# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2012: No 350**

**BETWEEN:-**

**NANETTE SNOWDEN**

**Plaintiff**

**-and-**

**(1) DR TERRI-LYNN EMERY**
**(2) DR CHARLES DYER**
**(3) THE BERMUDA HOSPITALS BOARD**

**Defendants**

## RULING

**(In Chambers)**

Date of hearing: 16th May 2014 and 22nd August 2014
Date of ruling: 25th September 2014

Mr Marc G Daniels, Charter Chambers Bermuda Ltd, for the Plaintiff
Mr Paul Harshaw and Ms Alsha J Wilson, Canterbury Law Limited, for the First Defendant
Mr Kai Musson, Cox Hallett Wilkinson Limited, for the Second Defendant
Mr Allan Doughty, ISIS Law Limited, for the Third Defendant

## Introduction

1. The Plaintiff brought a claim for damages against the First and Second Defendants for personal injury. The writ was endorsed:

> The Plaintiffs' claim [sic] against the First and Second Defendants damages for negligence and/or breach of duty of care emanating from the surgical procedures and treatment rendered by them to the Plaintiff on the 9th October 2006 and subsequently thereafter between October and December 2006 at King Edward Memorial Hospital in the Islands of Bermuda, together with interest, costs and such further or other relief as the court thinks fit.

2. The Third Defendant was the subject of allegations of negligence contained in the statement of claim. However as the Third Defendant was not named in the writ it did not accept that its joinder to these proceedings was valid.

3. All three Defendants applied to strike out the Plaintiff's claim pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1985 ("RSC") and/or the Court's inherent jurisdiction.

4. The Defendant has accepted that she has no cause of action against the Third Defendant, against whom her claim has accordingly been dismissed. It is therefore unnecessary for me to decide any of the issues arising on the Third Defendant's strike out application.

5. That leaves the First and Second Defendants. The grounds of their applications are:

   (1) That service of the writ was ineffective as it had expired before the purported dates of service and had not been renewed.

   (2) The contents of the writ do not comply with the formal requirements for a writ as set out in RSC Order 6. But these are technical defects which can readily be cured by amendment – indeed the Plaintiff has filed an amended writ, albeit without leave, which cures the defects – and are not a good reason for striking it out.

(3) The statement of claim discloses no reasonable cause of action and/or is frivolous, vexatious or otherwise an abuse of process.

**Chronology**

6. It will be helpful to set out a brief chronology. During the period which this covers the Plaintiff was admitted on a number of occasions to the King Edward VII Memorial Hospital ("the Hospital"), where she was treated by, among others, the First and Second Defendants. They treated her at all material times as a private patient. This is important, because it means that their relationship with her was contractual.

7. On 3rd February 2005 the Plaintiff was admitted to the Hospital complaining of abdominal pain. She underwent surgery to remove an abdominal wall lipoma, which was carried out by the First Defendant.

8. On 7th November 2005 the Plaintiff was admitted to the Hospital having been diagnosed with dysfunctional uterine bleeding. She underwent a hysteroscopy and dilation and curettage, which was carried out by the First Defendant.

9. On 23rd January 2006 the Plaintiff was admitted to the Hospital, where she underwent a hysterectomy. This was performed by the First Defendant.

10. On 9th October 2006 the Plaintiff was admitted to the Hospital where she underwent an operation to remove an ovarian cyst. Preston Swan, Vice President in charge of Quality and Risk Management for the Third Defendant, has sworn a Second Affidavit dated 15th August 2014 in which he reviews the Plaintiff's medical records. From these, he concludes that the Plaintiff's ovary was removed under the care of Dr Emery with the assistance of Dr Emma Robinson and that Dr Christopher Johnson performed separate reconstructive surgery. Neither Dr Robinson nor Dr Johnson has been named as a defendant in these proceedings.

11. During the course of the operation to remove the cyst, the Plaintiff's left ureter was accidentally transected or cut across. Although the medical records state that the ureter was repaired by the Second Defendant, it is not obvious from the medical records by whom it was cut. Mr Swan states at paragraph 10 of his Second Affidavit, summarising the Plaintiff's case notes:

> The next entry which I see on the following page is signed by Dr Dyer and states that he conducted a repair of the left transected ureter. Beneath that entry, on the same page I also see a note by Dr Emery which describes the procedure which took place noting that the left ureter was transected. It is then recorded that Dr Dyer repaired the ureter.

12. Following surgery, the Plaintiff experienced fever and severe abdominal pain. She was readmitted to the Hospital on several occasions as a private patient under the care of the Second Defendant. A stent was inserted in her left ureter and subsequently replaced.

13. On 16th December 2006 the Plaintiff attended the Hospital for a procedure to insert a nephrostomy tube. The medical records exhibited to the Third affidavit of Preston Swan dated 15th August 2014 state that after a couple of attempts at nephrostomy, which were carried out at the Second Defendant's request by Dr Rajah Koppala, the procedure had to be abandoned as the patient complained of enormous pain during the procedure. Dr Koppala advised the Plaintiff that she undergo the procedure under a general anaesthetic.

14. The Plaintiff elected instead to be treated overseas, and was for this purpose referred by Dr Johnson to Massachusetts General Hospital ("MGH") in Boston. She underwent further treatment there and on 21st June 2007 her kidney was removed.

