11 DEC 2013

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 927 of 2006

BETWEEN:

LEONIE MARBELL **CLAIMANT**

AND

GOTE PROPERTIES INC. **DEFENDANT**

BEFORE: Dr. The Hon. Madam Justice Sonia Richards, Judge of the High Court

2013: December 05, 11

Mrs . Marguerite Woodstock-Riley Q.C. in association with Ms. Lydia Farley for the Claimant.

Mr. Dane Hinds for the Defendant in association with Ms. Leslie Haynes, Q.C

DECISION

Background

[1] The Claimant filed a Writ of Summons on 25 May, 2006, claiming damages for personal injuries she sustained while at the Defendant's property on 13

June, 2003. The action is now at an advanced stage of pre-trial review, with four days of trail scheduled for 13, 14, 16 and 17 January, 2014.

[2] On 05 December, 2013, the Defendant filed a Notice of Application seeking the following orders pursuant to the Supreme Court (Civil Procedure) Rules, 2008 ("the CPR"):

1. That the proceedings be stayed until the Claimant is examined by the Defendant's consultant surgeon, Mr. Lawrence Freedman, MBBS, FRCS, who practices medicine in the United Kingdom.

2. That the costs of and occasioned by the application be the Defendant's costs in any event to be assessed and payable by the Claimant forthwith.

[3] The grounds of the application are that:

1. The Claimant was initially treated by Dr. Randolph Carrington FGRCSEd, who produced a report on the Claimant's injuries dated 16 June, 2003. The report spoke to the Claimant's injuries which she sustained but did not provide a future prognosis for her injuries.

2. Subsequent to her visit to Dr. Carrington, the Claimant returned to the United Kingdom where she underwent an MRI scan followed by surgery to repair her knee. A report was generated by Mr. R. Ravikumar, the consultant orthopaedic surgeon who conducted the surgery, dated 24 June, 2003. The said report however did not provide any information as to the Claimant's long term prognosis.

3. Sometime after the surgery the Claimant continued her medical care with Dr. Ma Jung Yu and Dr. S. H Yu who generated reports on the Claimant's injured knee dated 26 August, 2010 and 15 December, 2011. Neither report gave any clear indication as to the Claimant's long term prognosis.

4. On 11 November, 2013, the Defendant's Attorneys-at-Law, Mr. Daine Hinds of Finisterre Attorneys, wrote the Claimant's Attorney-at-Law, Mrs. Marguerite Woodstock-Riley, Q.C. requesting the Claimant be seen by Mr. Lawrence Freedman, MBBS FRCS, a consultant surgeon practicing in the United Kingdom for the purposes of ascertaining her present medical condition and future prognosis.

5. Mrs. Woodstock-Riley, Q.C. responded via letter dated 26 November, 2013 denying the Defendant's request to have the Claimant examined by Mr. Freedman.

6. In the Claimant's Statement of Claim dated 11 February, 2008, the Claimant claims damages against the Defendant for:

    (i) Handicap on the labour market;
    (ii) Future domestic assistance; and
    (iii) Future transport costs.

7. The Defendant does not have a clear indication as to the Claimant's future prognosis and cannot adequately defend the Claimant's claim under these heads of damages.

8. A stay of proceedings will ensure the proper administration of justice which requires that such action be taken in furtherance of the overriding objective.

9. Further, the Defendant's reason for denying the request is unreasonable as the assessment will not affect the trial date.

[4] The application was supported by a 14 paragraph affidavit of counsel for the Defendant, Mr. Daine K. Hinds. This affidavit repeated and expanded on the grounds of the application. Both the affidavit and the grounds refer to correspondence passing between counsel for the parties. This

correspondence is relevant to the determination of the application by the Court.

[5] By letter dated 11 November, 2013, counsel for the Defendant wrote to counsel for the Claimant requesting a further medical examination of the Claimant. The letter states in part:

> "We write to enquire whether your client would be willing to be examined by Mr. Lawrence Freedman, MBBS, FRCS, a consultant surgeon practicing in the United Kingdom in order to obtain a current report regarding your client's present medical condition and future prognosis.
>
> If your client consents to be assessed by Mr. Freedman, we will arrange a time and date convenient to both parties for the examination to be conducted.
>
> If you have any queries, please do not hesitate to contact us and we look forward to hearing from you soon.".

[6] Counsel for the Claimant replied by letter dated 26 November, 2013, in the following terms:

> "We refer to the matter at caption and to your letter dated the 11 November 2013.
>
> Please advise if the Defendant is now prepared to accept liability and we are moving forward on a determination of quantum.
>
> In the absence of such admission, the request for a medical examination is exceedingly late and would not be agreed.

