

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

2 **CIVIL DIVISION**

3 **CAUSE NO. G 0270 of 2010**

4 Coram: Hall, J (Actg.)

5
6 **BETWEEN:**

7 **LUCY MARIETA HODGSON CUTHBERT ORTIZ**

8 **(SUING AS NEXT FRIEND OF MARIANO ANTONIO RUIZ ORTIZ)**

9 **PLAINTIFF**

10 **AND:**

11 **1) VALBOURNE ANTHONY WHYTE**
12 **FIRST DEFENDANT**

13 **2) SALT CREEK VENTURES LTD**
14 **SECOND DEFENDANT**

15 **3) M&R CONSTRUCTION LTD**
16 **THIRD DEFENDANT**

17 **4) LITA WATLER**
18 **T/A V&W CONSTRUCTION & REPAIRS**
19 **FOURTH DEFENDANT**

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24 **APPEARANCES:**

25 *Plaintiff represented by Ms Farrah Sbaiti instructed by Stuarts, Walker,*
26 *Hersant, Humphries*

27 *First and Third Defendants neither appearing nor represented*

28 *Second Defendant represented by Mr David Collier instructed by Ritch &*
29 *Conolly*

30 *Fourth Defendant represented by Mr Clyde Allen*



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REASONS FOR DECISION

By Summons filed September 27, 2016, the Second Defendant sought the following Orders:

- "1. The Writ and the Statement of Claim in this action be struck out in whole or in part and/or this action be dismissed pursuant to Order 18 r. 19 and Order 25 r. 3(b) of the Grand Court Rules and/or under the inherent jurisdiction of the Court on the grounds there has been an abuse of process in that:
 - i. There has been a prolonged and inordinate delay by the Plaintiff
 - ii. The delay is inexcusable; and
 - iii. The Second Defendant is likely to be seriously prejudiced by the delay or that there is a substantial risk that a fair trial cannot be had between the parties.
- 2. The Plaintiff do pay the Second Defendant's costs of and occasioned by this application and of these proceedings."

On November 4, 2016, I dismissed the Second Defendant's application and awarded costs to the Plaintiff.

The parties relied on affidavits filed by several attorneys who had been involved in this action in one capacity or the other.

Background

The following chronology of events is taken from the Plaintiff's submissions.

"This claim arises from an accident which occurred on 30 July 2007 at the Second Defendant's construction site. The Plaintiff was employed by the Fourth Defendant. In the course of his employment as a labourer on the site, he was assisting in the transport of a large bath tub which was placed on the back of the truck. The Plaintiff was also situated on the back of the truck, which was owned by the Second Defendant and being driven by the First Defendant. The First Defendant was employed by the Third Defendant."



1 It was alleged that the Plaintiff fell from the back of the truck, hitting his
2 head on the ground and sustaining serious brain injury. After treatment
3 for over three months in the United States of America, he returned to the
4 Cayman Islands and thereafter returned to his country of origin,
5 Nicaragua. Due to significant and severe brain damage which resulted
6 from the accident, the Plaintiff lacked capacity and as such his wife was
7 appointed his guardian and receiver over his affairs by Order of the Grand
8 Court dated April 22, 2010.

9 A Writ of Summons was issued on July 27, 2010 which set out the claim
10 in relation to each defendant. On November 30, 2011 the Grand Court
11 ordered that liability be heard as a preliminary issue and gave directions
12 thereon.

13 The following chronology of the documents filed in this matter is taken
14 from the Affidavit of Mr. Ward Sykes, attorney-at-law and filed October
15 11, 2016. Being employed to the main parent company, Mr. Sykes
16 presented evidence on behalf of the Second Defendant.

