In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 166

BETWEEN:

KL

Plaintiff

- and -

DR

Defendant

RULING

Application to set aside judgment in default of appearance; substituted service; Judgment Enforcement Proceedings in New York, Indemnity Costs

Date of Hearing: **23, 30 March 2021**
Date of Ruling: **13 May 2021**

Appearances: **Paul Harshaw, Canterbury Law Limited, for the Plaintiff**

Michael Scott, Browne Scott, for the Defendant

RULING of Mussenden J

Introduction

1. This matter came before me as follows:
    a. A Summons dated 20 February 2020 in which the Defendant applies:
        i. To set aside the Amended Judgment in Default of Appearance[1] dated 6 July 2016 entered against him;
        ii. To Stay the Certified Amended Judgment in Default of Appearance dated 6 July 2016 and the Certificate of Assessment of Damages dated[2] 2 Nov [*sic*] in the amount of $172,487.53 together with the Certification of the Chief Justice as filed with the New York County Clerk, in the USA on 11 August 2017 ("**the New York Proceedings**"); and
        iii. For an Order that the Defendant be at liberty to file a Defence within 14 Days of a Ruling in order to defend the action.
        iv. The Summons is supported by the First Affidavit of DR sworn but undated (possibly sworn on 3 January 2020[3]) and filed on 26 January 2020 along with Exhibits "**1**" and "**2**" and the First (Rejoinder) Affidavit of DR sworn on or about 12 February 2021.

    b. A Summons dated 25 February 2021 for an urgent application for an order that the ongoing enforcement steps in the foreign Court of New York, USA be stayed as "originally directed" by the Supreme Court of Bermuda on 13 August 2020. ("**Urgent Application**") That Summons is supported by the Urgent Affidavit of DR sworn 12 February 2021 along with Exhibits "**1**" – "**5**".

    c. An Amended Summons dated 19 March 2021 was filed which deleted the application for a stay of the New York Proceedings. Consequentially, the Amended Summons also negated the need to hear the Urgent Application. I will discuss this amendment below as Counsel for the Plaintiff has applied for costs on an indemnity

[1] The Summons states "Judgment in Default of Defence" but there was only ever a Judgment in Default of Appearance and an Amended Judgment in Default of Appearance.
[2] The Certificate of Assessment of Damages is dated 28 September 2016
[3] First (Rejoinder) Affidavit of DR undated, possibly sworn on or around 12 February 2021 at para 3

basis for his wasted costs in respect of the New York Proceedings. This Amended Summons was supported by the Second Affidavit of Counsel Michael Scott sworn on 15 March 2021.

The Parties

2. The Plaintiff is a female Bermudian and resident of Bermuda. From in or about January 2009 through May 2013 she was a patient of the Defendant. The Plaintiff relies on her Second Affidavit sworn on 2 September 2020 in objection to the Defendant's application to set aside judgment and in that Second Affidavit she makes detail reference to her First Affidavit sworn on 1 July 2016.

3. The Defendant was at all material times an American independent surgeon with a specialty in plastic and reconstructive surgery and held himself out to be an experienced, skilled and competent plastic and reconstructive surgeon. He further held himself out as an MD, Msc, FACS, Board certified Plastic and Reconstructive Surgeon, licenced to practice in California, New York and Bermuda, certified by the American Board of Plastic Surgery and a Fellow of the American College of Surgeons.

4. At all material times the Defendant had Hospital Privileges at the King Edward VII Memorial Hospital ("**KEMH**"), Paget, Bermuda, which permitted him to arrange for patients to be admitted to KEMH for the purpose of undergoing surgery. The Defendant is a former resident of Bermuda and ceased to be a resident in Bermuda in or around 2013/2014. Since in or round June 2015, he has been a resident of Manhattan, New York, USA where he continues to practice plastic and reconstructive surgery in Manhattan.

Background of the Medical Events

5. The Amended Statement of Claim ("**ASOC**") sets out the medical events, some of which are as set out below.

6. On or around 6 January 2009 the Plaintiff entered into a written contract with the Defendant entitled "Cosmetic Fee Arrangement" whereby the Defendant agreed to carry out the following surgical procedures on the Plaintiff at a quoted fee rate of $8,700: breast augmentation, breast implants, liposuction of axillae, mini tummy tuck and liposuction of abdomen.

