

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION

3 CAUSE NO. G 222 of 2014

4
5 BETWEEN

6 SOPHIA EDWARDS

7 PLAINTIFF

8 AND

9 DR SARATH DE ALWIS-SENEVIRATNE

10 DEFENDANT

11
12 APPLICATION CONSIDERED ON THE PAPERS
13 BY JUSTICE K GUNN (ACTG)

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17 Representation: Miss Mullen for the Plaintiff
18 Mr Keeble for the Defendant
19 Plaintiff's submissions: 11th July 2018
20 Defendant's submissions: 27th July 2018
21 Plaintiff's reply: 3rd August 2018
22 Draft Ruling circulated: 9th November 2018
23 Date of Ruling: 3rd December 2018
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27 **RULING AS TO COSTS**

- 28
29 1. On 29th June 2018 I provided the perfected judgment regarding the Defendant's application for
30 a split trial and partial dismissal of the Plaintiff's claim. On 11th July 2018 the Plaintiff applied for
31 the Defendant to pay her costs of the applications. The Defendant objected to a costs order
32 being made. Counsel agreed that the matter could be dealt with by way of written submissions.
33 I hereby provide my ruling on the application for costs.
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1 *The Law*

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- 3 2. Costs orders are governed by section 24 of the Judicature Law (2017 Revision) and GCR O.62.
- 4 Whether to award costs is a matter of discretion and the overriding objective is that the
- 5 successful party to any proceeding should recover their reasonable costs incurred in conducting
- 6 the proceeding in an economical, expeditious and proper manner (O.62, r.4(2)). Costs should
- 7 follow the event except when it appears to the Court that some other order should be made
- 8 (O.62, r.4(5)), including but not limited to, ordering only part of the costs being paid, or to make
- 9 no order at all. The court should consider the conduct of the parties, whether the party
- 10 succeeded in part(s) of his case even though he was not wholly successful, and any offers of
- 11 settlement.
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- 13

14 *Strike out – Paragraph 24.b*

15

- 16 3. Turning to the costs of the strike out application. It is helpful to review my summary of
- 17 counsel’s submissions which I set out at paragraphs 6-8 of the judgment:-
- 18

19 *“6. Mr Keeble, on behalf of the Defendant, submitted that paragraph 24.b of the*

20 *Statement of Claim should be struck out because -*

- 21 (i) *“Misrepresentation” in this instance means “misdiagnosis”. Therefore the*
- 22 *substance of this allegation is negligent misdiagnosis, not battery. Negligent*
- 23 *Misdiagnosis is pleaded at paragraph 15 of the State of Claim and paragraph*
- 24 *24b is therefore duplicitous.*
- 25 (ii) *It is an unwarranted second attempt to plead battery which is pleaded at*
- 26 *paragraph 24.a.*
- 27 (iii) *Mr Keeble submitted that consent obtained as a result of misdiagnosis is still*
- 28 *valid consent and therefore the doctor is not committing a battery. Mr Keeble*
- 29 *replies upon the decisions in **Chatterton v Gerson** [1981] QB 43, **Hills v Potter***
- 30 *[1983] 3 All ER 716, **Abbas v Kenny** 31 BMLR 157 and **Sidaway v Board of***
- 31 ***Governors of the Bethlem Royal Hospital and the Maudsley Hospital** [1984] 1*



1 QB 493 in support of his client's position. The argument that there was no
2 "genuine consent" has no basis in law/has no prospect of success.

3 (d) The Plaintiff has not pleaded to the basis of "misrepresentation".

4 (e) That the allegation of battery as pleaded in 24.b is unsustainable in law.

5
6 7. For the same reasons Mr Keeble asserts that paragraph 24.b constitutes an
7 abuse of process and/or is frivolous and vexatious.

8
9 8. Miss Mullen on behalf of the Plaintiff opposed the application and submitted
10 that –

11 (a) Strike Out applications should be used in instances where most or all of the
12 other party's case will be struck out, rather than a narrow and discreet issue
13 which will not significantly impact the conduct of the proceedings.

14 (b) Paragraph 24.b is not the entirety of the Plaintiff's claim for battery.
15 Therefore, even if paragraph 24.b is struck out, the issue of battery will remain
16 an issue to be determined at trial. Consequently, the Defendant's application
17 is inconsistent with the overriding objectives that applications should be made
18 with consideration to what is just, expeditious and economic.

