IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2022/CLE/gen/001116

B E T W E E N

DERICK WALTON SANDS

Claimant

AND

DR. MAGNUS EKEDEDE

Defendant

Before:	**The Honourable Madam Senior Justice Deborah Fraser**
Appearances:	**Mrs. Krystal Rolle K.C. and Mr. Darron Cash for the Claimant** **Mr. Adrian Hunt for the Defendant**
Hearing Date:	**27 February 2024**

Personal Injury Claim – Medical Negligence – Striking Out - Rule 26.3(1)(b) and (c) of the Supreme Court Civil Procedure Rules, 2022 – Abuse of the Court's Process – Statue of Limitation – Sections 9(1) to (3) and 10(1) to (3) of the Limitation Act, 1995 – Date of Knowledge – Medical Reports – Plain and Obvious - Rule 26.2(1)(k) of the Supreme Court, Civil Procedure Rules, 2022 – Extension of Time to File a Defence

RULING

FRASER, SNR. J

[1.] This is an application brought on behalf of the Defendant, Dr. Magnus Ekedede ("**Dr. Ekedede**") seeking the following relief: (i) an order striking out paragraph 14 to 17 of the Claimant's, Derick Walton Sands ("**Mr. Sands**") Statement of Claim ("**SOC**") on the grounds that they concern claims and/or damages for personal injury, relief for which the Claimant is statutorily barred from pursuing; (ii) an order staying the filing of a Defence by Dr. Ekedede and all further proceedings herein pending the determination of this application; and (iii) an order granting extension of time for

entering a Defence herein to fourteen (14) days after the determination of the application and/or any further order of this Court.

Background

[2.] Mr. Sands was at all material times a patient of Dr. Ekedede.

[3.] Dr. Ekedede is and was at all material times a Neurosurgeon and the Chief Consultant of Neurological Surgery at the Princess Margaret Hospital and Doctor's Hospital Bahamas. He was at all material times Ms. Sands' medical doctor rendering medical services to Mr. Sands.

[4.] On 14 December 2016, Mr. Sands was involved in a vehicular accident resulting in multiple injuries about the body, including severe injuries to his cervical spine.

[5.] He initially consulted Dr. Ekedede on 23 February 2017. After several physiotherapy sessions and medication with no improvement, Dr. Ekedede advised Mr. Sands that his cervical spine injuries required surgical intervention.

[6.] Dr. Ekedede initially advised Mr. Sands that he required an Anterior Cervical Dissection and Fusion Surgery to be performed at C5-C6 and C6-C7 of his cervical spine ("**Surgery A**").

[7.] By Letter of Guarantee issued by the National Insurance Board ("**NIB**") on 26 April 2017, NIB approved payment to Dr. Ekedede for Surgery A, which was to be performed by Dr. Ekedede on 05 May 2017. The funds were allegedly paid to Dr. Ekedede for the purposes of performing Surgery A.

[8.] On the morning of the surgery, 05 May 2017, Dr. Ekedede allegedly made the decision not to perform the scheduled Surgery A on Mr. Sands and instead proceeded with a Posterior Cervical Laminectomy and Foraminotomy Surgery ("**Surgery B**") on Mr. Sands' cervical spine.

[9.] By letter dated 07 October 2020 from Dr. Ekedede's counsel to Mr. Sands, Dr. Ekedede stated, inter alia, that it was *"his preference and his advice…after conservative treatments had failed to sufficiently alleviate your client's symptoms, that your client undergo an anterior cervical discectomy and fusion (ACDF). Your client initially agreed to undergo the procedure, however, on the morning of the surgery (5 May, 2017) your client refused the ACDF after he decided that he did not want any hardware placed*

on his spine and left in his body after the surgery was completed. It was on this basis that the procedure was changed on the morning of the surgery for the ACDF to a posterior cervical laminectomy and foraminotomy (PCLF).”

[10.] On 11 January 2022, Mr. Sands, through his counsel under cover of an email of same date received from Bahamas First General Insurance Company Limited, a Medical Report of Dr. David Barnett dated 24 August 2020 (“**Barnett Report**”) in which Dr. Barnett states, inter alia:

> “Dr. Magnus being the expert/professional in the performance of spinal surgery needed to advise Mr. Sands that the surgery could not have been performed without the insertion of hardware, (plate, screws, rods, etc.) and therefore he should have cancelled/delayed the procedure.”

[11.] After having undergone Surgery B on 05 May 2017, it is alleged that multiple doctors including Dr. Clyde A. Munnings, Dr. Ian McDowell and Dr. Georgly Brusovanik all confirmed that Surgery B was inappropriate for Mr. Sands’ injuries and thereafter, Mr. Sands still needed Surgery A.

[12.] It is also alleged that on 20 June 2018, NIB disallowed a repeated request for payment for Surgery A, having already approved and issued an initial payout for such surgery (even though said surgery was never performed on Mr. Sands). Mr. Sands purportedly covered the costs necessary for Surgery A with the assistance of his personal medical insurance. Mr. Sands’ insurance allegedly paid 80% of the cost of the surgery and Mr. Sands had to pay 20% of the cost, plus all related costs and expenses.