17 " the following documents have been filed and/or served in the
18 Proceedings to date:

- 19 i) Writ of Summons and Statement of Claim – 27 July 2010
- 20 ii) Defence of the Second Defendant – 30 August 2010
- 21 iii) Defence of Fourth Defendant – 30 August 2010
- 22 iv) Default Judgment against the First Defendant – 31 August 2010
- 23 v) Defence of Third Defendant – 20 September 2010
- 24 vi) Notice of Intention to Proceed – 23 March 2011
- 25 vii) Replies to Defences – 2 May 2011
- 26 viii) Amended Defence of the Second Defendant – 10 February 2012
- 27 ix) List of Documents Second Defendant – 10 February 2012
- 28 x) List of Documents Plaintiff – 4 August 2012
- 29 xi) List of Documents of Third Defendant – 25 October 2012
- 30 xii) Notice of Intention to Proceed – 16 January 2015
- 31 xiii) Notice of Intention to Proceed – 10 December 2015
- 32 xiv) Summons for Directions – 2 June 2016
- 33 xv) Summons to Strike out – 27 September 2016"



1 It is useful to examine another extract from the affidavit of Mr. Sykes at
2 this juncture.

3 "13. *Whilst limited correspondence has passed between the parties since*
4 *the inception of the Proceedings, I would ask the court to view such*
5 *correspondence in light of the following chronology:*

- 6
7 (i) *The accident occurred on 30 July 2007 (almost 9 years ago);*
8 *and*
9 (ii) *Proceedings were not commenced until 27 July 2010 (some*
10 *three days before the expiry of the relevant limitation period;*
11 (iii) *Following the service of Defences no meaningful activity*
12 *occurred until 23 March 2011 when the Plaintiff served a*
13 *Notice of intention to Proceed; and*
14 (iv) *Replies to Defences were not served until May 2011; and*
15 (v) *Directions were given in November 2011 which included an*
16 *order that the issue of liability be tried as a preliminary issue;*
17 *and*
18 (vi) *Lists of Documents were exchanged between 10 February*
19 *2012 and 25 October 2012; and*
20 (vii) *After the service of List of Documents no meaningful activity*
21 *occurred to progress the proceedings although the Plaintiff*
22 *served a second Notice of Intention to Proceed in January*
23 *2015; and*
24 (viii) *The Plaintiff again served a third Notice of Intention to*
25 *Proceed 11 months later in December 2015 because nothing*
26 *had been done to progress the Proceedings since the service*
27 *of the Second Notice of intention to Proceed."*

28 Citing the preamble to the Grand Court Rules, 1995, the Second
29 Defendant submitted that following the filing of the proceedings, the
30 Plaintiff ought to have prosecuted this action within the timeframe set out
31 under the Grand Court Rules. It was submitted that the Plaintiff should
32 have taken steps long before June 2016 to file and serve a further
33 summons for direction in order to progress the claim.

34 Reference was made to information provided by the Plaintiff that following
35 the Order for Directions made on November 30, 2011; the Plaintiff's focus
36 had been to obtain a medical report so as to prepare an assessment of
37 damages with a view to settling the matter. Additionally Counsel for the
38 Plaintiff claimed that in or around July or August 2013, "without
39 prejudice" telephone conversations took place with two attorneys from
40 the firm that represented the Second Defendant.

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1 In response to the suggestion that the Second Defendant had in any way
2 acquiesced or agreed to the delays in the prosecution of the matter
3 Counsel for the Second Defendant pointed to the affidavit of Mr. Ward
4 Sykes which stated that "*from the Second Defendant's perspective, it has*
5 *not agreed to any delays*". Counsel also cited Guinness Mahon Cayman
6 Trust Ltd v Washington International Bank and Trust Limited [1984-85
7 CILR 167] wherein it was stated:

8 *"the plaintiff was wrong in believing that the delay was excusable*
9 *on the ground that it was seeking a remedy elsewhere. It was for*
10 *the defendant, not the plaintiff, to decide whether a substantial*
11 *delay (bordering on the inordinate) in the determination of the*
12 *case was in the best interests of the defendant, and the evidence*
13 *showed that the delay had in fact had a serious adverse effect on*
14 *the business of the defendant bank. Since it had not acquiesced in*
15 *the delay, the bank was entitled to require that the action be*
16 *brought on for hearing*".

17 It was submitted on behalf of the Second Defendant that the reason
18 advanced on behalf of the Plaintiff for the failure to progress the matter
19 was wholly inadequate and that the delay was inexcusable. According to
20 Counsel, even if the "without prejudice" discussions took place in the
21 summer of 2013, thereafter the case was not progressed until June 2016
22 and during that period no further action took place save for two Notices of
23 Intention to Proceed being served but not acted on by the Plaintiff's
24 attorneys. It was submitted that it would be unreasonable to consider
25 those actions as acceptable evidence of the progression of the claim
26 and/or acquiescence on the part of the Second Defendant or any of the
27 other defendants.