15. In an affidavit dated 22nd May 2014, which is in fact her Fourth Affidavit although it is wrongly described as her Third, the Plaintiff states that she remained a patient at MGH from 19th December 2006 until 21st January 2008, "*when it was communicated to me that I had a legitimate cause of*

*action against the Defendant for medical negligence*". It is not clear from her affidavit at what point during this period the communication took place. She adds that she consulted Canadian counsel about her injuries in or about 2007.

16. In or about March 2008, the Plaintiff's Canadian attorneys contacted the Bermudian law firm Lynda Milligan-Whyte and Associates ("LMW") with a view to instructing them to represent the Plaintiff in connection *inter alia* with a dispute between the Plaintiff and the Defendants in relation to medical malpractice. The attorney with whom they dealt at LMW was Paul Harshaw, who now acts for the First Defendant. The Plaintiff has applied for an order that he be prohibited from doing so, but I have not yet heard argument on that application. It appears to be in dispute whether LMW were ever formally retained by the Plaintiff in connection with her personal injuries claim.

17. Mr Harshaw left LMW at the end of 2008 to set up his own law firm. The Plaintiff's files remained with LMW. Although there was some further contact between the Plaintiff's Canadian attorneys and Mr Harshaw, they did not retain him to act for the Plaintiff.

18. The Plaintiff states in her Fourth Affidavit that in or about September 2009 she concluded that her professional relationship with Mr Harshaw had broken down and that she decided to seek alternative Bermudian counsel. She states that she approached a number of different law firms, but that they declined to represent her because of a perceived conflict of interest.

19. The Plaintiff eventually identified a Bermudian law firm, Charter Chambers Bermuda Ltd ("Charter Chambers"), her current attorneys, which was prepared to act for her. She formally retained them on 14th September 2012.

20. A generally endorsed writ of summons was issued on 5th October 2012. It has not been renewed.

21. On or about 27th September 2013 the Defendants were served with a letter before action from Charter Chambers. This included an extract from a report by one Dr Wilfred Steinberg setting out the actions of the First and Second Defendants which were alleged to amount to medical malpractice.

22. On Friday 4th October 2013, Charter Chambers instructed a process server, Evernell Davis, to serve the writ on the Defendants. Ms Davis states that she was unable to effect personal service on the First Defendant until Tuesday 8th October 2013 because the First Defendant was in the operating room performing surgery. It is not clear from Ms Davis's affidavit whether she attempted to serve the First Defendant on more than one occasion. The Plaintiff states in her Fourth Affidavit that Ms Davis tried on more than one occasion. Ms Davis states that she was unable to effect personal service on the Second Defendant until Wednesday 9th October 2013 as the Second Defendant was out of the jurisdiction. The Third Defendant was served on 4th October 2013.

23. A statement of claim was served on or about 22nd October 2013.

24. Summonses to strike out the action were issued by the First Defendant on 23rd October 2013, the Third Defendant on 30th October 2014 and the Second Defendant on 4th November 2013.

25. The hearing of the strike out applications commenced on 16th May 2014. I adjourned the hearing to give:

    (1) the Plaintiff an opportunity to file and serve:

        (a) an application for an extension of time to serve the writ on the First and Second Defendants. She had made the application orally at the 16th May hearing;

        (b) an amended statement of claim. The original statement of claim set out the extract from Dr Steinberg's report which was included in the letter before action, then made a number of

allegations against the Defendants in abstract terms, but did not attempt to relate the allegations to the facts and matters set out in the extract from the report. It was therefore not easy to discern what the Defendants were alleged to have done so as to give rise to a cause of action against them;

(c) all the evidence on which she intended to rely in opposition to the Defendants' strike out applications and in support of her application for an extension of time to serve the writ on the First and Second Defendants; and

(2) the Third Defendant an opportunity to file and serve further evidence dealing with the question of whether the First and Second Defendants were its employees or agents. It is now common ground that they were not.

26. The Plaintiff filed and served an amended statement of claim dated 5th June 2014 and her Third and Fourth Affidavits. The Third Defendants filed and served the Second and Third Affidavits of Mr Swan.

## The law

### Striking out

27. The law as to striking out was summarised by the Court of Appeal in Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd [2005] Bda LR 12. Stuart-Smith JA, giving the judgment of the Court, stated at 4 – 5.

> … Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's

> approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: "It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known….. There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220". In National Westminster Bank plc v Daniel [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: "Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: 'Is what the defendant says credible'? If it is not, then there is no fair and reasonable probability of him setting up the defence".

28. In a very clear case, an action may be struck out because it is time-barred. See the judgment of Kawaley J (as he then was) in Global Construction Ltd v Hamiltonian Hotel & Island Club Ltd [2005] Bda LR 81 at paragraphs 16 – 17.

**Service of writs**

29. RSC Order 6, rule 8 regulates the duration and renewal of writs. It provides in material part:

> (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for twelve months beginning with the date of its issue … .
>
> (2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.
>
> (3) Before a writ, the validity of which has been extended under this rule is served, it must be marked with an official stamp showing the period for which the validity of the writ has been so extended.

30. As a writ is valid for a period of 12 months beginning with its date of issue, the date of issue is included in the calculation of the 12 month period. Thus a writ issued on 12th December 2012 would expire on 11th December 2013 not 12th December 2013.