[13.] On 28 November 2018, Mr. Sands underwent Surgery A performed by Dr. Georgly Brusovanik in the United States of America.

[14.] On 03 August 2022, Mr. Sands filed a Generally Indorsed Writ of Summons and on 24 February 2023 filed a Statement of Claim (“**SOC**”) alleging that Dr. Ekedede was negligent due to his alleged failure to cancel or delay the surgical procedure consistent with the preferred and taught approach as confirmed by Dr. David Barnett in his report dated 24 August 2020.

[15.] Mr. Sands alleges that: (i) he underwent a wholly unnecessary surgery which caused pain, suffering and discomfort; (ii) he suffered Post Laminectomy Syndrome and aggravation of the existing neural compression in his cervical spine caused by the

motor vehicle accident; (iii) he suffered destabilization of his cervical spine as a result of the posterior cervical laminectomy; and (iv) he suffers from Failed Back Surgery Syndrome, which is permanent.

[16.] Mr. Sands also pleads breach of contract against Dr. Ekedede for his purported failure to perform the agreed and required Surgery A, despite being guaranteed the payment of the prescribed fee for the performance of that specific surgery and performing instead Surgery B knowing that such surgery was not indicated and/or appropriate for Mr. Sands' injuries. Mr. Sands also alleges breach of contract on Dr. Ekedede's part for performing Surgery B with the expressed knowledge and recognition that Mr. Sands would likely still require Surgery A in the future for the treatment of his cervical spine injuries, despite having had the Surgery B. He also pleads special damages in the amount of $15,795.32 relating to the additional expenses incurred for undergoing Surgery A in the United States and related expenses.

[17.] Furthermore, Mr. Sands claims the following relief:

> "1. Damages for Negligence.
> 2. Damages for Breach of Contract.
> 3. General Damages.
> 4. Interest on all damages pursuant to the Civil Procedure (Award of Interest) Act, 1992.
> 5. Such further or other relief as the Court deems just.
> 6. Costs."

[18.] Dr. Ekedede filed a Memorandum and Notice of appearance on 30 August 2022.

[19.] Thereafter, on 27 May 2023, Dr. Ekedede filed a Notice of Application requesting the following:

> "a. An Order pursuant to Rule 26.3 (1)(b) and (c) of the Supreme Court (Civil Procedure) Rules, 2022 ("the Rules") striking out paragraphs 14-17 ("the Offending Paragraphs") of the Statement of Claim filed herein on 24 February 2023 ("the SOC");
> b. An Order pursuant to Rule 26.1(2)(q) of the Rules that the filing of a Defence herein by the Defendant, and all further proceedings herein be stayed pending the determination of this application;

c. An Order pursuant to Rules 10.3(8) and 26.1(2)(k) and (v) of the Rules that the time for entering a Defence herein be extended to fourteen (14) days after the determination of this application and/or any further order of this Court as deemed necessary; and

d. An Order that the costs of and occasioned by this application are to be paid by the [Claimant] to the [Defendant], and all further proceedings herein are to be stayed pending the payment of such costs."

[20.] I shall address each application in turn.

Striking Out Application

Issue

[21.] The issue that the Court must determine is whether or not paragraphs 14 to 17 of the SOC ought to be struck out on the basis that such claims are statute barred?

Evidence

First Defendant's Evidence

[22.] On 27 March 2023, Dr. Ekedede filed the affidavit of Gabriel K. Brown ("Brown Affidavit"). It provides that: (i) at paragraph 25 of the SOC Mr. Sands references the advice and opinions of several physicians, including Dr. Clyde A. Munnings, Dr. Ian McDowell, and Dr. Georgly Brusovanik. According to the SOC, their opinions are that Surgery B was inappropriate and that Mr. Sands needed Surgery A; (ii) the SOC also alleges that Mr. Sands underwent Surgery A on 28 November 2018, which was performed by Dr. Brusovanik; (iii) By letter dated 03 May 2022 ("**GT Letter**"), Mr. Sands' attorneys were advised of Dr. Ekedede's lawyers' vies that the claims in the action appear to be statute barred. The GT Letter requested that Mr. Sands' attorney provide the basis for their position that the claims were not statute barred (a copy of the GT Letter is attached to the affidavit); and (iv) Mr. Sands' attorney responded by letter dated 12 May 2022 ("**Sands' Response**"). In rejecting the argument that Mr. Sands' claims are statute barred, Sands' Response made reference to an earlier letter from Dr. Ekedede's attorneys ("**1st GT Letter**" – also exhibited to the affidavit) and Dr. Barnett's Report. The specific reference in the Sands' Response reads as follows:

> "As regards the "knowledge" which sections 9 and 10 of the Act contemplate, it must be noted (1) that it was on 7th October 2020 when we received your letter that Mr. Sands became aware of Dr. Ekedede's contention that the [Surgery B]

was performed only because he had allegedly refused [Surgery A] on that date, and more significantl, (2) that it was on 11th January 2022 that Mr. Sands acquired the knowledge, aided by the medical report of Dr. Barnett that Dr. Ekedede was required in the circumstances to "cancel/delay the surgical procedure".