7. On 5 February 2009, prior to the scheduled date for surgery and in consideration of the Defendant's promised services, the Plaintiff paid to the Defendant in or around the amount of $11,700 as demanded by the Defendant.

8. On 30 March 2009, the Plaintiff had her scheduled surgery at KEMH. She had some post-operative medical complaints and on 1 April 2009 she was discharged from KEMH. On 9 April 2009 she had a follow-up visit with the Defendant. During the following months the Plaintiff's breasts healed but with severe disfiguration. The Plaintiff complains her marriage started to breakdown by June 2009 due to the appearance of her breasts, between 2009 – 2013 she lived in a depressed state with emotional and psychological distress and sought counselling.

9. After further consultation with the Defendant, the Plaintiff requested that the breast implants be removed. On 21 May 2013 the Defendant performed the removal operation in his office under a local anaesthetic. After the second surgery, the Plaintiff incurred infection, the scarring and breast deformity remained and she still had no nipples.

10. During the period April 2015 to January 2016 the Plaintiff was treated by Dr. Joseph M. Serletti, MD ("**Dr. Serletti**"), Chief of Division of Plastic Surgery at the University of Pennsylvania in Philadelphia, USA, who performed corrective surgery for raising the breasts, correcting the periareolar scarring, ptosis and contour irregularities, nipple areola reconstruction and nipple tattooing. Dr. Serletti has provided two medical reports as exhibited in the Plaintiff's Affidavits.

Background of the Litigation

11. On 24 April 2015 the Plaintiff filed a Writ of Summons seeking damages against the Defendant for personal injuries sustained in or about March 2009. On 22 March 2016 the Plaintiff filed a Statement of Claim. The Defendant had left Bermuda by this time and leave was granted to serve him out of the jurisdiction. Notice of the action was served on the Defendant but he took no action. On 13 May 2016 judgment was entered against the Defendant with damages to be assessed. A notice for the assessment of damages was sent to the Defendant and again he took no action.

12. On 6 July 2016, the ASOC was filed.

13. On 28 September 2016 damages were assessed in the amount of $172,487.53. Thereafter, the Bermuda judgment was made a judgment of the Supreme Court of the State of New York and proceedings were taken to enforce judgment.

14. On 24 January 2020 the Defendant applied to this Court to set aside judgment made against him on 13 May 2016. The application was supported by an undated affidavit of the Defendant. The application was due to be heard on 19 March 2020 but the Covid-19 pandemic caused delays, and at the rescheduled hearing on 13 August 2020, the Chief Justice gave direction to set the matter down including for agreed dates to be submitted. There were several rounds of communication between counsel to secure agreed dates.

15. On 25 February 2021 the Defendant applied by Summons for a hearing for the Urgent Application for an order that the New York Court be stayed "*as originally directed by the Supreme Court of Bermuda on 13 August 2020*[4]".

16. On 2 March 2021 counsel appeared before me for the substantive hearings. I informed Counsel that it was to be a Directions hearing and I gave directions that the substantive application to set aside would be heard on 23 March 2021 and if necessary, the Urgent Application would be heard on 30 March 2021.

[4] The Summons cited these words in italics although upon review of the Order dated 13 August 2020 there is no such direction.

17. On 19 March 2021, an Amended Summons was filed which deleted the application for a stay of the New York Proceedings. In any event, the substantive application to set aside judgment was heard on 23 and 30 March 2021.

The Defendant's Application

18. Counsel for the Defendant Mr. Scott submits that judgment in default of appearance should be set aside for several reasons.

Service was Irregular

19. First, Mr. Scott submits that the proceedings were not served correctly. In the Defendant's First Affidavit he states that in or around 6 July 2016 by way of substituted service, eleven (11) pleadings in this matter were served to both his medical practice Facebook and by registered mail to his published website by email. However, he states that at no time did his staff who exclusively manage his medical practice Facebook draw the pleadings to his attention. Mr. Scott relies on these facts to show that service was not proper.

20. Mr. Scott also states that the Plaintiff never submitted a complaint of malpractice or the legal proceedings to the Defendant's malpractice insurer who would have conducted a thorough investigation into the matter.