28 It was the Second Defendant's contention that the Plaintiff had provided
29 no adequate or reasonable explanation for the failure to advance the
30 matter by way of Summons for Direction after the Order made in
31 November 2011. It was submitted that by flouting the procedural orders
32 made by the Court, the Plaintiff had "caused inordinate and inexcusable
33 delay and in and, of itself, prejudice".

34 The Second Defendant, through Counsel, challenged the explanation
35 proffered by the Plaintiff's attorneys wherein they asserted that the
36 Plaintiff's injuries meant that he could not provide instructions and further
37 that by virtue of his residence in Nicaragua they could not properly
38 engage a medical expert. It was submitted that these reasons were weak
39 and could not justify the prolonged delay. In particular, the Plaintiff's
40 disability/injuries could not be regarded as a special factor when
41 considering delay. It was also submitted that these difficulties had only
42 been recently raised.

43



1 Counsel also submitted that any arguments put forward by the Plaintiff
2 which sought to lay the fault of delay at the door of the Second Defendant
3 for not pursuing the matter, must fail. Counsel referred to correspondence
4 which suggested the Plaintiff had been treated badly by the Second
5 Defendant and that after receiving serious injury, he had been left in
6 Nicaragua without any resources. It was pointed out by the Second
7 Defendant that the decision for the Plaintiff to return to Nicaragua did not
8 involve the Second Defendant. Further, it was submitted that if it was
9 argued that the Plaintiff lacked resources, steps could have been taken on
10 his behalf by his Counsel to obtain interim relief.

11 The decision of Henderson, J in Derrick Powell et al v the Attorney
12 General Cause 3 of 1995 (Unreported Ruling dated 6 May 2005) was
13 quoted. It stated:

14 *"the obligation for moving a claim forward rests with the plaintiff,*
15 *always provided, of course, that the defendant does nothing*
16 *deliberate to obstruct or delay the proceedings."*

17 It was argued that the delay in progressing this action had caused serious
18 prejudice to the Second Defendant and had given rise to a substantial risk
19 that a fair trial will not be possible. It was submitted that the inference of
20 serious prejudice could properly be drawn from delay in and of itself.

21 It was pointed out that the Second Defendant had always denied liability.
22 Issues of contributory negligence had also been raised against the Plaintiff
23 and against the First Defendant. It was suggested that at the trial of the
24 action, disputed facts would have to be obtained from the oral testimony
25 of witnesses. It was argued that the significant period of time which had
26 elapsed since the accident to date, would significantly impact the
27 testimony of the witnesses. This would greatly reduce the chances of the
28 Second Defendant being able to receive a fair trial because of the
29 difficulties which the Grand Court would be faced with in trying to
30 determine what had happened from these witnesses. It was submitted
31 that the quality of their evidence would be greatly diminished.

32 According to Counsel for the Second Defendant, statements which were
33 taken by the police at the time of the accident do not deal in detail with
34 all the points which may become relevant at trial. It was also suggested
35 that the recollection of detail which may not have seemed relevant or
36 material; when the witness statements were given, and which may be
37 material, may now be completely lost due to the passage of time.

38 Counsel pointed out that one of the witnesses to the accident, one
39 Godfrey Lawrence, was no longer resident in the Cayman Islands and that
40 it may not be possible to trace him.

41



1 It was argued that the Second Defendant was prejudiced and unable to
2 obtain a fair trial by virtue of the fact of the limitations the delay had
3 caused in obtaining proper evidence from this witness and from other
4 potential witnesses at trial.

5 It was also argued that given the alleged seriousness of the injuries
6 suffered by the Plaintiff, the potential financial repercussions for the
7 Second Defendant were substantial. Medical evidence was crucial and the
8 lapse of time is likely to have rendered proper independent diagnosis and
9 the identification of suitable treatment plans much more difficult. All of
10 this "causing prejudice and increased risk as the possibility as to the
11 question of potential damages."