[23.] The Brown Affidavit also states that: (i) Notwithstanding the contents of the Sands' Response, the SOC does not contain any specific pleading as to any later date of knowledge of any purported negligent act or omission on Dr. Ekedede's part in respect of the surgery; (ii) the SOC does not attest to any reasons why Mr. Sands was unaware of any such purported negligent acts or omissions on Dr. Ekedede's part within the three year period following Surgery B on 05 April 2017; (iii) Mr. Sands provided Ekedede's attorneys with copies of medical reports from Dr. Munnings dated 09 October 2018, Dr. Brusovanik dated 16 March 2019, and Dr. McDowee (collectively, "**Medical Reports**"); (iv) the Medical Reports appear to agree that Surgery B was inappropriate but also appear to diagnose Mr. Sands with injuries as complained in the SOC; (v) Dr. Munnings' report states the following at page 3, paragraph8 and page 4 at paragraph 4:

> "Upon further review of the historical events, MRI scans, EMGs, ER and hospital notes, notes from Dr. Magnus Ekedede and Dr. Ian McDowell, it is my further opinion that the cervical laminectormy was an inappropriate surgery for the patient's condition.
>
> It is my opinion that he needed an anterior cervical dissection and fusion which according to the patient was the surgery he was offered prior in any and all discussions prior to the surgery…
>
> Since Mr. Sands has undergone [an] inappropriate posterior cervical laminectomy his spine is now destabilized and would have to be stabilized for him to have a pain free and safe life going forward."

[24.] The Brown Affidavit also states that: (i) the affiant verily believes the contents of the Medical Reports, particularly Dr. Munnings' Report which led to the Mr. Sands undergoing Surgery B in November of 2018, refute any suggestion by Mr. Sands that he lacked the requisite knowledge as required under the Limitation Act, until receipt of Dr. Barnett's Report; and (ii) the affiant deposes to the affidavit in support of the

application to strike out paragraphs 14 to 17 of the SOC on the basis of his belief that Mr. Sands' claims for damages for personal injury are statute barred; (iii) the SOC.

Mr. Sands' Evidence

[25.] On 22 February 2024, Mr. Sands filed the Affidavit of Wallace I. Rolle which provides that: (i) a letter of Mrs. Rolle K.C. (counsel for Mr. Sands) dated 14 January 2022 was referenced in a letter from Mrs. Rolle K.C. dated 12 May 2022 (the 14 January 2022 letter is exhibited to the affidavit); (ii) the Brown Affidavit does not state that the Barnett report dated 24 August 2020 was not received by Mr. Sands until 14 January 2022 and also does not reference an accompanying email from Bahamas First General Insurance Company Limited dated 11 January 2022 (11 January 2022 email is exhibited to the affidavit); (iii) paragraph 15 of the SOC was premised on facts and matters contained specifically in the Medical Report of Dr. David Barnett dated 24 August 2020 received by Mr. Sands on 11 January 2022; and (iv) Mr. Sands' claim for Negligence is not premised on any other medical report, save for the Barnett Report.

Discussion and Analysis

Whether or not paragraphs 14 to 17 of the SOC ought to be struck out on the basis that such claims are statute barred?

[26.] I have considered the submissions of counsel and the evidence. I will now apply my analysis to the case. Dr. Ekedede's counsel frames his argument to strike out paragraph 14-17 of the SOC on the basis that it: (i) discloses no reasonable cause of action and (ii) is scandalous, frivolous and vexatious due to it being statute barred.

[27.] At this juncture, I wish to highlight paragraphs 14 – 17 of the SOC, which Dr. Ekedede seeks to have struck out:

> "**THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANT FOR NEGLIGENCE**
>
> 14 On 11th January, 2022 the Plaintiff via his Counsel under cover of an email of the same date received from Bahamas First General Insurance Company Limited a Medical Report of Dr. David Barnett dated 24th August, 2020 in which Dr. Barnett stated inter alia **"Dr. Magnus being the expert/professional in the performance of spinal surgery needed to advise Mr. Sands that the surgery could not have been performed without the insertion of hardware, (plate, screws, rods, etc.) and therefore he should have**

cancelled/delayed the procedure." [Emphasis Added] The Plaintiff will rely on the said Medical Report of Dr. David Barnett at the Trial of this action for its full terms and effect.

15 The Plaintiff's pleaded claim against the Defendant for Negligence is premised on the Defendant's failure to cancel or delay the surgical procedure consistent with the preferred and taught approach as confirmed by Dr. David Barnett in his Report dated 24th August, 2020 received by the Plaintiff on 11th January, 2022 as aforesaid in the circumstances described by the Defendant as set out in Paragraphs 11-13 hereof.