Meritorius Defence

21. Second, Mr. Scott submits that the Defendant has a meritorious defence to the matters alleged in the ASOC. In both the First Affidavit of the Defendant and his First (Rejoinder) Affidavit he states that the draft Defence that he filed shows a defence of merit which discloses arguable triable issues on the question of whether or not his professional care of the patient Plaintiff was negligent or otherwise fell below the standard of care of a reasonable and competent plastic surgeon. Mr. Scott submits that the Defendant can demonstrate that he has a real prospect of success in establishing a defence based on the following factors: (a) the Plaintiff presented to him with terrible prior implants (this

assertion is out-rightly denied by the Plaintiff as she states that the Defendant did the original breast implants); (b) the Plaintiff's expert's report has material omissions to facts which undermine his opinion that the Defendant fell below the required standard of care; (c) The Defendant explained the medical risks to the Plaintiff and she signed a Risk Acknowledgment Form; and (d) the Plaintiff was impatient, failed to follow medical advice and had expectations of instant recovery.

22. The draft Defence provides as follows:

a. The Defendant admits the clinical and biological facts of the Plaintiff[5];

b. The Defendant admits statements about himself and adds further information about his qualifications[6];

c. The Defendant admits the facts and the history of the initial consultation, the contractual terms for the proposed treatment and the treatment carried out.[7] The Defendant admits "*the facts and history of initial consultation ... set out in paragraphs 3 through 8*". The ASOC paragraph 8 states "*Prior to her surgery, the only issue with the Plaintiff's breasts were ptosis (sagging). There were no scars, stretch marks or deformities and her nipples were intact.*";

d. The Defendant asserts that the Plaintiff presented to him at all material times leading to the surgical procedure with terrible implant mal-positioning and extensive keloids from a previous surgery[8] ("**the Alleged Pre-existing Conditions**";

e. The Defendant asserts that the Plaintiff in her Amended Statement of Claim makes no reference to the fact of the Alleged Pre-Existing Conditions in its narrative of reliance on Dr. Joseph Serletti's purported expert opinion to seek to raise an issue of professional negligence;[9]

f. The Defendant avers that the central clinical fact in the previous point utterly and comprehensively displaces the opinion of Dr. Serletti that his surgical procedures

[5] Draft Defence para 1
[6] Draft Defence para 2
[7] Draft Defence para 3
[8] Draft Defence para 4
[9] Draft Defence para 5

failed to measure up to the standard of a reasonable skillful and professional surgeon[10];

g. The Defendant states that the omission of the relevant clinical facts of the Alleged Pre-existing Conditions was both a material irregularity and omission that goes to the heart of the central issue of alleged medical negligence of the defendant's failure to exercise reasonable care and skill or to have breached the duties of care owed by the him and particularised in the Statement of Claim.[11]

h. The Defendant denies any negligence and further says that (a) the risk of scarring, lack of improvement in breast ptosis, loss of nipple areola complex in periareolar mastopexy surgery in the treatment of the Plaintiff's condition of tuberous breast was an inherent risk arising in this particular patent despite the exercise of reasonable care and skill and (b) the treatment given accorded with the practice of a responsible body of medical opinion on periareolar mastopexy procedures in medicine.[12]

i. The Defendant denies that the Plaintiff's conditions of shortness of breath, pneumonia, large unsightly scarring, breakdown of the Plaintiff's marriage, living in a depressed state was caused by the alleged or any negligence on the part of the Defendant.[13]

j. The Defendant states that the Plaintiff's predisposition to impatience, refusal to follow clinical advice proffered to her and her admitted depression, anxiety and being prone to instant gratification contributed to her seeking the intervention of Dr. Serletti who delivered corrective surgical procedures to the Plaintiff's breasts without complication from the earlier procedure performed by the Defendant, was reflective of a carefully and skillfully performed prior surgical procedure which had not had time or follow up opportunities to heal or be corrected.[14]

[10] Draft Defence para 6
[11] Draft Defence para 7
[12] Draft Defence para 8
[13] Draft Defence para 9
[14] Draft Defence para 10

k. The Defendant denies that he breached his contractual duties of care and or acted negligently as alleged in the ASOC paragraph 33 and each particular of breach set out.[15]

l. The Defendant denies that the Plaintiff's injuries were caused by the or any alleged negligence as set out in paragraph 34.[16]

m. The Defendant denies the Plaintiff's alleged damages and special damages;[17]

23. Mr. Scott submits that these aspects of the draft Defence raise triable issues of the central claim of professional negligence.

The period of time in filing application to set aside the default judgment

24. Third, Mr. Scott submits that once US Marshalls entered the Defendant's medical practice, arrested and shackled him for production before the New York Court, and froze his bank accounts, that the Defendant took immediate steps to engage the Bermuda Court by filing documents in January 2020.