12 It was submitted that the Second Defendant was prejudiced at this point
13 in time from obtaining independent and reliable evidence on the Plaintiff's
14 pre-accident medical condition and his medical condition post-accident to
15 date.

16 It was suggested that the Second Defendant could suffer financial
17 detriment from the potentially increased value of the Plaintiff's claim
18 caused by the delay in prosecuting the action. The long delay may have
19 occasioned financial prejudice to the Second Defendant in that it may now
20 have to face an increased crystallized pre-trial loss. Had the case been
21 brought on earlier, the claim would have been part of the future loss and
22 subject to a discounted multiplier which would have reduced the claims
23 for damages and post-judgment interest.

24 Based on the foregoing it was submitted that the financial
25 detriment/prejudice from the increased value of the Plaintiff's potential
26 claim caused by the delay in prosecuting this action can be regarded as
27 serious prejudice.

28 Counsel for the Fourth Defendant supported the Second Defendant's
29 application.

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31 **The Plaintiff's Response**

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33 With reference to the application brought by the Second Defendant, it was
34 argued by the Plaintiff that any alleged delay could not be considered to
35 be inordinate when considering the circumstances and chronology of
36 events in this case. Any delay could not be viewed as inexcusable taken
37 against the factual background. Additionally, it was argued that the
38 Second Defendant had not identified either any specific prejudice at all
39 nor any particular prejudice which it faces as a result of an alleged period
40 of delay. It was argued that no substantive prejudice had been identified
41 at all.



1 When examining the issue of delay, Counsel for the Plaintiff identified
2 three relevant periods of time for consideration.

3
4 30 November 2011- 4 February 2014 (Period 1)

5 Following the Directions hearing on November 30, 2011, an Amended
6 Defence was served on February 10, 2012 and a discovery exercise
7 commenced. This continued until September 2013 largely, the Plaintiff
8 argued, due to the delay by the Third and Fourth Defendants in complying
9 with their disclosure obligations in an expeditious manner. An exchange of
10 witness evidence should have taken place by February 1, 2012 but this
11 date was affected by the discovery exercise.

12 The Plaintiff, was not in a position to give a statement and his Counsel
13 considered it best to attempt to focus on the determination of quantum.
14 In order to do this a medico-legal report was required concerning the
15 Plaintiff's injuries. It was alleged that Counsel for the Plaintiff entered into
16 detailed discussions with attorneys for the Second Defendant along these
17 lines. It was argued that this approach would defer the costly exercise of
18 obtaining and exchanging witness evidence. It was also argued that it
19 would be wasteful of costs to spend large sums of money and time
20 producing witness evidence as to liability when steps were being taken to
21 value the claim with a view to possibly reaching a settlement. It was
22 submitted that this approach had been eventually conveyed to all the
23 defendants.

24 Throughout this period it was alleged that the Third and Fourth
25 Defendants had still not been fully compliant in serving their Lists of
26 Documents. It was argued that for the parties to proceed to obtaining
27 witness evidence, the exchange of lists and inspection would need to have
28 been concluded.

29 Thereafter, of necessity, an extension in legal aid funding was sought and
30 granted on July 29, 2013 in order to cover work up to trial. The
31 defendants were collectively updated by Counsel on February 4, 2014 as
32 to the increase in legal aid funding and that he was in the process of
33 instructing a medical expert to assess the Plaintiff as had been discussed
34 with the Second Defendant's attorneys.

35 It was argued that there was no delay or inactivity on the part of the
36 Plaintiff during this period. Further, a clear approach had been outlined by
37 the Plaintiff, which was not objected to by any of the defendants.

38 It was stressed that at no time during this period did any of the
39 defendants complain about the deviation from the original directions
40 timetable.



1 Late February 2014 – 31 December 2015 (Period 2)

2 During this period of time, Counsel for the Plaintiff sought to identify an
3 expert and to instruct him to assess the Plaintiff and prepare a report.
4 There were many obstacles to this, not least because except for the
5 three-month period between December 2013 and March 2014, the
6 Plaintiff had left the Cayman Islands. In order to have him assessed,
7 extensive advanced planning was required because the Plaintiff was
8 incapacitated, could not travel alone, required supervision and was often
9 not well enough to travel. Great detail concerning this was provided in the
10 affidavit of Paul Murphy, attorney-at-law, filed on September 20, 2016.