PARTICULARS OF NEGLIGENCE

The Nature of the Case is that the Defendant on his own admission proceeded with the Posterior Cervical Laminectormy and Foraminotomy Surgery solely because the Plaintiff did not want any hardware placed on his spine and left in his body after the surgery and where the Defendant being the expert and the professional in the performance of spinal surgery knew or ought to have known that the surgery could not be performed without the insertion of hardware such that the Defendant in the specific circumstances described by him was required and/or ought to have cancelled or delayed the surgical procedure

The Defendant was therefore Negligent by:-

i. Failing to cancel or delay the Plaintiff's surgical procedure in circumstances where the procedure could not be performed without hardware and where he contended that the Plaintiff did not want hardware.

16 By reason of the Defendant's said failure to cancel or delay the surgical procedure the Plaintiff suffered personal injuries namely:

i. The Plaintiff underwent a wholly unnecessary surgery with attendant, pain suffering and discomfort associated with undergoing the surgery and with convalescing from the same.

ii. The Plaintiff suffered Post Laminectomy Syndrome and aggravation of the existing neural compression in his cervical spine caused by the motor vehicle accident.

iii. The Plaintiff suffered Destabilization of his cervical spine as a result of the posterior cervical laminectomy.

iv. The Plaintiff suffers from Failed Back Surgery Syndrome ("FBSS") which is permanent.

PARTICULARS OF LOSS AND DAMAGE

The Plaintiff claims damages for Pain Suffering and Loss of Amenities, Future Cost of Physiotherapy and Treatment and Loss of Future Earning Capacity and/or Future Loss of Earnings.

17 Further, the Plaintiff claims interest on any damages awarded by the Court for Negligence pursuant to Section 3 of the Civil Procedure (Award of Interest Act 1992) at such rate and for such period as the court may deem fit. ”

[28.] Dr. Ekedede’s counsel seeks to invoke the Court’s power to strike out a claim found at **Rule 26.3(1)(b) and (c) of the Supreme Court Civil Procedure Rules, 2022** (“**CPR**”). The rule states:

> “26.3 Sanctions – striking out statement of case.
> (1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —
> …
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
> (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings…”

[29.] I will address each in turn.

Striking Out as Disclosing No Reasonable Cause of Action

[30.] With respect to the ground of disclosing no reasonable cause of action, the Bahamian Court of Appeal decision of ***West Island Properties Limited v Sabre Investment Limited and others SCCivApp No. 119 of 2010 at paragraph* 15** (“**West Island**”) provides a helpful discourse on the relevant law. It discusses the old Rules of the Supreme Court Order 18 rule 19(1) (a) through (d), however, Rule 26.1 of the CPR essentially mirrors the aforementioned rule, thus the law as expounded in the case remains applicable and relevant. In ***West Island***, the Court made the following pronouncements:

> *““15 In the case of Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, Lord Pearson determined* ***that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the pleadings alone****. That is, beginning at page 695, he said the following:*

" Over a long period of years it has been firmly established by many authorities that ***the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases****.*

...

In my opinion the traditional and hitherto accepted view — that the power should only be used in plain and obvious cases — is correct according to the intention of the rule for several reasons. First, there is in paragraph (1)(a) of the rule the expression "reasonable cause of action," to which Lindley M.R. called attention in Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd 18991 1 Q.B. 86, pp. 90–91. No exact paraphrase can be given, but I ***think "reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck ou****t. In Nagle v. Feilden (1966) 2 Q.B. 633 Danckwerts L.J. said, at p. 648: The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court'*

Salmon L. J. said, at p. 651: it is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable*.' Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous or vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the Court." ... Thirdly,* ***an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success.*** *The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by*

> *application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases.*
>
> *...*
>
> *That is the basis of rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. It is not permissible to anticipate the defence or defences possibly some very strong ones — which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to reply on at the trial (emphasis added)."*

[31.] Accordingly, in order for paragraphs 14-17 of the SOC to be struck out as disclosing no reasonable cause of action, it must be: (a) plain and obvious that there is no reasonable cause of action; (b) unarguable; and (c) considered on the bare pleadings alone without any regard to evidence at a very early stage of the proceedings.

[32.] In relation to the instant case, one of the grounds of the strike out application is on the premise that there is no reasonable cause of action and it was made at a very early stage of the proceedings (only the Writ of Summons and SOC have been filed thus far, with a few summonses and before Discovery). That limb is thus satisfied. I must now consider the bare pleadings alone, with no regard to any evidence. Having reviewed the pleadings, I believe that paragraphs 14 to 17 do disclose a reasonable cause of action. Mr. Sands alleges that Dr. Ekedede was negligent by failing to cancel or delay the surgery when the procedure could not be performed without hardware and where Dr. Ekedede contended that Mr. Sands did not want hardware. Furthermore, the purported failure to cancel the surgery led to personal injuries (pain, suffering, discomfort. Failed Back Surgery Syndrome, aggravation of the existing neural compression in his cervical spine caused by the motor vehicular accident and destabilization of Mr. Sands' surgical spine).