The Plaintiff's Response

25. The Plaintiff objects to the application to set aside judgment for several reasons.

Service was proper

26. Mr. Harshaw submits that the Plaintiff was granted leave for substituted service and the Defendant has admitted that the substituted service was effective but claims that his staff did not bring the matter to his attention.

27. Mr. Harshaw submits that the complaint that the Plaintiff did not notify the Defendant's malpractice insurer is misconceived for various reasons including that the Plaintiff and the malpractice insurer have no contractual relationship and that an injured party brings an

[15] Draft Defence para 11
[16] Draft Defence para 12
[17] Draft Defence para 13

action against the negligent party, not the insurer, who may or may not assume conduct of the case.

Merits of the Defence

28. Mr. Harshaw submits that the Defendant has not put forward a meritorious defence for several reasons.

    a. Firstly, the draft Defence is not complete as the Defendant refers to his '*final defence …shall even be stronger…*'. Therefore, he intends to improve his Defence later.

    b. Secondly, although the Defendant alleges that the Plaintiff presented to him with implant issues, he omitted to say that he was the surgeon who implanted the implants in the first place. In her Second Affidavit, the Plaintiff states that prior to her surgery with the Defendant in 2009, she had never had breast implants in her life and that the Defendant gave her her first implants. Her nipples were in excellent shape, there was nothing wrong with them and she had no scarring. All she wanted was for a lift to her breasts. She states that the basis of the Defendant's whole defence, repeated throughout, that she presented with the Alleged Pre-existing Conditions is a lie.

    c. Thirdly, the Defendant has failed to adduce evidence in support of his case by an independent expert. The Defendant asks the Court to accept his self-serving evidence over that of Dr. Serletti who opined in his medical report a number of views including that (i) "*I believe that [the Defendant's] selection of periareolar mastopexy and augmentation was a poor choice to correct the patient's pre-existing ptosis*" and (ii) "*based upon the information that I Have received, I believe that [the Defendant] in this case failed to measure up to the standard of reasonable medical care in selecting his initial and secondary operative approaches.*"

    d. Fourthly, the Defendant attacks the Plaintiff without attempting to explain how such criticism is relevant to the judgment in the case.

    e. Fifthly, the Defendant has given no particulars capable of amounting to a defence to which the Court should pay heed.

f. Sixthly, the counter-claim is seeking to claim costs associated with the New York judgment, which the Defendant applied and failed to have set aside. Such a claim should be pursued in the New York Court.

Delay

29. Mr. Harshaw submits that the chronology of events suggest that the Defendant only took action following effective execution in New York. Further, the Defendant has offered no explanation for his 4-year delay in making an application to set aside judgment. He set out the conduct of the Defendant in addressing Court matters in Bermuda and New York as follows:

    a. On 24 April 2015, the Plaintiff filed a Writ of Summons seeking damages against the Defendant. A Statement of Claim was filed and leave to serve out was granted;
    b. On or about 6 July 2016 notice of the action was served on the Defendant but he took no action;
    c. A Notice to the Defendant for the assessment of damages was sent to him in New York but he took no action and on 28 September 2016 damages were assessed in the amount of $172,487.53;
    d. On 11 April 2018 the Bermuda judgment was made a judgment of the Supreme Court of the State of New York;
    e. The Plaintiff then sought to discover the Defendant's wealth by way of subpoena duces tecum but the Defendant failed to appear for the deposition or produce any documents;
    f. The Supreme Court of the State of New York made "*an Order to show cause to punish for contempt requiring the Defendant to appear before the Court on 15 November 2018*". The Defendant was served with that order but failed to appear before the Court;
    g. On 30 November 2018 the Supreme Court of the State of New York ordered that the Defendant produce the documents requested in the subpoena duces tecum on or before 28 December 2018 and within 45 days from the production of the documents to appear for deposition; The Defendant, despite the threat of arrest and

imprisonment, failed or refused to produce any of the documents or appear for the deposition;

h. On 11 January 2019 a second order to show cause to punish for contempt was issued by the Supreme Court of the State of New York ordering the Defendant to appear before the Court on 28 February 2019 to answer why he should not be punished for contempt. The Defendant, despite the threat of arrest and imprisonment, failed or refused to produce any of the documents or appear for the deposition;

i. On 13 March 2019 the Supreme Court of the State of New York having found and decided that the Defendant had committed the offence of contempt, allowed the Defendant to purge his contempt by submitting to the examination sought by the Plaintiff; The Defendant did not comply.

