct to reject this argument as a basis for reviewing his principal judgment. It also follows that the appellant's assertion that she was prevented from replying to these documents has no basis and accordingly could not logically have impacted upon her *"preparation for [the] hearing"*.

43. The appellant labours under the mistaken belief that the exhibits to her affidavit dated 22 April 2022 were not seen by the judge because the original exhibits were not furnished in advance to the trial judge. She herself handed them into court on 30 January 2023 and copies of them were included in the core book prepared by the respondent's solicitors which was furnished on 30 January 2023 to both Simons J. and the appellant. Thus, as confirmed by Simons J., he had the exhibits to the appellant's affidavit both at the hearing of the motion and when he was preparing his reserved judgment. It was thus open to the appellant to refer to those exhibits at the hearing on 30 January 2023 had she chosen

to do so. There is no question of a breach of fair procedures in relation to her exhibits or any arguments she wished to advance by reference to the exhibits.

44. The respondent did not prepare written legal submissions or a booklet of authorities in advance of the hearing. It follows that they were not furnished to the trial judge in advance of the hearing. Insofar as the appellant claims that she was not afforded a fair hearing because she was not furnished with copies of the authorities upon which the respondent intended to rely in advance of the hearing, this is not a case which she made on 30 January 2023. She was then furnished with copies of the authorities and had the opportunity to make submissions in respect of them. Had she wished, it would have been open to her to request that the matter be adjourned to afford her an opportunity to consider the authorities, but she chose not to do so. Simons J. specifically invited her to address the central issues regarding prejudice and she did so. It follows that she had the opportunity to make submissions and she was heard.

45. The appellant appears not to have prepared legal submissions or legal authorities in advance of the hearing on 30 January 2023. She prepared submissions in May 2023 addressing the law concerning the dismissal of cases on the grounds of delay, but she did not explain why she did not do so prior to the hearing on 30 January 2023. A scrutiny of the transcript of the digital audio recording of the hearing of 30 January shows that it is simply incorrect to say that she was not afforded the opportunity to make legal submissions on that date.

46. At the hearing on 18 May 2023 the appellant did not identify any document which she had not been provided with prior to the hearing on 30 January 2023 and she did not identify any argument that was not available to her at the hearing by reason of any document not being available to her.

47. In my opinion, the appellant has failed to identify any want of fairness in the hearing on 30 January 2023 such as would have engaged the exceptional *HKR Middle East Architects* jurisdiction before a court of first instance to review its decision.

48. The appellant's submission that Simons J. infringed the maxim *nemo iudex in causa sua* when reviewing his judgment of 30 January 2023 is misconceived. She had invited the judge to revisit or review his judgment and accordingly he was required to engage in precisely the exercise he engaged in. Given the nature of the application, no other judge could review the decision of 30 January 2023 (outside of the appeal process). This ground of appeal is without merit.

49. It follows in my judgment that the appeal in respect of the review judgment is without merit and should be rejected.

The appeal in respect of the principal judgment

50. There remains the question whether the trial judge erred in his judgment of 30 January 2023 in dismissing the proceedings on the grounds of delay. This was not really addressed in the notice of appeal. In her written submissions, the appellant addresses the principles applicable to the dismissal of proceedings on the grounds of delay, but she does not relate the statements of principle to the facts of her case. They remain untethered from the facts in this case. She does not suggest that the judgment was wrongly decided; rather, she wishes for a different result. However, this court in conducting this appeal, does not conduct a rehearing of the case before the High Court. It conducts a review. In my judgment, Simons J. correctly identified the principles and applied them appropriately.

51. As regards the authorities relied upon by Simons J., it was entirely appropriate for him to set out the leading authorities and the principles applicable to the application before him. The authorities are well known and the passages from *Primor* and *Cave Projects* are regularly cited. They are easily discoverable by even a very basic legal search on the issue

of delay. As the appellant has already shown, she was more than capable of finding authorities relevant to the arguments she wished to advance. The principles were those upon which Simons J. was required to decide the application before him even if neither side had specifically relied upon them. In my judgment there is no merit in the suggestion that he acted in any way improperly in referring to, quoting from and relying on decisions of the Supreme Court and Court of Appeal which were binding upon him. I would reject this ground of appeal.

52. It was accepted by the appellant that the delay had been both inordinate and inexcusable. She advanced no explanation for the failure to bring the case to trial since October 2013. The affidavit sworn by her solicitor on 8 March 2022 seeking leave to come off record sets out in detail the difficulty the solicitor had in obtaining instructions from the appellant. The solicitor states that she started having difficulties obtaining instructions in or around early 2015 and she sets out her attempts to contact the appellant by telephone and by letter from October 2015 through to 2016 until an unsuccessful mediation occurred on 6 November 2017. She said that since the mediation she had *"significant difficulty obtaining instructions"* from the appellant and she set out her telephone contacts and exhibited copies of the letters written in 2019 and 2020 requesting further instructions. Throughout March 2021 the solicitor advised the appellant that her firm would have no option but to apply to come off record and ultimately matters came to a head when the respondent served the motion seeking to strike out the claim for want of prosecution in January 2022. Notwithstanding this, the appellant failed to give clear instructions to her erstwhile solicitor and ultimately by order dated 21 May 2022 they were permitted to come off record, with no objection by the appellant.

53. In my judgment, the trial judge was correct to conclude that the appellant had more than ample opportunity to pursue her claim for personal injuries; she had the benefit of

professional legal representation and her claim had been ready for hearing by October 2013 and that for reasons which have never been properly explained she did not pursue the matter to hearing and ceased to provide instructions to her then solicitor. Her right to litigate was not absolute and it must be balanced against the right of the respondent to defend the claim. He held that the balance of justice pointed firmly to dismissal of the proceedings, given that the capacity of the court of trial to adjudicate fairly on the claim had been compromised by the delay, the recollection of witnesses of events necessarily fades over time (in this case the disputed events occurred some fifteen years ago), and that the respondent's ability to defend the proceedings was further prejudiced by the fact that one of the key protagonists was now retired and not in good health.

54. As regards the appellant's submissions appertaining to her right to her good name, justice is to be administered in public. The written judgments of the High Court, the Court of Appeal and the Supreme Court are routinely published online for all to see. This is a necessary element of the administration of justice in public. Litigants may not complain when a judgment is so published or thereafter reported in the press. In limited circumstances the court may direct the anonymisation of proceedings or that the proceedings be heard in camera, but these exceptions do not apply to these proceedings. Moreover, the transcript of 30 January 2023 shows that Simons J. then told the appellant that the judgment would be published on the Courts Service website. The appellant has no legitimate ground of complaint that the judgment was published online whether before or after the question of costs was finalised or that it was subsequently referred to in *Echo* online.

55. Clearly the question of a breach of the principle *nemo judex in causa sua* in respect of the hearing of 30 January 2023 cannot arise as Simons J. had no interest in the

proceedings so there was no *"causa sua"* precluding his hearing and deciding the application before him, as contended by the appellant.

56. In all the circumstances, I am satisfied that the trial judge correctly exercised his discretion to dismiss the proceedings on the grounds of inordinate and inexcusable delay. It is quite remarkable that nowhere in her eloquent and able submissions does the appellant actually say that he *"got it wrong"*.

Conclusion

57. For all of these reasons I would refuse the appeal and affirm the order of the High Court.

58. Allen J.: I agree.

59. O'Moore J.: I have listened carefully to the judgment delivered by Costello J. and I too agree.