31. Where a writ which has not been served expires within the limitation period the plaintiff can simply issue a new writ. The difficulty arises where a writ which has not been served expires outside the limitation period. The difficulty is exacerbated if before the writ expires no application for its renewal has been made.

32. Lord Brandon, giving the judgment of the House of Lords, reviewed the leading authorities and set out the principles applicable to renewal of a writ where questions of limitation are involved in Kleinwort Benson Ltd v Barbrak Ltd [1987] 1 AC 597 at 615H – 623B. He summarised the principles when giving the judgment of the House of Lords in Waddon v Whitecroft Scovell Ltd [1988] 1 WLR 309 at 313G – 314B. The Court of Appeal applied them in Bermuda in Piper v O'Brien [2000] Bda LR 15 at 2. They may be summarised thus:

    (1) These principles are applicable where, unless the writ is served before the expiry of the original period of its validity, or an extension of that

original period to permit later service is granted, the plaintiff's cause of action against the defendant will have become statute barred. See Waddon v Whitecroft Scovell Ltd at 313G. From this I conclude that these principles are applicable where a writ has purportedly been served, but service is invalid because the writ is no longer valid.

(2) There is a two stage enquiry. First, the Court must determine whether the threshold conditions for the renewal of the writ have been satisfied. Namely: (i) that there is a *good reason* for exercising its power to extend the validity of the writ; and (ii) if the plaintiff has failed to apply for an extension of the writ before its validity expired, that there is a *satisfactory explanation* for this failure. If these threshold conditions have not been satisfied then that is an end of the matter and the Court will not extend the validity of the writ. See Kleinwort Benson Ltd v Barbrak Ltd at 300*b* and *d* and Piper v O'Brien at 2.

(3) This is another way of stating the principle approved by the Court of Appeal of England and Wales in Chappell v Cooper [1980] 1 WLR 958 at 965E *per* Roskill LJ (as he then was) that in general in the absence of good or sufficient reason the court will not exercise its discretion in favour of the renewal of a writ after the period allowed for service has expired if the effect of doing so will be to deprive the defendant of the benefit of a limitation period which has accrued. Thus the prospective deprivation of an accrued limitation period is something that triggers the two stage enquiry rather than a factor to be taken into account within that enquiry.

(4) Although it may be possible for a plaintiff to show good reason for an extension of the original period of validity of the writ without establishing good reason for failure to serve it during that original period, it is not easy to visualise such a case. See Waddon v Whitecroft Scovell Ltd at 314G.

(5) The question whether such good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting service of the writ may well constitute good reason but is not the only matter capable of doing so. See Waddon v Whitecroft Scovell Ltd at 313H – 314A. On the other hand, it is the duty of a plaintiff who issues a writ to serve it promptly. See Battersby v Anglo-American Oil Co Ltd [1945] KB 23 *per* Lord Goddard CJ at 32. If the plaintiff delays until the very last minute he has only himself to thank. See Baker v Bowketts Cakes Ltd [1966] 1 WLR 861 *per* Lord Denning MR at 866B.

(6) Provided that the threshold conditions have been satisfied, the Court has a discretion whether to renew the writ. The balance of hardship between the parties can be a relevant matter to be taken into account in the exercise of the discretion. See Waddon v Whitecroft Scovell Ltd at 314A.

33. There are other provisions of the RSC which are potentially relevant. RSC Order 2, rule 1 provides that a failure to comply with the Rules shall be treated as an irregularity and shall not nullify the proceedings or any step taken in them. RSC Order 3, rule 5 provides that the Court may extend the time in which a person is required by the Rules to do any act in any proceedings.

34. RSC Order 2, rule 1 and Order 3, rule 5 are in all material respects the same as were Order 2, rule 1 and Order 3, rule 5 of the Rules of the Supreme Court of England and Wales. Their applicability to the renewal of writs and summonses has been considered in a line of authorities in that jurisdiction.

35. In Bernstein v Jackson [1982] 1 WLR 1082 the Court held that RSC Order 6, rule 8 provided a compendious code for the extension and renewal of writs, and that consequently a failure to apply for the extension of a writ within the time allowed under RSC Order 6, rule 8 was not the type of irregularity which could be dealt with under RSC Order 2, rule 1.

Alternatively, it was such a fundamental defect in the proceedings that the court ought not to exercise its discretion to make an order under RSC Order 2, rule 1. See the judgments of Dunn LJ at 1089 and Slade LJ at 1089 – 1090.

36. However in Leal v Dunlop Bio-Processes Ltd [1984] 1 WLR 874 the Court held that it had jurisdiction to extend the validity of a writ retroactively under RSC Order 2, rule 1. See the judgments of Stephenson LJ at 879D; May LJ at 882G; and Slade LJ, who had been a member of the Court in Bernstein v Jackson, at 884F – G. In Ward-Lee v Lineham [1993] 1 WLR 754 the Court reached the same conclusion under the analogous provisions of the County Court rules with respect to an originating application. See the judgment of Sir Thomas Bingham MR (as he then was) at 762H – 763E. In both cases, however, the Court emphasised that special circumstances would be needed to justify renewal after expiry of a limitation period.