> This incident occurred on the 13th day of January, 2003. The Defendant was served with the Claimant's Witness Statements including those of her physicians since May, 2012. It is approximately 7 weeks before the trial of this matter and such an examination would likely delay the same. Time would be needed for your expert to produce a report and to file a Witness Statement. Further, the Claimant would need to review the report, we would then need to obtain our client's instructions and expert advice on the same.
>
> While a Claimant shall submit to a reasonable request for a medical examination, a Claimant is entitled to refuse a late request.
>
> In **Maloney v Regan**, six weeks before the trial, the Defendant requested that the Plaintiff undergo a medical examination. The Plaintiff refused and an application for stay of the proceedings was refused by the Court.
>
> We look forward to your urgent response."

[7] The response of counsel for the Defendant was to file the Notice of Application with the accompanying affidavit on 05 December, 2013. The matter came on for hearing on 05 December, 2013, and was treated as an urgent application. Senior counsel for the Claimant declined an adjournment to file an affidavit in reply. Both sides presented their oral submissions, and the matter was adjourned to 11 December, 2013, for the Court's ruling. The parties agreed to file their written submissions on or before 09 December, 2013. Those written submissions were received together with an affidavit in reply sworn by Mrs. Woodstock-Riley Q.C.

The Defendant's Request

[8] The Defendant contends that an additional medical assessment is necessary so that it may adequately respond to the claims for future losses. It is argued that without the assessment, the Defendant would be severely prejudiced by its inability to adequately defend these claims. In addition, neither the parties nor the Court would be able to properly determine the Claimant's present medical condition, her future prognosis, or the validity or extent of her claims for future losses.

[9] The Defendant relied on the case of **Starr v. National Coal Board ([1977] 1WLR 53),** where Scarman LJ considered the existing case law and pondered:

> "So what is the principle of the matter to be gleaned from this case? In my judgement the court can order a stay if....the conduct of the plaintiff in refusing a reasonable request for medical examination is such as to prevent the just determination of the cause....We are, of course, in the realm of discretion. It is a matter for the discretion of the judges, exercised judicially upon the facts of the case, whether or not a stay should be ordered.... There is, I think, clearly a general rule that he who seeks a stay of an action must satisfy the court that justice requires the imposition of a stay." (Page 70 E-G).

[10] There are clearly three elements to the dicta of Scarman LJ. First, the request for a medical examination has to be reasonable. Secondly, where a claimant refuses to consent to the examination, the court must determine

whether that refusal prevents the just determination of the claim. Thirdly, the onus is on the Defendant to satisfy the court that justice requires that the proceedings be stayed.

The Claimant's Objections

[11] The Claimant stoutly resisted the application to stay these proceedings on several grounds. Counsel for the Claimant pointed to the lateness of the application; the absence of any prejudice to the Defendant; the requirements of the CPR; and the fact that the Defendant is currently in breach of existing Court orders in this matter. The **Starr** case was distinguished from the facts of the present case, and the case of **Preece v. British Rail Engineering Limited** (1982 WL 967783) tendered as being more relevant to the present facts. The Court notes that counsel for the Claimant expounded on the Defendant's delay in her letter of 26 November, 2013. However, the case of **Maloney v. Regan**, mentioned without citation in this letter, was not included in the written submissions.

Discussion

[12] The Defendant has been aware of the injuries alleged by the Claimant through correspondence sent to it since 2003. It also received 3 medical reports, authored by Dr. Randolph Carrington, Dr. S.H. Yu and Mr. R. Ravikumar, under cover of a letter dated 26 October, 2007. This was not

disputed by the Defendant. The Statement of Claim was filed on 11 February, 2008. And so for almost six years the Defendant has known about the claims for future losses.

[13] Case Management orders were also made with respect to medical evidence. The order of Master Clarke filed on 21 October, 2011, provides that:

> "3. The parties have permission to rely on experts in relation to the issue of tortuous (sic) liability, and medical experts in relation to the issues of the quantum of damages. The number of experts shall be limited to two for each issue for each party and the reports of such experts to be exchanged on or before the 31st January, 2012.
>
> 4. Each party be at liberty to put written questions to the experts of the other party up to twenty eight (28) days after the service of the report of the expert.
>
> 5. The experts to reply to written questions on or before the 10th April, 2012.".