[33.] On the face of the pleadings, it cannot be said that this is a plain and obvious case for striking out. Mr. Sands particularizes the allegations of negligence and personal injury in great detail. Based on what is pleaded, there is some prospect of success and an arguable case.

[34.] In the premises, I am not prepared to strike out paragraphs 14 to 17 of the SOC as it does disclose a reasonable cause of action.

Statute of Limitation Argument

[35.] This application also concerns a statute of limitation argument. Therefore, I must analyze the Limitation Act, 1995 ("**LA**"). **Sections 9(1) to (3) and 10(1) to (3) of the LA** provide:

> "9. (1) Subject to subsection (6), this section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by any written law or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
>
> (2) Subject to subsection (3), **an action to which this section applies shall not be brought after the expiry of three years from** —
>
> (a) the date on which the cause of action accrued; or
>
> **(b) the date (if later) of the plaintiff's knowledge.**
>
> 10. (1) **In section 9, references to a person's date of knowledge are references to the date on which that person first had knowledge of the following facts** —
>
> **(a) that the injury in question was significant;**
>
> **(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;**
>
> **(c) the identity of the defendant;** and
>
> (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant, and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.
>
> **(2) For the purposes of this section, an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify the institution of proceedings against a defendant who did not dispute liability and was able to satisfy a judgment.**
>
> (3) For the purposes of this section, **a person's knowledge includes knowledge which such person might reasonably be expected to acquire** —

> **(a) from facts observable or ascertainable by such person; or**
> **(b) from facts ascertainable by such person with the help of such medical or other expert advice as it is reasonable, in the circumstances, to seek, but there shall not be attributed to a person by virtue of this subsection knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (and where appropriate to act on) that advice**
>
> [Emphasis added]."

[36.] There is no dispute as to the applicable sections of the LA. What appears to be the crux of the matter is when Mr. Sands gained the requisite knowledge to bring the negligence claims. I believe the Bahamian Court of Appeal decision of **Lucretia Rolle v The Airport Authority** SCCivApp. No. 119 of 2021 is instructive on the matter.

[37.] In that case, the appellant/claimant brought an action against her employers on 06 January 2016 for an alleged slip and fall injury she suffered on 06 January 2011. The defendant/respondent filed a Defence denying certain allegations made by the appellant/claimant and put her to strict proof. With leave of the court, the respondent/defendant filed an amended Defence asserting that it was not liable in negligence or for breach of statutory duty for the alleged injuries suffered by the appellant/claimant. At first instance, the respondent/defendant filed an application for striking out as frivolous, scandalous and vexatious on the basis that it was made against the wrong party. That application was dismissed. The matter lay dormant until the respondent/defendant, with leave of the court, re-amended its Defence. The appellant/claimant then filed an amended Reply.

[38.] By the re-amended Defence, the respondent/defendant averred that the claim was statute barred as it was not brought within three years from the alleged slip and fall. The court of first instance acceded to the striking out application on that basis. The appellant/claimant appealed that decision. The Court of Appeal dismissed the appeal and upheld the learned judge's ruling. The court's reasoning is found at paragraphs 46 to 55, which provide:

> "46. The appellant challenges the judge's decision on this issue on two basic points. Firstly, that the action is statute barred as the time of the appellant's knowledge of the seriousness of her injuries according to the Limitation Act is

calculated from October 2012 the latest. Secondly, that the learned judge failed to recognize that knowledge for the purposes of the computation of the relevant limitation period requires, inter alia, knowledge of the identity of the defendant. She asserts that the issue as to the identity of the proper defendant remains unresolved and as such it was improper for the judge to make a determination that the action was statute barred while the identity issue remains extant.

47. As noted, earlier subsection 9(2) of the Limitation Act provides that an action to which that section applies shall not be brought after the expiry of three years from — **(a) the date on which the cause of action accrued; or (b) the date (if later) of the plaintiff's knowledge**.

48. Section 10 (which is set out at paragraph 24 herein) then sets out the details of what constitutes knowledge referred to in section 9(2)(b).

49. **It is important to note that once the limitation defence has been raised, the legal burden of proving that the claim falls under section 9 (2) (a) or 9 (2) (b) of the Limitation Act rests on the plaintiff. In the case of Crocker v British Coal Corporation (1996) 29 BMLR 159 the court noted that it was not for the defendant to prove that the plaintiff had acquired the knowledge more than three (3) years before the commencement of the action. The following is seen in the headnote:**

> **"Held — It was not for the defendants to prove that the plaintiff had the required knowledge more than three years before the commencement of the action. The onus of proof on limitation did not vary according to whether the issue of limitation turned on when the cause of action accrued, or on when the plaintiff first knew of the facts specified in s 14(1) of the Limitation Act 1980. The onus was on the plaintiff in both cases**."