37. In my judgment the law was stated accurately by Farquharson LJ in the subsequent case of Singh v Duport Foundries Ltd at 775 D – E. In exceptional circumstances and where the interests of justice so require the court will entertain an application to extend the validity of the writ under RSC Order 2, rule 1 and Order 3, rule 5. However the applicant will be required to show, just as he would under Order 6, rule 8, that there is a good reason for such an extension and, where appropriate, provide a satisfactory explanation for the failure to apply during the period of the writ's original validity.

**Limitation periods**

38. The limitation period for actions founded on negligence or breach of contract in which damages for personal injuries are claimed is governed by section 12 of the Limitation Act 1984 ("the 1984 Act"). This provides that, except in circumstances which do not apply in the instant case, an action shall not be brought after the expiration of six years from the date on which

the cause of action accrued, or the date of knowledge of the person injured, whichever is the later.

39. When calculating the limitation period, the date on which the cause of action accrued or, if later, the date of knowledge of the person injured, as the case may be, is excluded from the calculation. Thus if a cause of action accrued on 12th December 2012 the limitation period would expire on 12th December 2018 not 11th December 2018. See Pritam v S Russell & Sons [1973] 1 QB 336, EWCA, at 348D – E *per* Lord Denning MR; 349 *per* Karminski LJ; and 348H *per* Megarry J (as he then was); approving Marren v Dawson Bentley & Co Ltd [1961] 2 QB 135, QB, *per* Havers J at 143.

40. Section 15 of the 1984 Act provides that in section 12:

> (1) references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—
>
> (a) that the injury in question was significant; and
>
> (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; 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 person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages 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 he might reasonably have been expected to acquire—
>
> > (a) from facts observable or ascertainable by him; or
> >
> > (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek,
>
> but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

41. The wording of section 15 of the 1984 Act was modelled on the wording of section 14 of the Limitation Act 1980 ("the 1980 Act") in England and Wales. Section 14 has generated a wealth of case law. The applicable principles were summarised by Brooke LJ, giving the judgment of the Court, in Spargo v North Essex District Health Authority [1997] PIQR P235, EWCA, at P242:

> (1) The knowledge required to satisfy section 14(1)(b) is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable;
>
> (2) "Attributable" in this context means "capable of being attributed to", in the sense of being a real possibility;
>
> (3) A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation;
>
> (4) On the other hand she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree: or if her knowledge of what the defendant

did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was.

42. The limitation period in section 12 of the 1984 Act is qualified by section 34 of the 1984 Act, which gives the Court a discretion to exclude the time limit in a case of personal injury. The material provisions of the section are as follows:

> (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
>
> > (a) section 12 … prejudice[s] the plaintiff or any person whom he represents; and
> >
> > (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,
>
> the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> . . . . .
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
>
> > (a) the length of, and the reasons for, the delay on the part of the plaintiff;
> >
> > (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 12 … ;
> >
> > (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for

> the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

43. The wording of section 34 of the 1984 Act was modelled on the wording of section 33 of the 1980 Act. It used to be understood, following the decision of the House of Lords in Walkley v Precision Forgings Ltd [1979] 1 WLR 606, that section 33 was not applicable once an action had been commenced, and could therefore not assist a plaintiff who had issued a writ within the limitation period but failed to serve it until after the limitation period had expired.

44. But in Horton v Sadler [2007] 1 AC 307 the House of Lords departed from Walkley and held that the discretion under section 33 of the 1980 Act was unfettered. See the leading judgment of Lord Bingham at paragraphs 20 – 31, with which three of the four remaining members of the House expressly agreed. He went on to state at paragraph 32:

> the court must make a decision of which the inevitable effect is either to deprive the defendant of an accrued statute-bar defence or to stifle the claimant's action against the tortfeasor who caused his personal injuries. In choosing between these outcomes the court must be guided by what appears to it to be equitable, which I take to mean no more (but also no less) than fair, and it must have regard to all the circumstances of the case and in particular the six matters listed in subsection (3).

45. The loss of an accrued limitation defence is a *precondition* for the exercise of the Court's discretion under section 33 rather than a factor to be weighed when deciding *how* the discretion is to be exercised. This is for the reasons explained by Sir Andrew Morritt C in Cain v Francis [2009] QB 754, EWCA:

> 79. In cases to which section 11 of the Limitation Act 1980 [or, in Bermuda, section 12 of the 1984 Act] applies an action may not be brought after the expiration of the periods prescribed by subsections (3) and (4). In any such case there will be no trial on the merits. The purpose of section 33 is to enable the court to review the position in the light of the facts of individual cases. The object of the exercise is to consider the circumstances of individual cases in order to determine whether the action should proceed to trial. That this is the purpose is confirmed by the material words in subsection (1) which pose the indirect question whether "it would be equitable to allow the action to proceed …"
>
> 80. The action can only proceed in cases to which section 11 applies if the provisions of that section are disapplied by a direction to that effect made by the court under section 33 . By subsection (1)(b) the court is required to have "regard to the degree to which [such a decision] would prejudice the defendant …" Thus the prejudice is to be ascertained on the assumption that the provisions of section 11 have been disapplied by an order made under section 33 . The subsection does not direct the court to have regard to the prejudice the defendant would suffer from the very act of disapplication.
>
> 81. The consequence of the disapplication of section 11 will be that there may be a trial of the claimant's claim on its merits notwithstanding the delay in commencing the proceedings. Has that delay caused prejudice to the defendant in its defence? If so, does it outweigh the prejudice to the claimant of being denied a trial at all? In addition the court will need to consider all the circumstances of the case and in particular the other aspects of the case enumerated in subsection (3) .
>
> 82. In that context it does not appear to me that the loss of a limitation defence is regarded as a head of prejudice to the defendant at all; it is merely the obverse of the disapplication of section 11 which is assumed.