[14] It was open to the Defendant, to request the additional medical examination of the Claimant, within the parameters of the above quoted paragraphs of the order of 21 October, 2011. This was not done. And there is nothing to indicate that the Defendant sought to put any written questions to the Claimant's medical experts with respect to either her future prognosis or her claims for future losses or at all. It is two years after this Case Management

order, and at the threshold of the trial, that the Defendant is seeking to garner its own expert medical evidence.

[15] The witness statements of the medical experts were filed on behalf of the Claimant on 31 January, 2012. And yet again the Defendant was not galvanized into action. A full 22 months passed by until 11 November, 2013, when counsel for the Claimant was alerted by a written request for an additional medical examination of the Claimant.

[16] The Court has also noted that although the Defendant identified a medical doctor in London, conspicuously absent from its application is any time frame for the preparation and delivery of the report by the medical expert. Therefore, the Court is unable to set any realistic time lines to accommodate the production of the report, the filing of the witness statement, and any questions about the report raised by counsel for the Claimant. And those time lines would have to be fitted into the 4 of 5 weeks remaining before the scheduled start of the trial on 13 January, 2014, unless the parties agreed to vacate the trial dates.

[17] The Court is also mindful of the prejudice to the Claimant who has been awaiting her day in court for 7 years in relation to injuries that occurred 10 years ago. In addition, she has already booked her passage to Barbados for a trial in January. A stay of proceedings at this time would incur further

frustration and cost to the Claimant and to her mother who is to accompany her to Barbados. The Court has to take into consideration the fact that the Claimant does not live in Barbados.

[18] In these circumstances, the Court is of the view that the request for the medical examination would have been reasonable at any time between the Case Management order of 21 October, 2011, and perhaps up to a year after the filing of the witness statements on 31 January, 2012. It is not now reasonable, especially in light of the fact that the Defendant was unable to give the Court any realistic time line for the production of the additional medical report.

[19] The Defendant believes that this medical evidence is critical to its response to the claims for future loss. However, the Defendant cannot predict that the new evidence will assist in undermining these claims. All that is predictable at this stage is that both sides will require additional time to evaluate that evidence. And in the case of the Claimant, there will be a further need to have the new evidence made available to her medical team for their future expert opinion.

[20] The Defendant also requires further medical evidence because of its assessment that the existing medical reports do not assist the Claimant in proving her claims for future loss. It is not for the Defendant to be concerned about any apparent weaknesses in the Claimant's case. The Defendant need not be seeking evidence to assist the Claimant. It is open to the Defendant, at the conclusion of the trial,

to persuade the Court that there is a lack of or paucity of evidence to support the claims for future loss.

[21] Against this background, the refusal of the Claimant to subject herself to further medical examination at this time is not unreasonable. Any prejudice to the Defendant is the result of its own tardiness. It cannot at the eleventh hour be alleging that the Claimant's refusal is preventing the just determination of the claim, when it has had several years to secure the additional medical evidence. The Defendant has not satisfied this Court that justice requires that the proceedings be stayed until the Claimant permits a further medical examination.

[22] This Court adopts the observations of Cumming-Bruce LJ in the **Preece** case (supra). He opined that:

> "In my view, against the background of the correspondence, which demonstrates the belated stage in the litigation when the defendants began to consider whether they required to place before the court evidence from their own medical witnesses, together with the fact that as long ago as July the defendants agreed on a date for hearing .....estimated at a number of days....those factors point to such a profound inconvenience and prejudice to the plaintiffs if the date is now vacated, that it would be quite wrong for the court to embark, or give the parties the opportunity of embarking upon a course of preparation for trial if such course must inevitably lead to an application for vacation of the date.....I do not think it would be right in the interests of justice to contemplate vacation of the date, with the necessity that the plaintiffs should try to obtain another date...and to console the plaintiffs by making the defendants pay any costs thrown away as a result of the delay.....It is too late in the day to set in motion the

investigations that the defendants now seek to undertake.". (Pages1and 2).

[23] The Defendant has not persuaded the Court that its request can be accommodation within the narrow window of time available before the start of the trial. And the Court takes judicial notice of the fact that we are fast approaching an internationally recognised holiday season, that encompasses the beginning of the New Year, and in which deadlines are more challenging to achieve. To grant the Defendant a stay of proceedings would lead inevitably to the vacating of the January 2014 trial dates. The new regime under the CPR does not tolerate "such a profound inconvenience".

Disposal

[24] For the forgoing reasons, the Defendant's application for a stay of proceedings is dismissed.

S. L. Richards

SONIA RICHARDS
High Court Judge