50. Mrs. Hanna submitted that in the normal course of things a plaintiff may seek to discharge the aforementioned burden by pleading the facts in the Writ of Summons and/or Statement of Claim. She notes that in the aforementioned case of Crocker v British Coal Corporation the plaintiff specifically pleaded in her Statement of Claim that the action was not statute-barred and claimed a later date of knowledge. The court thereafter went on to consider the issue of limitation based on the pleaded case of the plaintiff.

51. The appellant, in this matter, made no such averment and **although she sets out the date of the accident in her Statement of Claim as being 6 January 2011 the Writ nor the Statement of Claim explains why the action was not filed until 6 January 2016. The Statement of Claim does not indicate the**

dates on which, as per section 10 of the Limitation Act, she became aware " (a) that the injury in question was significant; (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; or (c) the identity of the defendant(s)…"

53. It was not until she filed her amended Reply that the appellant alleged that time did not start to run until March 2014. She pleaded:

> "…that it was the 1st Defendant's medical examiner who determined by letter dated the 20 March 2014 that the Plaintiff was permanently disabled as a result of the slip and fall accident. The 1st Defendant concealed the results of the said report from the Plaintiff until years later when it was disclosed. The date of knowledge for the purposes of the Limitation Act did not run until at the earliest, March 2014."

54. Mrs. Hanna submitted that this allegation is unsustainable for the following reasons:

> "1. The Appellant, at paragraph 24 of her Witness Statement, recites that on the 22nd day of June, A.D., 2012, she was seen by Dr. Valentine Grimes who diagnosed her as having sustained Lumbar Radiculopathy and Cervical Radiculopathy. See TAB 6 and page 188 of the Record of Appeal.
>
> 2. The Appellant, under the Heading "(e) PROGNOSIS", in her Statement of Claim, relies on "Early medical reports about the personal injuries" which she alleges she sustained. One of these reports (namely from Dr. Robert Gibson) date back to as early as the 10 th day of October, A.D., 2012. The aforementioned report stated that the Appellant's symptoms had become progressively worse and that the symptoms which she presented were directly related to her fall in January, A.D., 2011; See page 14 of the Record of Appeal.
>
> 3. The Appellant relied on the aforementioned report to prove her injuries and Dr. Gibson was present at trial to give evidence on her behalf;
>
> 4. The Appellant's pleaded case of her alleged injuries are the verbatim findings of Dr. Grimes and Dr. Gibson as outlined in their 2012 medical reports. The Appellant in her Statement of Claim recites under the Heading "Principal Injury, Pain and Suffering". The Appellant describes her injury as follows"-

> ‘Degenerative signal decreased and loss of height in the discs from C2 to C7 with associated mild broad-based protruding contour in her disc margins. Focal subligamentous herniation of disc material at C4–5 level. Dextroconex curvature in the spine and accentuated lumbar lordosis. She has been diagnosed with Cervical radiculopathy and lumbar radiculopathy.’
>
> (See page 12 of the Record of Appeal)
>
> The aforementioned description of the Appellant's injuries is the verbatim description of her injuries as diagnosed by Dr. Grimes. (See TAB 188 of the Record of Appeal for the Medical Report).
>
> 5. Moreover, under the heading, “(e) PROGNOSIS”, the Appellant relied on the (sic) Dr. Gibson's finding in his 2012 report, that “there is an increase possibility of right sided intracranial ‘contra coup’. (See page 191 of the Record of Appeal).
>
> 55. Mrs. Hanna further submitted that the injuries outlined in the reports of Dr. Grimes and Dr. Gibson are the injuries which the appellant was required to prove at trial if she was to be successful in her claim. **It therefore follows that if the appellant relied on these reports as proof of her injuries, the learned judge, in the court below, was entitled to rely on these reports as the date of the appellant's requisite knowledge. I accept, therefore, that in these circumstances the learned judge was entitled to find as she did that the time of the appellant's knowledge for the purposes of the Limitation Act is calculated from October 2012 the latest**.
>
> [Emphasis added].”

[39.] The fact that a Defence has not been filed is not an impediment to an application to strike out on the basis of a pleading being frivolous, vexatious or an abuse of the court’s process. This was observed by Sawyer CJ (as she then was) in the case of **Girten v Andreu [1998]** BHS J. No. 164. There, the learned judge opined:

> *“Mr. Wallace Whitfield also submits, among other things, that the issue of the limitation period under the Act having expired prior to the bringing of this action is a matter which should be left for the trial.* ***I think it is now trite law that where it is clear from the statement of claim that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the limitation defence and there is nothing before the court to suggest that the plaintiff could escape from that defence the claim will be struck out as***

being frivolous, vexatious and an abuse of the process of the court *- see., e.g., Riches v. Director of Public Prosecutions [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935 as explained in* ***Ronex Properties Ltd. v. John Lain Construction Ltd. [1983] Q.B. 398; [1982] 3 All E.R. 961. In the latter case, at page 404 - 405, Donaldson, L.J., when dealing with the issue of whether or not a defence under the Limitation Act had to be pleaded, said****:*