> It is this consideration which, in my view, accounts for and justifies the marked reluctance of the courts, as demonstrated by the judgments to which Smith LJ has referred in detail, to have regard to the loss of a limitation defence.

46. Smith LJ and Maurice Kay LJ agreed with him at paragraph 63 and 79 respectively. Smith LJ expressed the same point in her own words at paragraphs 69 – 70. She went on to give some general guidance as to the application of the discretion under section 33 of the 1980 Act.

> 73. It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones.
>
> 74. Although the delay referred to in section 33(3) is the delay after the expiry of the primary limitation period, it will always be relevant to consider when the defendant knew that a claim was to be made against him and also the opportunities he has had to investigate the claim and collect evidence: see Donovan v Gwentoys Ltd [1990] 1 WLR 472.

47. In Cain v Francis the defendant could not show any forensic prejudice and the accrued limitation defence would have been a complete windfall. In the subsequent case of McDonnell v Walker [2010] CP Rep 14; [2009] EWCA 1257, Waller LJ, giving the judgment of the Court, stated at para 22 that that type of case must be contrasted with the case where forensic prejudice is

suffered by a defendant who has not for many years been notified of a claim in any detail so as to enable him to investigate it. He added at para 35:

> I would add, where there has been inexcusable and lengthy delay in a claimant notifying a defendant as to his case on liability or as in this case quantum *and* there has been negligence in issuing the proceedings or in serving them on time, that is a situation in which it almost speaks for itself that a defendant has suffered forensic disadvantage and a claimant is unlikely to suffer prejudice.

48. Although the test for an application under section 34 of the 1984 Act is not the same as the test for an application to renew the validity of a writ, most of the facts relevant to the latter application will likely be relevant to the former. Under section 34, however, there is not a two stage test. Rather, the Court will conduct a single balancing exercise taking into account all the material circumstances.

**Does the Court have a concurrent jurisdiction in tort and contract?**

49. The foundation of this area of the law is the decision of the Privy Council in Tai Hing Ltd v Liu Chong Hing Bank [1986] 1 AC 80. The case concerned the duties arising between banker and customer under a banking contract. Lord Scarman, giving the judgment of the Board, stated *obiter* at 107 B – D and G:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual

> analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action. … Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract.

50. In White v Conyers, Dill and Pearman [1994] Bda LR 9, Da Costa JA, giving the judgment of the Court of Appeal, stated at page 5 that the question of concurrent duties in tort and contract had been settled by Tai Hing Ltd v Liu Chong Hing Bank. It appears that the Court took the point of its own motion, as the learned Judge stated at page 4 that it was not pursued either below or on appeal. The case concerned a claim of breach of duty by a client against his attorneys.

51. After citing the above extract from Tai Hing Ltd v Liu Chong Hing Bank Da Costa JA stated at page 6:

> While it is true that the Privy Council were there dealing with the relationship between banker & customer, the language employed, with its reference to the different dates when an action may become barred in tort and contract, would appear to be equally appropriate to the case of solicitor and client. Further the decision of the Board must also be viewed against the background that the Court of Appeal in Hong Kong had considered that the relationship between banker and customer was governed both by the law of contract and tort. Accordingly therefore in Bermuda a claim against an attorney for failing to exercise due care and skill in the performance of his duties to his client lies solely in contract.

52. The relationship between doctor and patient is not the same as the relationship between banker and customer or attorney and client. But I can see no basis, where that relationship is governed by contract, for holding that

concurrent duties in tort and contract exist in the one case if they do not exist in the others. I am therefore satisfied that in Bermuda, where the doctor/patient relationship is governed by a contract between them, a claim by the patient that the doctor has breached her duty of care towards that patient lies solely in contract.

**Applying the law to the facts**

**Is there satisfactory explanation for the Plaintiff's failure to renew the writ before its validity expired?**

53. This question falls to be addressed within the context of the expiry of the limitation period. In my judgment the limitation period began to accrue when the Plaintiff elected to be treated overseas. By that point she knew that the surgery on 9th October 2006 had given rise to complications which had caused her more than merely minor pain and inconvenience. I shall take 19th December 2006, the date of her admission to MGH, as the date on which the limitation period began to run. It therefore expired on 19th December 2012. The writ was issued within the limitation period, on 5th October 2012. It expired on 4th October 2013. Therefore the Plaintiff did not serve the writ within the limitation period.

54. The Plaintiff's case is that she did not apply to renew the writ because it was intended to serve the writ within the limitation period. She states in her Fourth Affidavit that her attorneys advised her that they had taken steps to ascertain the whereabouts of the First and Second Defendants and that their information was that all parties were within the jurisdiction so that the writ could be served before the limitation period expired. This advice was based on enquiries made by her attorneys approximately four days prior to the expiry of the limitation period. The renewal of the writ, it was submitted, would therefore have been an unnecessary expense.