11 Additionally the instructed neurosurgeon was not permanently based in
12 the Cayman Islands and was regularly out of the country. Counsel tried to
13 identify and instruct another neurosurgeon to expedite matters. The
14 logistical problems and cost to the Plaintiff's family as identified in the
15 affidavit of Paul Murphy are the basis for the assertion that while there
16 may have been delay during this period, it could not be viewed as being
17 inexcusable.

18
19 January 2016 – date (Period 3)

20 The Plaintiff returned to the Cayman Islands in December 2015.

21 During this third period, the attorney who previously had conduct of the
22 matter, Mr. Murphy left the Plaintiff's law firm and there was some
23 consideration about whether that firm should retain the matter.
24 Thereafter there were meetings to discuss the case with family members
25 and a decision was taken to have the Plaintiff examined by a Psychiatrist
26 as well as a Neurosurgeon. Dr. Marc Lockhart was instructed in April 2016
27 and he commenced his examinations of the Plaintiff during that month. A
28 completed medical report was served on the Second Defendant in
29 September 2016.

30 After failing in several attempts to contact the initially instructed expert
31 neurosurgeon, in April 2016 attempts were made to locate another
32 expert. The possibility of using an expert wholly based in the United
33 States, was not pursued when the difficulties of the Plaintiff meeting the
34 immigration requirements in order to travel and see that person were
35 considered. Thereafter Dr. Phillips a neurosurgeon based in the United
36 States but who visited as a practitioner to the Cayman Islands was
37 identified and instructed in June 2016. Firm arrangements were made for
38 the Plaintiff to be examined by Dr. Phillips in November 2016.

39 Additionally other medical records were obtained and reviewed from two
40 institutions in the Cayman Islands. Further, a summary was obtained
41 from the Plaintiff's doctor in Nicaragua but the actual records remain
42 outstanding. A request has been made of the doctor for these records.



1 There have been problems in the past about getting medical records from
2 the physicians in Nicaragua but Counsel for the Plaintiff was optimistic
3 that the relevant information would soon be obtained.

4 It was submitted on behalf of the Plaintiff that the foregoing showed that
5 significant progress had been made during this period.

6 The Plaintiff issued a summons for directions on June 3, 2016. According
7 to Counsel for the Plaintiff, it was three months after this that the Second
8 Defendant advised that it intended to take out the instant summons.

9 With respect to the representations made by the Second Defendant about
10 witnesses; Counsel for the Plaintiff submitted that the majority of the
11 witnesses who could be expected to give evidence are on the island.
12 Counsel emphasized that these include two witnesses who could be
13 considered to be the Second Defendant's key witnesses but who
14 reportedly did not see the accident. It was submitted that these persons
15 would be available to give evidence.

16 According to the Plaintiff, this was not a case where liability rests on
17 eyewitness recollections of the accident because it does not appear that
18 there were any eyewitnesses to the accident itself. It was submitted that
19 there are significant documents pertaining to the construction site and its
20 operation which were disclosed by the Second Defendant, there is a police
21 report and witness statements taken by the police from persons who
22 traveled in; and on the back of the truck but who did not see the Plaintiff
23 fall. There are also contemporaneous documents recording the accident
24 and the inquiry undertaken by the Second Defendant in the aftermath.
25 Additionally there are documents related to the relationship between the
26 Second and Fourth Defendant. As a result it was submitted that this was a
27 "document case" and not a case which was reliant on the memories of
28 witnesses.

29 It was submitted on behalf of the Plaintiff that the Second Defendant had
30 failed to give any evidence of a period of delay which has caused any
31 particular issue within its defense to not be capable of being determined.
32 It was also submitted that the dimming of memories over time, was not
33 sufficient to establish prejudice.

34 It was submitted that there was no evidence of any particular witness
35 who could not recall something which was either pertinent to the defence
36 of the Second Defendant or which was an issue in the case. There was no
37 suggestion that there was a witness who would previously have been
38 capable of providing evidence but who could not now recall it, given the
39 lapse of time. Finally it was suggested that there had been no assertion
40 that the Second Defendant had been precluded from adducing evidence
41 on any point in issue due to any alleged "culpable, causative delay".
42 Based on all of this it was submitted that the Second Defendant had not
43 suffered any prejudice.