*"…The matter is not in fact free from authority. It was considered in Riches v. Director of Public Prosecutions … in which the earlier cases are reviewed. There the grounds put forward in support of the application to strike out included an allegation that the claim was frivolous and vexatious and an abuse of the process of the court. Accordingly, the court was able to consider evidence and it is 'understandable that the claim could be struck out…. **Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence.** But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed (emphasis added)."""*

[40.] What is considered 'knowledge' and 'date of knowledge' was discussed in the UK Court of Appeal decision of **Dobbie v Medway Health Authority [1994] EWCA Civ J0511-2 ("Medway")**. In Medway, the claimant/appellant brought an action against the defendant claiming damages for personal injury arising from the negligent performance of a procedure. The Defendant, in its Defence, pleaded that the action was statute barred as three years from the date of the alleged negligence elapsed prior to the filing of the action. In her Reply, the claimant/appellant pleaded, *inter alia*, that she did file in time and that she received the requisite knowledge required under sections 11 and 14 of the UK 1980 Limitation Act (which is similar to our sections 9 and 10 of our Limitation Act) within the required period. In dismissing the appeal, the Court opined:

"The effect of sections 11(4)(b) and 14(1)(a) is to postpone the running of time until the claimant has knowledge of the personal injury on which he seeks to found his claim. That is "the injury in question". The word 'knowledge' should be given its natural meaning (Davis v Ministry of Defence, unreported, 26 July

1985, Court of Appeal Transcript No 413 of 1985). As Lord Donaldson of Lymington MR said in Halford v Brookes [1991] 1 WLR 428 at 443,

> "**In this context 'knowledge' clearly does not mean 'know for certain and beyond possibility of contradiction'. It does, however, mean 'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence**.'"

This test is not in my judgment hard to apply. **It involves ascertaining the personal injury on which the claim is founded and asking when the claimant knew of it. In the case of an insidious disease or a delayed result of a surgical mishap, this knowledge may come well after the suffering of the disease or the performance of the surgery. But more usually the claimant knows that he has suffered personal injury as soon or almost as soon as he does so. Time does not begin to run against a claimant until he knows that the personal injury on which he founds his claim is significant within the definition in section 14(2)**…

The effect of sections 11(4)(b) and 14(1)(b) is to postpone the running of time until the claimant has knowledge that the personal injury on which he founds his claim was wholly or partly attributable to the act or omission of the defendant on which his claim in negligence is founded. "Attributable to" was construed by May LJ in Davis to mean "capable of being attributed to" and not "caused by", and I see no reason to question that conclusion. It cannot plausibly be suggested that the words "act or omission" import any requirement that such act or omission should be actionable or tortious, since that would stultify the closing words of section 14(1) and would moreover flout the recommendation on which the legislation was admittedly founded. In Wilkinson v Ancliff (B.L.T.) Limited [1986] 1 WLR 1352 at 1362 H reference was made to a submission of counsel based on the use of the words "act or omission" rather than "conduct" in section 14(1)(b). I do not understand the court to have accepted that submission. But it is customary in discussing tortious liability to refer to acts and omissions, and I do not think the meaning of section 14(1)(b) would be any different had the reference been to conduct. **Time starts to run against the claimant when he knows that the personal injury on which he founds his claim is capable of being attributed to something done or not done by the defendant whom he wishes to sue**…

> The personal injury on which the plaintiff seeks to found her claim is the removal of her breast and the psychological and physical harm which followed. She knew of this injury within hours, days or months of the operation and she at all times reasonably considered it to be significant. She knew from the beginning that this personal injury was capable of being attributed to, or more bluntly was the clear and direct result of, an act or omission of the health authority. What she did not appreciate until later was that the health authority's act or omission was (arguably) negligent or blameworthy. But her want of that knowledge did not stop time beginning to run.
>
> [Emphasis added]"

[41.] Based on the aforementioned authorities, in order to establish date of knowledge, one must be satisfied: (a) that the injury in question was significant; (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and (c) the identity of the defendant.

[42.] Furthermore, it is for Mr. Sands to prove that his claim is not statute barred.

[43.] Mr. Sands' Counsel submits that Mr. Sands was armed with knowledge (as required under section 10.1 of the LA) as at 11 January 2022, thus he has until 11 January 2025 to file a claim against Dr. Ekedede for Negligence. The Writ of Summons was filed on 03 August 2022 and the SOC was subsequently filed on 24 February 2023. Counsel argues that the limitation defence therefore falls away as the requisite filing of the action took place within the three year limitation period from the date of the requisite knowledge.