55. The Plaintiff's attorneys did instruct a process server to effect service of the writ on the last day of the limitation period. However when she tried to serve the First and Second Defendants she encountered the unanticipated difficulties set out above, which were not of the Plaintiff's making. These, the Plaintiff submits, meant that it was not possible to effect service until shortly after the limitation period had expired.

56. The difficulties in effecting service beg the question of why the Plaintiff did not attempt to serve the writ much earlier. In her Fourth Affidavit she puts forward a number of reasons for the delay:

    (1) The breakdown of her professional relationship with Mr Harshaw (to use her terminology), and the difficulties which she found in instructing alternative Bermuda attorneys.

    (2) Ongoing medical issues, both physical and psychological, which she states have made it difficult for her to instruct her counsel on a regular basis. The Plaintiff states that her psychological condition is often disabling and includes, but is not limited to, paralyzing depression whereby she is unable to communicate with anyone including her lawyers. She further states that she has been in and out of doctors' offices on a weekly basis in an effort to manage her health and is in constant pain.

    (3) Impecuniosity, flowing from the breakdown of her marriage and her inability to return to work after the surgery in Bermuda. The Plaintiff states that she has been unable to return to work after the surgery that is the subject matter of this action. She adds that since 2012 she has been destitute and homeless, living on friends' couches with her young son, who is now aged 10.

57. Mr Harshaw can hardly be blamed for the failure of the Plaintiff's Canadian attorneys to formally instruct him. That apart, and notwithstanding the absence of much in the way of supporting documentation, for the purposes of this application I accept the Plaintiff's evidence. Thus I appreciate that

she has faced physical, emotional, logistical and financial difficulties in prosecuting this action.

58. These go to explain why the Plaintiff did not instruct her current attorneys until 14th September 2012 and why, once issued, a writ was not served promptly. The Plaintiff states in her affidavit that another reason for the delayed service of the writ was the amount of medical documentation that was required to be obtained and reviewed prior to the preparation of a letter before action and a statement of claim. It is nonetheless unfortunate that the Plaintiff's attorneys did not attempt to serve the writ until the last day of its validity.

59. Not without hesitation, I am prepared to find that the reasons given by the Plaintiff provide a satisfactory explanation for her failure to renew the writ before its validity expired. But it is a close run thing.

**Is there a good reason to extend the validity of the writ?**

60. The starting point for this enquiry is whether the Plaintiff has shown good reason for failing to serve the writ during the original period of its validity. I have dealt with that issue in the preceding section of this judgment. I am – just – prepared to find that she has.

61. Turning to the balance of hardship, if the action is not allowed to proceed, the Plaintiff will be deprived of the opportunity to pursue a claim for compensation with respect to an injury which has, on her case, had a devastating effect on her life. Her claim is a substantial one, although not perhaps quite as substantial as the $7.7 million which she is seeking.

62. On the other hand, if the action is allowed to proceed, and notwithstanding the loss of the benefit of an accrued limitation period, neither the First nor Second Defendant would be in a materially worse position than they would have been had the writ been served, as the Plaintiff intended, on 4th October 2013 rather than 8th or 9th October 2013.

63. Both Defendants were served with a letter before action on or about 27th September 2013, before the validity of the writ expired. Although this was far from early notification, it should have put them on enquiry to start investigating the claim. The relevant medical records are still in existence.

64. As to liability, the case will turn largely upon expert evidence, which will be based upon the medical records, and upon the identity of the person who cut the ureter, which is a detail as to which memories are unlikely to have dimmed. As to quantum, the case will turn on medical evidence and documentary evidence of special damage.

65. In all the circumstances, I am satisfied that there is a good reason to extend the validity of the writ.

66. As I am also satisfied that there is a satisfactory explanation for the Plaintiff's failure to renew the writ before its validity expired, I am in principle prepared to renew the writ to permit its service outside of the limitation period.

**Should the Court extend the limitation period?**

67. Although there was no written application to extend the limitation period before me, the Plaintiff's counsel applied to do so orally and relied heavily on section 34 in his written submissions. I shall therefore rule on this issue.

68. In light of my findings as to the renewal of the writ I can do so quite briefly. I need not embark upon a detailed consideration of the facts of the case as they relate to the circumstances identified in section 34(3) of the 1984 Act, although I have those circumstances well in mind. Suffice it to say that the facts and matters which I have considered in relation to a renewal of the writ are also relevant to an extension of the limitation period.

69. For the avoidance of doubt, and with particular reference to the observations of Waller LJ cited above, I do not regard the delay in this case as

inexcusable. The First and Second Defendants have not demonstrated any forensic prejudice resulting from the delay and I am unable to infer any from the surrounding circumstances. Indeed, for the reasons set out earlier in this judgment, I am satisfied that the First and Second Defendants have not suffered any forensic prejudice as a result of the delay.

70. Having regard to all the circumstances of the case, had I not decided to extend the validity of the writ then, pursuant to section 34 of the 1984 Act, I should have been prepared to extend the limitation period for the Plaintiff's claim in contract against the First and Second Defendants so as to permit service of a fresh writ upon them.