1 The Plaintiff cited the English Court of Appeal in Rowe v Glenister (1995)
2 70 P. & C. D43; CHANI 91/1431/B as authority for the position that a
3 defendant must not just show that the delay has caused prejudice or a
4 substantial risk that a fair trial cannot be had but must also identify the
5 precise prejudice that it asserts and why they are in this detrimental
6 position now which they would not have been but for the delay.

7 The Plaintiff invited the Court to consider any delay this case against the
8 factual backdrop. It was submitted that what may be considered to be
9 inordinate in one case may not be such in another; because the issue of
10 delay is a matter of fact and degree in each particular case.

11

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Conclusion

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14 In the classic case Birkett v James [1977] 3 W.L.R. 38, it was held that:

15 *"the power of the court to dismiss an action for want of prosecution*
16 *should be exercised only where the plaintiff's default had been*
17 *intentional and contumelious or where there had been inordinate*
18 *and inexcusable delay on his or his lawyers' part giving rise to a*
19 *substantial risk that a fair trial would not be possible or to serious*
20 *prejudice to the defendant"*

21 In the affidavit of Mr. Ward Sykes, the starting point for the submissions
22 on delay was the date of the accident, in 2007. However, the cause of
23 action was filed within the limitation period, albeit three years after the
24 accident. No criticism of the Plaintiff can be made on that basis.

25 There has been a passage of six years since proceedings commenced. The
26 period of greatest concern is the gap between the date of the directions
27 hearing on November 30, 2011 to date.

28 Reference was made to the difficulties in obtaining disclosure from the
29 Third and Fourth Defendants as factors which contributed to delay. This is
30 a matter of record.

31 Further, based on the material presented it is accepted that Counsel for
32 the Plaintiff did enter into "without prejudice" discussions with attorneys
33 for the Second Defendant. It is also accepted that attempts were made to
34 facilitate the examination of the Plaintiff by medical doctors so that
35 reports could be prepared. It is also accepted that the circumstances of
36 identifying a specialist as well as the practical difficulties of getting the
37 Plaintiff to liaise with said specialist were extremely difficult.

38



1 It is accepted that it was very important to obtain the relevant medical
2 evidence, whether the matter was proceeding to trial or whether there
3 was a possibility of a settlement. Counsel for the Plaintiff cannot be
4 faulted for making these attempts.

5 It is clear however, that following the November 2011 directions hearing,
6 there was quite some delay in moving the case forward.

7 It is accepted that Counsel for the defendants were made aware of the
8 direction that Counsel for the Plaintiff was taking and it is also accepted
9 that no objection was raised. This however cannot be viewed as a waiver
10 of the defendants' rights. The onus is on a Plaintiff to advance a case and
11 not on the defendants to make complaint. The circumstances of the
12 defendants' knowledge coupled with the lack of complaint, does however
13 *weaken* their arguments concerning the "inexcusable nature" of any
14 delay.

15 Taken against the background of that which was sought to be done on
16 behalf of the Plaintiff, and the difficulties encountered, while I find that
17 there has been delay in the prosecution of this matter, I do not accept
18 that such delay was inexcusable.

19 Further, the suggestions of possible problems with witnesses made by the
20 Second Defendant were somewhat speculative in nature. I accept the
21 assertion made on behalf of the Plaintiff that the Second Defendant did
22 not raise any specific issue which demonstrated that the defence would be
23 harmed. Further, it was not demonstrated that the Second Defendant had
24 been precluded from adducing any evidence due to the delay.

25 The Plaintiff still bears the burden of establishing its case and it is open to
26 the defendants, if the matter reaches that stage, to make submissions
27 about damages.

28 Additionally, I consider that significant progress has been made in this
29 matter during the "third period" as submitted on behalf of the Plaintiff.

30 I did not find that there has been any abuse of process in this matter by
31 the Plaintiff.

32 On the basis of the foregoing, I dismissed the Second Defendant's
33 application on 4th November 2016.

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37 Hall, J (Actg.)
38 Judge of the Grand Court
39 21st December 2016