19 (c) The Defendant misrepresented to the Plaintiff, both before and after the
20 surgery, that she had cancer. Misinformation, whether or not innocently
21 given, and withholding information which is sought by the patient may well
22 "vitiating consent". Reliance was placed on the dictum in **Re: T (Adult: Refusal
23 of Treatment) [1993] FAM 95**). The Plaintiff had been informed that the
24 tumours were to be removed which she consented to. She was not told of, nor
25 had she consented to, a full abdominal hysterectomy."

26
27 4. I rejected the Defendant's arguments finding that paragraph 24.b disclosed a course of action;
28 and that it was not appropriate to make an order pursuant to O.18 r.19 and O.14 r.12 or 14A
29 (see paragraphs 17-19 of the judgment for the reasons).
30



1 5. The Plaintiff seeks the costs of the application as paragraph 24.b was found to have “some
2 *chance of success*” thereby making her the successful party. Miss Mullen asserts that the merits
3 of paragraph 24.b were discussed extensively in correspondence between counsel prior to the
4 Defendant filing his summons, giving the Defendant ample opportunity to realise the strength of
5 the Plaintiff’s argument.

6
7 6. Furthermore, Miss Mullen reiterates her submission made at the hearing that using summary
8 judgment to try to strike out 2 sentences of the pleadings is contrary to the overriding objective
9 that proceedings be dealt with in a just, expeditious and economic way.

10
11 7. Mr Keeble argues that the question of costs of the strike out application should be reserved for
12 the trial or a further hearing on the application for particulars because “*the Court (perhaps*
13 *generously) allowed the claim ... to go forward based on the unsupported allegation of*
14 *“misrepresentation”.... It remains to be seen whether on an application for particulars or at trial*
15 *such pleading can be sustained or whether it will fail and should have been struck as the*
16 *Defendant has submitted.*” (at paragraph 27 and 28 of his written submissions)

17
18 8. I can see from the correspondence included in the hearing bundles that paragraph 24.b was
19 indeed extensively debated, including the grounds upon which the application was ultimately
20 dismissed. With all arguments made in that correspondence, the Defendant chose to proceed
21 with the application but was ultimately unsuccessful. As the successful party the Plaintiff can
22 reasonably expect to recoup her costs of having to defend the application. But the matter does
23 not end there. Not only was the Defendant’s challenge of paragraph 24.b unmeritorious, the
24 issue was so narrow and inconsequential to the overall conduct of the proceedings that, even if
25 there had been a basis for striking out paragraph 24.b, the Defendant could have properly
26 addressed the matter at the trial without prejudicing his case. That would have been the just,
27 expeditious and economic approach to this marginal issue. The fact that the application was
28 accompanied by an application for a split trial does not improve the situation. It is entirely
29 appropriate that the Defendant should pay the Plaintiff’s costs relating to the strike out
30 application.





1 SPLIT TRIAL

2
3 9. The Defendant's application for a split trial was with a view to the preliminary trial determining :

- 4
5 (i) Whether the Defendant was consulted by the Plaintiff on 1st December 2012 and was the
6 surgeon on that date and thereafter as alleged by the Plaintiff; or
7 (ii) Whether the Defendant was first informed of, and consulted in respect of, the Plaintiff's
8 case on 6th December 2012 as he asserts.

9
10 10. Without meaning any disrespect to the parties and their counsel or speaking to the merits of the
11 case, I will only recap in the briefest terms the issues that are relevant to this application. A
12 fuller summary is set out at paragraphs 3 – 5 of my earlier judgment.

13
14 11. The Plaintiff's pleadings allege that she was being treated by another physician who then
15 enlisted the Defendant to assist in the Plaintiff's diagnosis and treatment. Her pleadings allege
16 that her first meeting with the Defendant was on 1 December 2012 after which she underwent
17 further tests, was diagnosed and eventually underwent surgery on 6 December 2012.

18
19 12. The Defendant's case is that he had no knowledge of the Plaintiff or her condition until he was
20 called by the Plaintiff's treating physician on 6 December 2012; that this was the date of their
21 first meeting; and that the Defendant had not been involved in the Plaintiff's diagnosis.

22
23 13. The Defendant sought a split trial to have the issue of whether the Defendant was the Plaintiff's
24 treating physician or in any way involved in the Plaintiff's diagnosis and treatment prior to 6
25 December 2012 (the day of the surgery) resolved. Mr Keeble's arguments in favour of a split
26 trial are set out at paragraph 21 of my judgment, which I do not rehearse here.