**Does the statement of claim fail to disclose a reasonable cause of action and/or is it frivolous, vexatious or otherwise an abuse of process?**

71. There are a number of problems with the amended statement of claim. Rather than going through the document paragraph by paragraph, I shall treat them with a broad brush. As the Plaintiff's relationship with the First and Second Defendants was contractual, the claims in negligence fall to be struck out. Her claim lies in breach of contract. However the Plaintiff has failed to plead the contracts on which she relies, or the terms which she avers have been breached.

72. For present purposes, I shall proceed on the assumption, which I think is implicit in the amended statement of claim, that on the Plaintiff's case both the First and Second Defendants owed her a contractual duty to treat her with reasonable care and skill, and that this is the duty which they have breached.

73. I am satisfied that the reference in the writ to "*breach of duty of care*" is a reference to a contractual breach of duty. As the term is used to denote an alternative claim to one arising in negligence, it does not refer to a tortious breach, and there is no suggestion that the duty breached is a statutory one. The Plaintiff has therefore alleged breach of contract from the outset.

74. Turning to the particulars of breach given in the amended statement of claim, the pleader has paraphrased a number of propositions contained in Dr Steinberg's report without analysing whether each of those propositions constitutes a breach of duty which has caused injury to the Plaintiff. For example, the Plaintiff alleges that the First Defendant:

> … fell below the requisite duty of care to the Plaintiff, given the underlying manifestation of Crohns disease and the Plaintiff's multiple prior surgeries. As such it would be reasonable to find dense scarring in the abdomen and around the adnexae.

To allege that "*given the underlying manifestations of Crohns disease…*" etc the Plaintiff fell below the requisite duty of care is a *non-sequitur*.

75. Further, the mere fact that Dr Steinberg has questioned or criticised an aspect of the Plaintiff's medical care does not mean that on his evidence that aspect gives rise to an actionable breach of duty.

76. For example, the amended statement of claim contains a number of allegations, culled from Dr Steinberg's report, that the First Defendant kept inadequate medical records. But it is impossible to work out from the pleading how those deficiencies are said to have injured the Plaintiff.

77. Other allegations based on Dr Steinberg's report are contradicted by the medical records. Presumably he did not have the opportunity to review the records in question before preparing his report.

78. Specifically, it is alleged that the First Plaintiff did not anticipate the need for a second pair of skilled surgical hands to help dissect the ureter and bowel. As mentioned above, the medical records show that the First Defendant was assisted during surgery by Dr Robinson. On the Plaintiff's own case, both the First and Second Defendants were involved in the surgery.

79. Further, and apparently based on Dr Steinberg's report, it is alleged that the First Defendant failed to apprise the Plaintiff of her options in dealing with the cyst and of the risks involved in surgery for its removal. These allegations are contradicted by the consent form which the Plaintiff signed in relation to the operation on 8th September 2006. This states:

> I hereby confirm that the nature of the diagnostic, operative or treatment procedure(s), risk of these procedures and therapeutic alternatives has been explained to me and I have read and fully understand this authorisation.

80. The consent form also includes a statement signed by the First Defendant confirming:

> I have explained the nature of the diagnostic/operative/treatment procedure(s) and risks of these procedures and therapeutic alternatives to the patient/relative.

81. Moreover, the Plaintiff states at paragraph 18 of the amended statement of claim that in a consultation with the First Defendant prior to the operation to remove the cyst she was informed about further management and removal procedures should the cyst persist or cause further problems. Thus the Plaintiff herself contradicts her allegations.

82. The amended statement of claim also includes allegations which do not appear to be based on Dr Steinberg's report. For example, it raises – for the first time – allegations of breach of duty against the First Defendant which are said to have occurred on 3rd February 2005, 2nd October 2005 and 23rd January 2006. No claims relating to these dates were mentioned in the letter before action. The allegations in the writ and the original statement of claim expressly relate to the procedure carried out on 9th October 2006 and the Plaintiff's subsequent treatment.

83. These allegations have not been particularised; no evidence has been adduced to support them; and they are in any event time-barred. The Court has not been supplied with any explanation as to why they were not raised

previously and there was no application before me to extend the applicable limitation periods.

84. As to the Second Defendant, it is alleged that he failed to meet the requisite standard of care in that he read the Plaintiff's chart on 11th October 2006 and decided to put in a stent, but waited until his surgery day, which was on 18th October 2006, before doing so. It is not pleaded why this was a breach of duty, eg that the need to install a stent was a medical emergency. Neither has the Plaintiff adduced any material – eg a further extract from Dr Steinberg's report – to suggest that the decision to wait until the surgery day was inappropriate or that the delay injured the Plaintiff.

85. It is further alleged that the Second Defendant was at fault with respect to the aborted operation to insert a nephrostomy tube. The Plaintiff has adduced no evidence to support these allegations, which are not consistent with the account of the procedure, summarised earlier in this ruling, contained in the medical records and given by Mr Swan.

86. Neither of these allegations against the Second Defendant was made in the letter before action or the unamended statement of claim.

87. As against both the First and Second Defendants, the statement of claim is peppered with sweeping allegations – eg that each of them "*was an incompetent medical practitioner/surgeon who ought not to have attempted to assist and provide treatment and care to the plaintiff*" – that are wholly unparticularised.