j. On 31 May 2019 the Supreme Court of the State of New York issued a Warrant of Arrest directing the Sheriff to arrest the Defendant and bring him before the Court. The arrest warrant was executed and the Defendant was brought before the Court in handcuffs. The Court heard the Defendant's pleas and released him from custody based on his assurances that he would comply with the orders of the Court. Thereafter the Defendant's accountant produced some financial documents to the Plaintiff.

k. To date, the Defendant has never appeared for deposition;

l. On 5 February 2020 an Income Execution garnishment was served on the Defendant's place of business, his medical practice and that Income Execution garnishment has never been complied with by the Defendant;

m. On 24 January 2020 the Defendant applied to this Court to set aside judgment made against him on 13 May 2016.

n. On 16 July 2020 the Defendant applied in New York for the Plaintiff to show cause why an order should not be made staying execution of the judgment in New York alleging that there was no service and the judgment was obtained 'illegally';

o. On 13 August 2020 the Defendant's summons came on for hearing and directions were made by the Chief Justice;

p. On 17 August 2020 the application to the Supreme Court of the State of New York was refused;

q. On 24 February 2021 the Defendant filed his urgent application in this Court for an order that the enforcement steps in New York be stayed;

The Law on Setting Aside Judgment

30. In the case of *Evans v Bartlam* [1937] A.C. 473 Lord Atkin stated at 480 as follows:

> *"The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits rules, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there was a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."*

31. In the same case, Lord Killowen stated at 481 as follows:

> *"[the discretion of the Court] in its terms is unfettered by any conditions, and purports to confer upon the Court or a judge full power to set aside a judgment signed in default of appearance, and if thought fit to impose such terms, as a condition of the setting aside, as may be just."*

32. Counsel relied on the leading case of *Alpine Bulk Transport v Saudi Eagle Shipping Co. ("The Saudi Eagle")* [1986] 2 Lloyds Law Rep 221 Sir Roger Ormrod set out five general indicia to guide the Court in deciding whether or not to set aside a default judgment regularly obtained. Kawaley CJ had relied on the stated legal principles in *Burgess v Burgess-Salina and Williams* [2016] SC (Bda) 7 Civ and in the case of *S Smith-v- N Stoneham et al* [2015] SC (Bda) 42 Civ where he added underlined emphasis as follows:

> *'The following 'general indications to help the Court in exercising the discretion" (per Lord Wright at page 488) can be extracted from the speeches in Evans v Bartlam (1937) A.C. 473 , bearing in mind that 'in matters of discretion no one case can be authority for another' (ibid, page 488):*
>
> *(i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;*
>
> *(ii) the Rules of Court give to the judge a discretionary power to set aside the default judgment which is in terms 'unconditional' and the court should not 'lay down rigid rules which deprive it of jurisdiction' (per Lord Atkin at page 486);*
>
> *(iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;*
>
> *(iv) <u>the primary consideration is whether the defendant 'has merits to which the Court should pay heed'</u> (per Lord Wright at page 489), not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown 'merits' the Court will not, prima facie, desire to let a judgment pass on which there has 'been no proper adjudication' (ibid. page 489 and per Lord Russell of Killowen at page 482*
>
> *(v) Again <u>as a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the</u>*

defendant 'found himself bound by a judgment regularly obtained to which he could have set up some serious defence' (per Lord Russell of Killowen at page 482).'

In applying these 'general indications' it is important in our judgment to be clear what the 'primary consideration' really means. In the course of his argument Mr Clarke Q.C. used the phrase 'an arguable case' and it, or an equivalent, occurs in some of the reported cases (e.g. Burns v Kendel (1977) 1 Ll.L.R. 554 and Vann v Awford). This phrase is commonly used in relation to Order 14 to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standard indicated by each of their lordships in Evans v Bartlam. All of them clearly contemplated that a defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success. (In Evans v Bartlam there was an obvious defence under the Gaming Act and in Vann v Awford a reasonable prospect of reducing the quantum of the claim). Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The 'arguable' defence must carry some degree of conviction.'" [Emphasis added]

33. In the case of *Vann v Awford* Times Law Reports, 23 April 1986 Dillon LJ stated as follows:

"The major consideration was whether the defendant had a defence to the action: that transcended any reason given for the delay."