[44.] I agree with this argument. Based on the letter dated 09 October 2018 to Christina Galanos from Dr. Clyde Munnings – a consultant neurologist, (a letter which, according to the uncontested Brown Affidavit, was sent by Mr. Sands' counsel and provided to Dr. Ekedede's counsel), the following information was communicated:

> *"*On [May 5th 2017 Mr. Sands] was taken to Operating Room for an anterior cervical discectomy and fusion. Apparently the procedure done was a posterior laminectomy and discectomy. Post operatively, his pains worsened to a level 10 out of 10 on a persistent and consistent basis.
>
> Review of the MRI showed additional discs at C3-C4 and C5-C6. He was referred on to Dr. Valentine Grimes upon which another MRI scan was undertaken…

> This MRI was clearly worse compared with the MRI that was performed prior to surgery…
>
> Upon further review of the historical events, MRI scans, EMG's ER and hospital notes, notes from Dr. Magnus Ekedede and Dr. Ian McDowee, it is my further opinion that the cervical laminectomy was an inappropriate surgery for the patient's condition.
>
> It is my opinion that he needed an anterior cervical dissection and fusion which according to the patient was the surgery he was offered prior in any and all discussions prior to the surgeries.
>
> It is not clear to me why this procedure was not undertaken and why the posterior laminectomy was done in this young patient and the herniated discs were not addressed and the pressure upon the spinal cord and nerves were not addressed
>
> …Since Mr. Sands has undergone an inappropriate posterior cervical laminectomy his spine is now destabilized and would have to be stabilized for him to have a pain free and safe life going forward.*"*

[45.] It is, in my view, not plain and obvious that Mr. Sands was fixed with the requisite knowledge as required under the LA to bring a claim for negligence against Dr. Ekedede on 09 October 2018. Dr. Munnings' report did not definitively state what was the standard of care/recommended protocol in the circumstances arising in this case. It was the Barnett Report that confirmed that Dr. Ekedede should have cancelled or delayed the surgery, given the circumstances. Furthermore, it is unclear when Mr. Sands would have had knowledge of the contents of the 09 October 2018 letter as it is not addressed directly to him (it was addressed to Christina Galanos).

[46.] Though Dr. Munnings' report does mention injuries post-surgery and that the surgery performed on Mr. Sands at the time was inappropriate, it is not clear, plain and obvious that Mr. Sands was fixed with the requisite knowledge that the surgery ought to have been delayed or cancelled, as this is the purported standard practice in the medical profession.

[47.] Mr. Sands' counsel focused on the opinion of Dr. Barnett heavily in her submissions to the Court. Specifically, counsel asserts that Mr. Sands' claim was framed as negligence due to Dr. Ekedede's failure to "cancel/delay the surgery". Based on how the pleadings were framed, I am persuaded that the absence of the phrase "cancel/delay

the surgery in prior medical reports makes this an entirely different claim. This was not a plain and obvious case for striking out as the requisite knowledge was not acquired until receipt of the Barnett Report on 11 January 2022.

[48.] Accordingly, I will not strike out paragraphs 14 to 17 of the SOC as being statute barred.

Applications for Stay of the Proceedings and Extension of Time for Dr. Ekedede to file a Defence

[49.] In relation to the stay application, such stay was requested pending the determination of this application. Based on the foregoing, such stay is unnecessary.

[50.] With respect to the requested extension of time to file a Defence, Mr. Sands' counsel does not appear to object to this.

[51.] **Rule 26.2(1)(k) of the CPR** states:

> "26.1 Court's general powers of management.
> (2) Except where these rules provide otherwise, the Court may —
> (k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed…"

[52.] The **Supreme Court Civil Procedure Rules, Practice Guide, January 2024 at page 104** states:

> "The Court's express power pursuant to r. 26.1(2)(k) to grant an extension even after the expiry of the relevant deadline is subject to the overriding objective of the Civil Procedure Rules. Accordingly, the onus is on the applicant to seek the extension promptly, as soon as the need for the same is apparent. This obligation can be discerned from the Court's approach to extension applications made both "in time" and "out of time".
> In cases of the former, the Courts have signaled that the key consideration is the overriding objective, rather than treating the application as one for a relief from sanction. **By contrast, instances of the latter are to be approached strictly as a relief from sanction, even where a sanction had not been stipulated. In either event, the relevant factors the Court**

would consider include: (1) the prejudice to the parties, (2) the merits of the claims, and (3) the circumstances of the case

[Emphasis added]."

[53.] In relation to the instant case, I see no prejudice that Mr. Sands would suffer (particularly as there is no challenge or objection to the requested extension of time to file a Defence) and I do believe there are certain facts and issues that the Court ought to investigate to make a sound determination in the matter. Accordingly, I shall grant the extension which Dr. Ekedede seeks.

Conclusion

[54.] Based on the applicable principles in this matter, Dr. Ekedede's application to strike out paragraphs 14 to 17 of the SOC on the grounds that Mr. Sands' negligence claim (i) discloses no reasonable cause of action; and (ii) is statute barred are dismissed.

[55.] I also exercise my powers under Rule 26.1(2)(k) of the CPR and permit Dr. Ekedede to file and serve a Defence within fourteen (14) days from the date of this ruling.

[56.] Mr. Sands is granted leave to file and serve any Reply fourteen (14) days from the date the filed Defence is received by him/his counsel. Dr. Ekedede shall pay the costs for any filed and served Reply, to be assessed by this Court if not agreed.

[57.] Costs for this application shall be costs in the cause.

Dated this 27th day of May, 2024

Deborah E. Fraser
Senior Justice