27
28 14. During the course of the hearing Miss Mullen raised the issue that the reference to 1 December
29 was an "error" and that in due course the pleadings would be amended to allege that the first
30 meeting between the parties was 5 December 2012.

31
32 15. In short, I rejected the Defendant's application because a split trial would not obviate the need
33 for a second trial, and would likely lead to –

- 1
- 2 (i) a duplication and overlap of the expert evidence;
- 3 (ii) the parties giving evidence at both hearings;
- 4 (iii) the court having to determine credibility and reliability of the parties at the
- 5 preliminary hearing without having heard all of the relevant evidence;
- 6 (iv) cause prejudice to one or other party;
- 7 (v) significant delay; and
- 8 (vi) additional costs being incurred.
- 9

10 16. Mr Keeble now submits, on behalf of the Defendant, that the Defendant would not have

11 pursued the application had the Plaintiff sought to correct the date "error" in her pleadings (see

12 paragraph 14 above), or at the very least bring it to the Defendant's attention in

13 correspondence that there had been an error at some point before the Defendant issued the

14 summons seeking the split trial:-

15

16 *"the case presented to the Court and argued on behalf of the Plaintiff on 8 June 2018*

17 *was entirely different from that pleaded and maintained over the previous 3 ½ years*

18 *of this litigation."* (at paragraph 16 of his submissions)

19

20 *"...the Plaintiff improperly maintained pleadings which she knew to be erroneous,*

21 *misleading and damaging over the course of some 3 ½ years of litigation."* (at

22 paragraph 19 of his submissions)

23

24 *"...had the Plaintiff's case been pleaded and presented, as it was on 8 June 2018...the*

25 *Defendant would not have proceeded by way of Summons for a split trial. It was the*

26 *pleaded allegation of such a meeting and diagnosis on 1 December 2012 that was*

27 *the motivation for and genesis of the Defendant's Summons..."* (at paragraph 20 of

28 his submissions)

29



1 17. Mr Keeble argues that *“to allow the Plaintiff her costs would have the effect of*
2 *condoning the extraordinary and highly irregular manner in which this action has been*
3 *prosecuted and the egregious conduct referred to ...”* (at paragraph 21 of his
4 submissions). Mr Keeble invites me to either order the Plaintiff to pay the Defendant’s
5 costs of the application or make no order as to costs.
6

7 18. In reply, Miss Mullen submitted that, the “date error” was referenced in a footnote in
8 correspondence to Mr Keeble as early as September 2017. Furthermore, the Plaintiff’s
9 first affidavit and other documents exhibited/created for the purposes of the
10 proceedings reference the parties’ first meeting on 5 December. Miss Mullen described
11 the Defendant as seeking to “retro-engineer” his earlier application.
12

13 19. Furthermore, Miss Mullen argues that the Defendant’s submissions are an intentional
14 but unjustifiable attack on her professional character. For that reason the Plaintiff seeks
15 costs of preparing the submissions on costs on an indemnity basis.
16

17 20. Both my recollection and my notes reflect that, upon Miss Mullen raising the issue of
18 the “date error” in her oral submissions, Mr Keeble did not resile from his position. He
19 maintained that a split trial was necessary for all of the same reasons already proffered.
20

21 21. Even with the benefit of reviewing the original submissions together with the
22 Defendant’s after-the-fact submissions now made, I cannot see how an amendment to
23 the date pleaded would have materially changed the basis of the Defendant’s
24 application or the submissions made.
25

26 22. The letter from Broadhurst to Hampson and Co on 24th September 2017 does include a
27 footnote speaking to the consultation taking place on 5 December. Paragraph 12 of the
28 Plaintiff’s first affidavit (dated 8th February 2018) asserts that the first meeting was on 5
29 December. Other documents do make mention of that date also. The Defendant cannot
30 claim to have been taken by surprise by the conflict between the pleadings and the
31 other documents.
32



1 23. Even though the Defendant had already filed his summons (20th November 2017) there
2 was ample opportunity to withdraw it.

3
4 24. The Plaintiff will in due course have to explain why there has been a delay in correcting
5 the date "error", but I do accept Miss Mullen's submission that the Defendant has
6 sought to rewrite the basis of the original application. His grounds for opposing the
7 Plaintiff's costs application are entirely at odds with the submissions made at the
8 substantive hearing. There is no possibility of an oversight or error or
9 misunderstanding. I accept that the Defendant's submissions have caused the Plaintiff
10 to incur further costs in requiring Miss Mullen to prepare a detailed reply to the
11 Defendant's entirely new and unexpected argument.