34. In the case of *M&M Construction Ltd. V Claudio Vigilante* [2012] SC (Bda) 6 Com Kawaley ACJ stated as follows:

"4. Mr. Harshaw correctly submitted that the Defendant had to demonstrate more than an arguable defence and was required to make out a defence with a "real prospect of success": Dobie-v-Interinvest (Bermuda) Ltd. and Black [2009] Bda LR 31 (at paragraph 14), citing Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. [1986] 2 Lloyd's LR 221 at 223. While the explanation as to how the default occurred is a subsidiary factor, Sir Roger Ormrod in the Saudi Eagle case (at page 225) concluded the English Court of Appeal's judgment with the following words:

> *"The conduct of the defendants …in deliberately deciding not to give notice of intention to defend because it suited the interests of the group to let the plaintiffs proceed against these defendants is a matter to be taken into account in assessing the justice of the case. While it does not amount to an estoppel in law, the Court can and must consider it. The principle of election and the maxim about approbating and reprobating are, in origin, rules of equity and as such give some indication of where the justice of a case may lie."*

Analysis of the Legal principles

35. In my view, the judgement in default of appearance should not be set aside for several reasons.

36. First, I am guided by *The Saudi Eagle case* which sets out five general indicia to consider in deciding whether or not to set aside a default judgment regularly obtained. In relation to service, I am of the view that service was effective and in accordance with the substituted service as ordered by the Court. Accordingly, the judgment obtained later was a regular judgment. The Defendant complains that service was not effected on his insurer who would have conducted a robust investigation of the claim. In my view, that point lacks any merit as service was effected as set out above. In any event, I am not satisfied that it is for a Plaintiff to seek out a Defendant's insurer to advance a claim or legal proceedings.

37. Second, I am bound to consider "*the primary consideration which is whether the defendant 'has merits to which the Court should pay heed'... not as a rule of law but as a matter of common sense."* The Defendant's defence and affidavit evidence generally is on the basis that the Plaintiff presented to him with the Alleged Pre-existing Conditions. The draft Defence characterizes this assertion as "*this central clinical fact in and of itself utterly and comprehensively displaces the opinion of Dr. Serletti*", and that "*it goes to the heart of the central issue of alleged medical negligence or the Defendant's failure to exercise reasonable care and skill or to have breached the duties of care owed …*".

38. However, the Plaintiff asserts in the ASOC and her evidence that she never had breasts implants, scarring or issues with her nipples before the surgery with the Defendant. Most importantly, in the draft Defence, the Defendant admits the ASOC paragraph 3 through 8, and paragraphs 10 through 11 and 13 through 15. Of significant note, relevant paragraphs of the ASOC state as follows:

    a. Para 5 – "*The Plaintiff entered into a written contract with the Defendant … to carry out the following surgical procedures … breast implants …*";
    b. Para 8 - "*Prior to her surgery, the only issue with the Plaintiff's breasts were ptosis (sagging). There were no scars, stretch marks or deformities and her nipples were intact.*"
    c. Para 11 – "*The surgery conducted was bilateral donut mastopexy with implants …*"
    d. Para 15 – "*Over the next three months the Plaintiff's incisions healed but left large and unsightly scars. Her breasts became lumpy and malformed. Her nipples disappeared."*

39. In my view, following *M&M Construction Ltd. V Claudio Vigilante* the admissions set out above, undermine the heart of the draft Defence such that it is a defence which does not have a real prospect of success. Despite the Defendant stating that the Plaintiff had the Alleged Pre-existing Conditions prior to submitting to his surgical procedures, the Defendant is strikingly inconsistent in that he admits to significant claims in the ASOC, namely (a) contracting to perform breast implants; (b) recognized that prior to the first surgery that he performed, there were no scars, stretch marks, or deformities and her

nipples were intact; (c) he conducted the implant surgery; and (d) later on there were large unsightly scars, her breast became lumpy and malformed and her nipples disappeared. In my view, once the Defendant has admitted these significant facts, then his defence is significantly weakened if not destroyed, particularly on the admission that the Plaintiff presented to him initially with no scars, stretch marks or deformities and her nipples were intact. In following *The Saudi Eagle* in respect of forming a provisional view of the probable outcome if the judgment were to be set aside and the defence developed my provisional view is that the defence would sustain core inconsistencies that would be fatal at trial. In my view, whilst the defence carries some enthusiasm, it fails to carry some degree of conviction.