88. If the allegation of incompetence is dependent upon the various other particulars of breach of duty pleaded in the amended statement of claim then it adds nothing to the Plaintiff's case as to prove incompetence the Plaintiff would have to prove those other breaches. If the Plaintiff is alleging that the Defendants were incompetent for other reasons then the allegation is defective because the material facts constituting those other reasons have not been pleaded.

89. Other allegations are merely repetitious. Eg alleging both that the First Defendant failed to take adequate steps to protect the ureter during surgery and that she was insufficiently ureter conscious during the procedure.

90. These criticisms of the amended statement of claim are by no means exhaustive.

91. I conclude that the vast majority of the allegations of breach of duty in the amended statement of claim fail to disclose a reasonable cause of action or are frivolous, vexatious or otherwise an abuse of process. Nonetheless the statement of claim does contain a kernel of allegations which are not open to these criticisms. As against the First Defendant, they are supported by Dr Steinberg's report. These allegations may be summarised thus:

    (1) *That the First Defendant should not have proceeded to carry out surgery on the Plaintiff to remove an ovarian cyst without further surveillance and testing.* (Particulars of breach of duty against First Defendant, paragraph j.)

    (2) *That the First Defendant failed to take any or any adequate steps to protect the ureter during surgery.* (Particulars of breach of duty against First Defendant, paragraph o.)

    (3) *The First and/or Second Defendant transected the Plaintiff's ureter during surgery.* (Particulars of breach of duty against First Defendant, paragraph o; particulars of breach of duty against Second Defendant, paragraph b.) The ureter should not have been cut, and the fact that it was calls for an explanation.

92. There are several matters arising from my summary of these allegations. First, in the amended statement of claim the allegation that the First Defendant cut the ureter is not made in express terms. What is alleged at paragraph o of the relevant particulars is that the First Defendant:

> … did not take any and all requisite steps during the operative procedures to identify and protect the integrity of the ureter during surgery, which resulted in the transection [of] the left ureter.

93. Notwithstanding the use of the passive tense, I understand the Plaintiff to be alleging in that paragraph that the ureter was transected by the First Defendant while dissecting the adnexal mass.

94. Second, the Plaintiff alleges at paragraph b of the relevant particulars that the Second Defendant "*dissected the adnexal mass causing damage to the ureter*". I understand this allegation to be further and in the alternative to the allegation that the First Defendant transected the ureter.

95. This allegation against the Second Defendant appears to be based on a misunderstanding of a passage in Dr Steinberg's report. Dr Steinberg refers to the Second Defendant's transcribed operative note, in which the Second Defendant describes the site of the repair of the ureter which he performed. Dr Steinberg draws an inference from this description that the surgeon who dissected the adnexal mass, whom he has earlier identified as the First Defendant, failed to meet the accepted standard of care. He does not suggest that the adnexal mass was dissected by the Second Defendant.

96. The evidence before me tends to suggest that the Second Defendant, who repaired the ureter, did not become involved in the operation until after the ureter was cut. If so, he would not be liable for its transection. However the identity of the cutter is not altogether clear and the Second Defendant should therefore remain a party to the action for now. Whether he should remain a party can be revisited after the pleadings have closed and discovery has taken place.

97. The Plaintiff has leave to re-amend the amended statement of claim to give effect to this ruling. Ie to plead a claim for breach of contract properly and, if so advised, the allegations of breach of duty in the terms set out above. I order that the remaining allegations of breach of duty should be struck out as

they do not disclose a reasonable cause of action or are frivolous, vexatious or otherwise an abuse of process.

**Summary and conclusion**

98. I am satisfied that there is a satisfactory explanation for the Plaintiff's failure to renew the writ before its validity expired and that there is a good reason to extend its validity. I shall therefore extend the validity of the writ until 4th October 2014 so as to permit its service upon the First and Second Defendants. In light of RSC Order 6, rule 8(3), I judge that this is procedurally the correct course rather than validating its service on 8th and 9th October 2013 retrospectively.

99. Moreover, pursuant to section 34 of the 1984 Act, had I not decided to extend the validity of the writ then I should have extended the limitation period for the Plaintiff's claim in contract against the First and Second Defendants until 4th October 2014 so as to permit service of a fresh writ upon them.

100. As to the statement of claim, the Plaintiff has a properly arguable claim that the First and/or Second Defendants breached their contractual duty to treat her with reasonable care and skill as particularised in the preceding section of this ruling. The Plaintiff has leave to amend the statement of claim accordingly within 14 days after the date of this ruling. I order that the remaining allegations of breach of duty and the claim in negligence should be struck out.

101. The Plaintiff also has leave to amend the writ in the terms sought, although I order that the claim in negligence endorsed on the writ be struck out.

102. I make no further order, save as to costs, on the First Defendant's strike out application. The Second Defendant's strike out application is adjourned with liberty to restore.

103. The strike out applications by the First and Second Defendants have therefore succeeded in part. The Second Defendant's strike out application may yet prove wholly successful. I am minded to order that costs should be in the cause (apart from the Third Defendant's costs of this action, which I have ordered should be paid by the Plaintiff). But if any party wishes to persuade me otherwise, I shall hear them.

DATED this 25th day of September 2014

Hellman J