12
13 25. The Defendant's objection to the Plaintiff's application for costs for the unsuccessful
14 application for a split trial is entirely without merit. The Plaintiff was successful and
15 should properly receive her costs after the event. The Defendant should pay the
16 Plaintiff's full costs in this regard.

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18
19 *Standard or Indemnity Basis*

20
21 26. I turn to consider whether costs should be awarded on a standard or indemnity basis.
22 The court's power to make an order for costs to be paid on an indemnity basis is
23 contained in GCR O.62, r 4(11) and 11(2).

24
25 O. 62, r.4(11)

26 *"The Court may make an inter partes order for costs to be taxed on the indemnity*
27 *basis only if it is satisfied that the paying party has conducted the proceedings, or*
28 *that part of the proceedings to which the order relates, improperly, unreasonably or*
29 *negligently.*



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O.62, r.11(2)

“Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.”

O.62, r.11(3)

“Subject to the following provisions of this rule, where it appears to the Court that costs have been incurred improperly, unreasonably or negligently in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may order –

- (a) the attorney whom it considers to be responsible (whether personally or through an employee or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or*
- (b) the attorney personally to indemnify such other parties against costs payable by them.*



1 27. In **Al Sadik v Investcorp Bank BSC and others** [2012(2) CILR 33] Jones J reviewed the
2 purposes of these two rules:-

3
4 *“The application of both rules depends upon establishing that a party has behaved*
5 *improperly, unreasonably or negligently in some way, but I think that they are aimed*
6 *at dealing with misconduct in two different contexts. Rule 4(11) is aimed at*
7 *substantive misconduct on the part of a party personally which results in the court*
8 *expressing its disapproval by making an order for indemnity costs against him. Rule*
9 *11 (as a whole) is aimed at procedural misconduct by a party and/or his attorney*
10 *which causes their opponent to waste money on legal fees and expenses which*
11 *would not otherwise have been incurred. In both cases the result is an order for*
12 *indemnity costs ... r.4(11) deals with substantive misconduct committed by the party,*
13 *for which his lawyer is not responsible....In contrast, r.11 is aimed at procedural*
14 *misconduct of a kind which is likely to be committed by attorneys, for which their*
15 *clients should not necessarily be held responsible. Orders can be made against*
16 *attorneys for the purpose of compensating the opposing party and/or compensating*
17 *their own clients.” (at paragraph 9).*

18
19 *“It follows from this analysis that r.11(2) and (3) are compensatory in nature. The*
20 *court can only make a wasted costs order if it is satisfied that the misconduct of the*
21 *defaulting party and/or his attorney has caused their innocent opponent to waste*
22 *money on legal fees and disbursements which would not have been incurred but for*
23 *their default. The purpose and effect of an order for indemnity costs under r.4(11) is*
24 *to express the court’s disapproval of a party’s misconduct by stripping him of the*
25 *protections which would otherwise apply.”*

26
27 28. Given that Miss Mullen’s complaint as to the allegation of professional misconduct is
28 directed at Mr Keeble rather than the Defendant, I am concerned with r.11(2) and (3).



1 29. As I have already touched upon, Miss Mullen alleges that Mr Keeble's submissions, in
2 particular paragraph 21, constitute serious allegations of misconduct against her. Mr
3 Keeble has subsequently sought to clarify his submissions, in particular to stress that he
4 did not intend his submissions to be construed in that manner, and that his sole purpose
5 had been to emphasise the consequences of the delay to the Defendant's professional
6 reputation. I accept Mr Keeble's explanation and I need not consider the matter
7 further.

8
9 30. I am satisfied that the Defendant's "revisionist" approach to the split trial application is
10 itself so unreasonable that it warrants an award of costs on an indemnity basis, albeit
11 limited to the costs application itself.

12
13 31. The Defendant shall pay the Plaintiff's costs in relation to the *unsuccessful applications*
14 on 8th June 2018 on a *standard basis*.

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17 **ORDER**

- 18
19 1. The Defendant shall pay the Plaintiff's costs for the preparation and attendance at
20 the hearing on a standard basis, taxed if not agreed.
21
22 2. The Defendant shall pay the Plaintiff's costs arising from the application for costs on
23 an indemnity basis, payable forthwith.
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26 Dated this 3rd day of December 2018

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31 **THE HON. JUSTICE K GUNN**
32 **ACTING JUDGE OF THE GRAND COURT**