40. Third, the Defendant seeks to negate the opinion of Dr. Serletti who was of the opinion "*that [the Defendant] in this case failed to measure up to the standard of reasonable medical care in selecting his initial and secondary operative approaches*." This is on the basis that the ASOC makes no mention of Dr. Serletti being informed of the Alleged Pre-existing Conditions". The Defendant therefore states that that the opinion of Dr. Serletti would be utterly and comprehensively displaced. However, in my view, for the reasons that I have already set out in respect of the Plaintiff's evidence and the Defendant's inconsistencies about the Alleged Pre-existing Conditions, it is highly likely that once the Alleged Pre-existing Conditions are put aside – because they did not exist - then Dr. Serletti's opinion would have great force – that the Defendant was negligent in selecting the first and second operative approaches to meet the Plaintiff's needs. This view provides further support that the Defence put forth does not have a real prospect of success. Additionally, even if the Defendant sought an expert opinion in support of his defence, in my view, the Defence falls at the start point in that the Defence has fatal inconsistencies about the Alleged Pre-existing Conditions.

41. Fourth, in following *The Saudi Eagle* I am bound to consider the conduct of the Defendant and the reasons for the delay of some four years for an application to set aside judgment in this matter although this is balanced by the principle in *Vann v Awford* that "*the major consideration was whether the defendant had a defence to the action: that transcended any*

reason given for the delay". The start point is that the Defendant claims that his employees did not inform him of the electronic notices of the Bermuda litigation sent to his medical practice on or around July 2016 when he notes that eleven (11) 'pleadings' were sent electronically. I have not been provided with any other explanation or evidence for the delays in respect of any events after July 2016 or in respect of the New York Proceedings. In any event, the Defendant did not submit to the Bermuda Court once he was effectively served. Additionally, the Defendant did not submit to the New York Court until he was shackled at his office premises and brought before the Court. It appears that from the first notice to the Defendant on 6 July 2016 to 5 February 2020 when an Income Execution garnishment was served on the Defendant's place of business there were seven (7) occasions when the Defendant was required to appear before a Court or comply with a Court Order and he did not do so. Meanwhile, the Plaintiff took steps available to her in Bermuda and in New York at cost to obtain the engagement of the Defendant in the legal proceedings.

42. In my view, other than the explanation about the staff nor informing him of the electronic service in July 2016, the Defendant's conduct in causing delay in these proceedings is seemingly demonstrated by his First Affidavit evidence wherein he says the following about the Plaintiff, "*She came to me like a train wreck. She had little money and I helped her almost for free. Her problem is depression and she has a very low IQ. She is an OR aid and I worked with her for over 10 years. She doesn't follow directions well. I did my best but this train was always wrecked.*" On the flip side, in the same First Affidavit, in the context of setting out his qualifications, the Defendant described himself as being a graduate of Harvard Medical School, holding a Masters Degree in Bio Chemistry from Oxford University and having performed over 10,000 breast surgeries in a career of 25 years having the largest series of breast surgeries in black women. He also stated that "*the Plaintiff has laboured under the malaise too of accepting the medical advice of a white doctor and not rebelling and not accepting the advice of a same sex equally if not higher qualified black reconstructive surgeon, the syndrome of "anglo conformity*".

43. In my view, it is irresistible to conclude that the Defendant takes offence to the litigation brought by the Plaintiff, and is likely saying that as a man of his stature, he need not be

bothered with the Plaintiff, a person of lower standing than he, her complaints as well as her legal proceedings against him. However, the Plaintiff exercised her right to pursue legal proceedings against the Defendant and to engage him accordingly but he chose not to engage until he was brought before the Court in shackles. Therefore, the conduct of the Defendant in not submitting to the Bermuda Court or the New York Court until brought to the New York Court in shackles, contributed to the extraordinary delay which supports my view that the judgment should not be set aside. In reaching this position, I am satisfied that this is a secondary consideration in determining whether the judgment should be set aside. For clarity, if I was of the view that there was a defence with a real prospect of success, that would have transcended these specific issues of conduct leading to delay.

44. In light of the above reasons, in taking a commonsense approach to the draft Defence and all the circumstances, I am of the view that the judgment in default of appearance should not be set aside.

The Plaintiff's application for costs for the application to stay the New York Proceedings and the Urgent Application

45. Mr. Harshaw seeks costs on an indemnity basis for the application to stay the New York Proceedings and the Urgent Application. He submits that he had to prepare for the 2 March 2019 hearing and that the application should never had been made as this Court has no authority to stay the Supreme Court of New York in pursuing its own proceedings. He submitted that the aspect of the New York proceedings complained of by the Defendant was the contempt by the Defendant of the New York Court by not appearing before that Court as ordered.

46. Mr. Scott opposed costs on any basis as he submitted the aim was to get a stay of the Bermuda proceedings in order to arm the Defendant's counsel in New York to get a stay of the proceedings there. In any event, the Defendant withdrew his application for the stay. In his Second Affidavit, Mr. Scott stated that: (a) he admitted that a possible reading of the current summons could be interpreted as suggesting the Summons seeks to cause a Judge

of the New York Supreme Court to stay an order or orders of his Court; (b) the intended aim and objective of the Summons was to secure an Order from this Court setting aside judgment in default and leave to file the Defendant's Defence; (c) The further intention was that the US Counsel for the Defendant had advised that armed with such Orders from this Court, he would be able to make an application in the New York Court to stay the execution of the enforcement proceedings in New York, pending the determination of the Bermuda proceedings; and (d) In light of the circumstances the application for the stay of the New York Proceedings would be withdrawn in order to preserve expense and save time and arguments on the jurisdictional issue, a submission that he says he clarified in this Court on 2 March 20221.

47. In my view, Mr. Scott's strategy was ill-conceived with no chance of success. It appears that Mr. Scott came to this conclusion during or after the hearing on 2 March 2021, as he filed his Amended Summons on 19 March 2021, a few days before the substantive hearing date. On the same date, 19 March 2021, Mr. Harshaw filed the Plaintiff's submissions for the application to set aside the judgment which included submission about the application for a stay of the New York Proceedings. On that basis the Plaintiff should have her costs in relation to her Counsel's preparation on the application for 2 March 2021 and for the preparation for the hearing on 23 March 2021.

48. In respect of Mr. Harshaw's application for indemnity costs, the legal principles governing the Court's jurisdiction and discretionary powers to award indemnity costs are well established.

49. RSC O. 62/3(4) provides:

> *"The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where… unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis."*

50. RSC O. 62/12 outlines the distinction between costs on a standard basis and costs on an indemnity basis. Simply put, a standard basis allows for a reasonable amount of all

reasonable costs to be allowed by the Registrar in the course of a taxation. However, for an indemnity costs order, the successful party is entitled to 100% of all reasonable costs incurred.

51. The learned Justice Mr. Richard Ground (as he then was) made the following remarks about indemnity costs in *DeGroote v MacMillan* [1991] Bda LR 27 [p.4]:

> *"... I consider that an award of indemnity costs, as against a defendant, should be reserved for exceptional circumstances, involving grave impropriety going (to) the heart of the action and affecting its whole conduct."*

52. *DeGroote* was cited by Bell J (as he then was) in *Phoenix Global Fund Ltd v Citigroup Fund Services (Bermuda) Ltd* [2009] Bda LR 70, both of which were later cited by the Court of Appeal in *American Patriot Insurance v Mutual Holdings* [2012] Bda LR 23. In the leading judgment of the Court Evans JA stated:

> *"In our judgment, it would be wrong to say that indemnity costs should be ordered in every case where fraud is proved, but equally wrong to suggest that they can only be ordered when the proceedings have been misconducted by the losing party. Both "the way the litigation has been conducted" and the "underlying nature of the claim" (per Kawaley J in Lisa SA v Leamington and Avicola at para 6) may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just."*

53. In my view, Mr. Scott deployed a strategy to achieve an understandable aim. However, it was the wrong strategy. The various grounds for awarding costs on an indemnity basis, namely grave impropriety going to the heart of the action and affecting its whole conduct and the way the litigation has been conducted do not arise in this matter. Therefore, I find that an order for indemnity costs for the application to stay the New York Proceedings and the Urgent Application is unwarranted.

Conclusion

54. For the reasons above, I deny the Defendant's application to set aside the judgment in default of appearance.

55. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs for the application to set aside judgment in default (Summons dated 20 February 2020) I direct that costs shall follow the event in favour of the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed.

56. In respect of the application for costs for the application to stay the New York Proceedings and the Urgent Application (Summons dated 25 February 2021 and Summons dated 19 March 2021), I direct that costs shall follow the event in favour of the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed.

Dated 13 May 2021

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT