In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 312

BETWEEN:

RAYMOND MOSES SANTUCCI

Plaintiff

v

BERMUDA HOSPITALS BOARD
HOPE HEALTHCARE LTD.
DR. SOTIRIOS KASSAPIDIS

Defendants

RULING

Date of Hearing: **8 February 2024**
Date of Ruling: **11 April 2024**

Appearances: **Bruce Swan, Bruce Swan & Associates, for Plaintiff**

Allan Doughty, MJM Limited, for First Defendant

David Kessaram, Cox Hallett Wilkinson Limited, for Second Defendant

Ben Adamson, Conyers Dill & Pearman Limited, for Third Defendant

RULING of Mussenden CJ

Introduction

1. This matter appears before me on three Summonses as follows:
    a. The Second Defendant Hope Healthcare Ltd.'s ("**HHL**") Summons dated 19 September 2023 for the matter to be struck out on the basis that:
        i. The Plaintiff failed to comply with a condition in an Order dated 10 August 2023 to file further and better particulars of the Statement of Claim ("**SOC**"); and
        ii. Alternatively, that the SOC: (i) fails to disclose a reasonable cause of action against HHL; and/or (ii) it is frivolous and or vexatious and or embarrassing; and or (ii) it is otherwise an abuse of the process of the Court.
        iii. The Summons is supported by the second affidavit of HHL Director Dr. Brent Williams sworn 31 August 2023 ("**Williams 2**").
    b. The Third Defendant Dr. Kassapidis' Summons dated 19 January 2023 that the Specially Endorsed Writ (the "**Writ**") be struck out as disclosing no reasonable cause of action and/or as being frivolous or vexatious. It is supported by the affidavits of Dr. Kassapidis sworn 19 December 2022 ("**Kassapidis 1**") and counsel Ryan Robinson sworn 27 March 2023 ("**Robinson 1**")
    c. The Plaintiff Mr. Santucci's Summons dated 7 February 2024 for an application: (i) that the Second and Third Defendants file the required test result and confirm the diagnosis; and (ii) to dismiss the strike-out application immediately. It was supported by the affidavits of Mr. Santucci sworn on 6 February 2024 ("**Santucci 1**").

General Background

2. The SOC sets out that Mr. Santucci was a patient of the Defendants. The First Defendant ("**BHB**") owns and operates the King Edward VII Memorial Hospital ("**KEMH**"). HHL is the general medical practice attended by Mr. Santucci. Dr. Kassapidis was the medical doctor responsible for COPD care at HHL.

3. Mr. Santucci attended KEMH on 9 December 2019, 13 February 2019 and two other unknown dates complaining of chest and shoulder pains on each occasion. He was diagnosed as having pneumonia each time and was discharged with instructions which he followed but which did not relieve his chest pains. Mr. Santucci further consulted doctors at HHL and had a diagnostic CT-Scan (the "**Scan**") taken which was reviewed by Dr. Kassapidis at HHL on 22 February 2019 who diagnosed that he had COPD instead of pneumonia. COPD, or chronic obstructive pulmonary disease, refers to a group of diseases that cause airflow blockage and breathing-related problems. Mr. Santucci was prescribed medication by Dr. Kassapidis.

4. Later on, Mr. Santucci was referred to medical doctors in England in respect of his shoulder pains when he also sought treatment for his chest pains. There in May 2019, a Dr. Wharton confirmed a diagnosis of COPD. When he returned to Bermuda he began to seek compensation from the BHB, and sought the assistance of Dr. Kassapidis for a report confirming KEMH's misdiagnosis. When Dr. Kassapidis refused to do so, Mr. Santucci sought the assistance of a medical doctor, Professor Alice Turner. She, having reviewed the matter, provided him a report dated 20 December 2021 stating that, as of July 2021 he had a stable diagnosis of COPD. On 7 January 2022, Professor Turner provided a second report wherein she stated that she could not see how, based on the scans, BHB could have been expected to have diagnosed COPD earlier. The Plaintiff claims she did not agree with Dr. Kassapidis that he had COPD in February 2019, a point which Mr. Adamson says is not true according to the reports. Thus, Mr. Santucci claims that the Second and Third Defendants breached their duty of care owed to him.

5. There have been various requests, appearances and Orders in respect of Further and Better Particulars ("**FBPs**"). The BHB filed a Defence.

6. In respect of disclosure to date, counsel for each of the Defendants stated to the Court at the hearing that all documents have been disclosed to the Plaintiff.

The Applications

HHL's Submissions

7. Mr. Kessaram submitted that Mr. Santucci complains in his FBPs that HHL: (i) as Dr. Kassapidis' employer, agreed to the care that Dr. Kassapidis provided to him; (ii) owed a duty to him; (iii) failed to conduct appropriate breathing tests; and (iv) failed to have procedures for Dr. Kassapidis to conduct a breathing test to diagnose him correctly.

8. Mr. Kessaram submitted that HHL is a limited liability company which as a legal fiction cannot act except by its employees or agents. Thus, it cannot conduct breathing tests or could agree to the care provided by Dr. Kassapidis except by independent human intervention, which is not alleged. Mr. Kessaram also submitted that the legal consequence of the claim being struck out against Dr. Kassapidis as disclosing no reasonable cause of action, or of it failing at trial, is that the claim against HHL falls with it also.

9. Mr. Kessaram submitted that HHL challenges the claim on a second alternative basis, namely that even if the claim against Dr. Kassapidis survives his strike-out application and it proved at trial that Dr. Kassapidis was in breach of his duty of care to Dr. Kassapidis, then HHL cannot be held vicariously liable for his negligence for the simple reason that HHL was not his employer, nor was Dr. Kassapidis acting as an agent of HHL and nor is the duty owed by HHL a non-delegable duty. He referred to Williams 2 where it was explained that the medical services provided to Mr. Santucci, were provided under the terms of a Clinical Services Agreement between HHL and Lennox Hill Hospital ("**LHH**"), which provided in Clause 1 and 4.1 as follows:

> *Clause 1 - "Clinical Services: HHC [HHL] hereby retains Hospital to provide the services of medical professionals who are employed by the Hospital or another hospital member of Northwell Health, Inc (each an "Employee", collectively "Employees") who are trained to provide care in the specialties as described on Exhibit A attached hereto (the "Services"). Hospital agrees to accept such retention to provide all such Services as needed by HHC in accordance with the terms of this Agreement and on a schedule mutually acceptable to Hospital and HHC."*

> *Clause 4.1 Independent Contractors – "It is expressly acknowledged by the parties hereto that Hospital and HHC are independent contractors and nothing in this Agreement is intended or shall be construed to create with HHC an employer/employee relationship or a joint venture relationship."*

10. Mr. Kessaram submitted that HHL does not seek determination of this second argument at this stage, instead choosing to abide the result of Dr. Kassapidis' strike-out application, noting that if Dr. Kassapidis succeeds in his strike-out application, HLS will be spared the time, trouble and expense of having to seek an adjudication of the no-vicarious-liability issue.

Dr. Kassapidis' Submissions

11. Mr. Adamson submitted that the Pleadings are poorly drafted. He noted that based on the SOC and the FBPs, Mr. Santucci complains that Dr. Kassapidis care was not reasonable because Professor Turner does not agree with Dr. Kassapidis that Mr. Santucci had COPD, as of February 2019, based on the Scan that was reviewed. Mr. Adamson maintained that Professor Turner did not say that. Further, even if Dr. Kassapidis was correct, he still should have ordered a breathing test to confirm without doubt the diagnosis.

12. Mr. Adamson submitted that the claim falls apart in respect of what loss Mr. Santucci suffered. When asked what Dr. Kassapidis or any reasonable doctor should have diagnosed, Mr. Adamson says the question is dodged in that the answer was Dr. Kassapidis or any reasonable doctor should have ordered a breathing test to confirm the diagnosis. When requested to set out the loss suffered, the answer was that Mr. Santucci cannot confirm at the moment the damage that was a result of the misdiagnosis as Dr. Kassapidis would need to put in writing the method used to make his diagnosis so an expert can confirm the damage that was caused.

13. Mr. Adamson, noting that actions should only be struck out if they are not properly arguable or are abusive, submitted that the test for strike-out was met in this case. First, he argued that it cannot be negligent for a doctor to give the correct diagnosis. Noting that Mr.

Santucci's case is that a doctor must give a correct diagnosis in a certain way, Mr. Adamson submitted that there are several difficulties with such a claim:

a. If Dr. Kassapidis was confident in his correct diagnosis, why would further test be necessary and what difference would they make;
b. Mr. Santucci's medical evidence does not support a claim as set out in the FBPs, "*It is our position that based on Professor Turner's opinion no doctor shall diagnosis COPD without having first conducted a breathing test to determine the diagnosis being made*". Mr. Adamson argued that Professor Turner did not say that;
c. In professional negligence cases, it is common practice to adduce expert evidence in support of the claim at the outset. Thus, the absence of supporting expert evidence can itself result in a strike-out. He relied on *Pantelli Associates c Corporate City* [2010] EWHC 3189 (TCC). Mr. Adamson argued that Mr. Santucci provided a number of expert reports, but none claimed that Dr. Kassapidis was negligent. Thus, where the expert evidence does not support the pleaded case, the claim can be struck out. He relied on *Quaatey v Guys & St. Thomas's NHS* [2020] EWHC 1296.

14. Second, Mr. Adamson submitted that Mr. Santucci cannot prove any loss, noting that in order to have an arguable case in negligence, Dr. Kassapidis' failure to order the test must have caused him loss. He argued that where a claim cannot properly show a causal link between the actions of a defendant and the claimant's loss, then the claim should be struck out. He relied on *Tiuta International v De Villierrs Surveyors* [2017] UKSC 77.

15. Mr. Adamson submitted that Mr. Santucci admits that he cannot show any causal link with any loss, thus the case should be struck out on this admission. He stressed that Mr. Santucci's opposition to the strike-out is that he wants a form of pre-action disclosure or deposition in order to find out how Dr. Kassapidis came to make his correct diagnosis, after which he will be able to work out if he suffered loss. He argued that you do not issue proceedings first and then work out if you have a claim later.

16. Third, Mr. Adamson submitted that the claim made no sense as Dr. Kassapidis diagnosed him with COPD and he was immediately treated, raising the question as to what loss has been suffered by any failure to confirm the COPD diagnosis. He suggested that the claim might be coherent if Mr. Santucci claimed that he did not have COPD and Dr. Kassapidis had rushed his diagnosis and that he had received unnecessary treatment.

17. Fourth, Mr. Adamson submitted that the claim was abusive as Mr. Santucci complained to the Bermuda Medical Council, alleging that Dr. Kassapidis was not helping him to sue the BHB and the unchallenged evidence is that the proceedings were brought because of his refusal. Mr. Adamson argued that medical practitioners have a duty to inform patients of the risks of any procedure and to provide explanations if something has gone wrong, relying on *Jackson & Powell, 13-051*. He also relied on *Lee v SSW Thames* [1985] 1 WLR 845 at 851C in respect of disclosure as a possible contractual obligation, noting that Dr. Kassapidis' clinical notes have been provided to Mr. Santucci. He stressed that in this case, there is no allegation that anything went wrong as regards the treatment by Dr. Kassapidis. However, there was no duty to opine on the possible reasons why other doctors may have got it wrong and doctors have no duty to provide testimony against other practitioners, that being the role of an independent expert.

The Plaintiff's Submissions

18. Mr. Swan submitted that it was only on referral to England that Mr. Santucci learned that COPD could only be diagnosed after taking a breathing test, after which he questioned why the test was not administered. He commenced action against BHB for KEMH's misdiagnosis and sought the assistance of Dr. Kassapidis who declined. He accepted that he now has COPD but based on Professor Turner's report, there was no evidence of COPD in February 2019 based on the Scan she observed, a diagnosis which can only be made after a breathing test is administered. Mr. Santucci also sought the advice of Dr. Kassapidis' primary employer in New York, LHH, which confirmed that in its practice, a breathing test would be done before a diagnosis of COPD was determined.

19. Mr. Swan submitted that upon request for his medical records, Dr. Kassapidis provided all the records except for the method of diagnosis and the medication provided. To date, Dr. Kassapidis continues to refuse to provide the method of diagnosis for an independent expert to review and determine the misdiagnosis. Mr. Swan submitted that he has sought to obtain the information to advance his claim but HHL and Dr. Kassapidis failure to disclose the important information is preventing the matter from proceeding.

20. Mr. Swan submitted that Mr. Santucci has a claim based on sufficient facts to establish liability and additional information is required to determine quantum. However, the position of HHL and Dr. Kassapidis to not disclose information leads to a patient potentially being prevented from bringing a claim of medical negligence.

21. Mr. Swan submitted that the Second and Third Defendants' position is that Mr. Santucci was diagnosed with COPD and thus no loss was suffered as a result of their actions. He argued that that position ignores the fact that Professor Turner found no basis to diagnose COPD on review of the Scan.

22. Mr. Swan submitted that there is no abuse of process as the factual matrix provides some evidence to which the Court can feel assured that Mr. Santucci is not fishing.

23. Mr. Swan requested that the Court order the Second and Third Defendants to provide Mr. Santucci with the method of diagnosis, diagnosis report and the medication and quantity prescribed on the day of diagnosis, after which Mr. Santucci would be able to provide them to an independent expert to then opine on their medical negligence.

24. Mr. Swan submitted that the strike-out applications should be dismissed and Mr. Santucci's application for an unless order for disclosure be granted.

The Law on Strike-Out Applications

25. In *Bentley Friendly Society v Minister of Finance* [2022] SC (Bda) 9 Civ, I made reference to the case of *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2019] SC (Bda) 10 Civ (5 February 2019) where Subair Williams J set out the law on strike out applications.

26. Subair Williams J set out the general approach and the Court's case management powers.

> *"General Approach and the Court's Case Management Powers*
> *50. In David Lee Tucker v Hamilton Properties Limited [2017] SC (Bda) 110 Civ I outlined the general approach and relevant legal principles applicable to strike out applications. As a starting point, at paragraph 11, I stated:*
>
> > *'The principles of law applicable to the strike-out of a claim were no source of contention between the parties. This area of the law has been well recited in previous decisions of this Court. In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out.'*
>
> *52. At paragraphs 14-16 in David Lee Tucker v Hamilton Properties Limited I considered the Court's case management powers in the context of a strike out application:*
>
> > *'14. The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.'*
> >
> > *16. In Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5 at paras 14-15 the learned Hon. Chief Justice, Ian Kawaley, examined the impact of the new CPR regime and the Overriding Objective on strike out applications:*
> >
> > > *'…In Biguzzi v Rank Leisure plc [1999] 4 ALL ER 934 (CA), Lord Woolf explained that the CPR introduced an entirely new procedural code. It is true that he stated that pre-CPR authorities would not generally be relevant. But that was in the context of contending that the new regime imposed greater case management powers on the court to prevent delay than under the old Rules. Trial judges, post-CPR, were expected to use these case management powers judicially, only striking out as a last resort. It is also important to remember that this reasoning was articulated in a statutory context in which an entirely*

new procedural code was in force. And the particular strike-out discretionary power which was under consideration in that case was an entirely new one, a power exercisable on grounds of mere non-compliance with the Rules. As Lord Woolf observed (at 939-940): "Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under Part 3.4. That provides that: '(2) The court may strike out a statement of case if it appears to the court- (a) that a statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process…' [and, most importantly] (c) that there has been a failure to comply with a rule, practice direction or court order.'

Under Part 3.4(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.'

53. At paragraph 13 in David Lee Tucker v Hamilton Properties Limited I cited Auld LJ's remarks in Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247 p.613 which were previously relied on by the Bermuda Court of Appeal in Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12."

27. Subair Williams J set out the case law on reasonable cause of action.

"54. The rule against the admission of evidence in support of the ground that no reasonable cause of action is disclosed is contained at RSC Order 18/19(2).

55. At paragraphs 18- 20 in David Lee Tucker v Hamilton Properties Limited I referred to the following authorities in support of the rule at RSC Order 18/19(2):

"18. This rule was recognized in Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12: "Where the application to strike-out (is) 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.

19. In E (a minor) v Dorset CC [1994] 4 All ER 640 at 649, [1995] 2 AC 633 at 693-694, Sir Thomas Bingham MR stated:

'It is clear that a statement of claim should not be struck out under RSC Ord 18, r 19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad…I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are

fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if, after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

20. The White Book (1999 edition) provides at 18/19/10:

"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA): …""

28. Subair Williams J set out the case law on scandalous, frivolous or vexatious.

"56. At paragraphs 21- 22 in David Lee Tucker v Hamilton Properties Limited I considered the meaning of these terms and made the following observations:

Scandalous

21. A complaint that a pleading is 'scandalous' necessarily imports an allegation that the pleading is grossly disgraceful, false and malicious or defamatory. Scandalous claims are irrelevant to the proceedings and are invariably liable to be struck out on the basis that they are improper.

Frivolous and Vexatious

22. Justice Meerabux in The Performing Rights Society v Bermuda Cablevision Limited 1992 No. 573 at page 31 considered the meaning of 'frivolous' and 'vexatious':

"…It is pertinent to mention that the words "frivolous or vexatious" mean cases which are obviously frivolous or vexatious or obviously unsustainable. Per Lindley L.J. in Attorney-General of Duchy of Lancaster v L. & N. W. Railway [1892] 3 Ch. 274 at 277. Also when "one is considering whether an action is frivolous and vexatious one can, and must, look at the pleadings and nothing else… One must look at the pleadings as they stand." Buckhill L.J. in Day v William Hill (Park Lane) Ld. [1949] 1 K.B. 632 at page 642."

However, Day pre-dates the 1985 Supreme Court Rules and the new CPR regime which introduced the Overriding Objective. RSC O.18/19(2) only excludes the

admissibility of evidence on the grounds that no reasonable cause of action or defence is disclosed. Evidence may now be filed in support of grounds that the pleadings are 'scandalous, frivolous or vexatious'."

29. Subair Williams J set out the case law on abuse of process:

> *"57. The term 'abuse of process' has long been explored and addressed by the Court. Having relied on the persuasive passages stated and approved by learned judges of this Court and those sitting in the English House of Lords, I cited the following at paragraphs 23- 25 in David Lee Tucker v Hamilton Properties Limited:*
>
> *'Misuse of procedure*
>
> *23. In Michael Jones v Stewart Technology Services Ltd [2017] SC (Bda), Hellman J considered the meaning of 'abuse of process' by reference to Lord Diplock's passage in Hunter v Chief Constable [1982] AC 529 at 536 C: "It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied…'"*

Analysis of the Applications

30. I am satisfied that I should grant the Second and Third Defendants' strike out applications for several reasons. I should note here that I have found no merit in Mr. Swan's submissions in objecting to the strike-out applications.

No reasonable cause of action

31. First, I am satisfied that the Plaintiff's case shows no reasonable cause of action against them and is in effect a hopeless case. On this ground, I am only required to consider the case on the Pleadings, thus, I have reviewed the SOC and the FBPs. The thrust of the Plaintiff's case is that Dr. Kassapidis was negligent in giving a correct diagnosis of COPD in February 2019 but without first administering a breathing test, although three months later in May 2019, the diagnosis of COPD was confirmed.

32. When asked by Conyers to particularise how Dr. Kassapidis was negligent in diagnosing COPD in February 2019, the FBPs dated 14 August 2023 stated that no doctor should diagnose COPD without first administering the breathing test. I rely on the above White

Book extract citing the case of *Drummond-Jackson v British Medical Association* to conclude that this case against the Second and Third Defendants is not a case with some chance of success when considering the Pleadings, the real issue being how could Dr. Kassapidis be negligent in providing the correct diagnosis.

33. In *Pantelli Associates v Corporate City*, a case about professional negligence of quantity surveyors, the allegations of professional negligence were struck out as the Court found that there was no expert evidence of any kind to suggest that work was carried out inadequately or was in some way below the standard to be expected of an ordinarily competent quantity surveyor. I accept Mr. Adamson's arguments that Mr. Santucci provided a number of expert reports, but none claimed that Dr. Kassapidis was negligent. I rely on the case of *Quaatey v Guys & St. Thomas's NHS,* an appeal case about clinical negligence, where the Court noted that in striking out the action, the Court below had referred to *Pantelli* and had recognized the need for supportive expert opinion and that there was none. In *Woolridge v BHB & Miller* [2015] CA (Bda) 25 Civil, a case about medical negligence, where the plaintiff's case was struck out for various reasons including failing to file expert evidence. The Court of appeal dismissed the appeal against strike-out. In *Hofer v BHB* [2015] SC (Bda) 55 Civ, a case about the alleged negligence of the BHB where the claimant sustained a broken neck, Kawaley J (as he then was) struck out the case for various reasons including that there was no expert evidence to support the case. In my view, in the present case, there is no expert report to support Mr. Santucci's case against the Second and Third Defendants, and on that basis the case should be struck out. The case would be entirely different if the diagnosis was incorrect. I rely on the case *E (a minor) v Dorset CC* that the Plaintiff has pleaded his best case, and on those pleadings in my view the case is both unarguable and the Plaintiff can have no sense of injustice of the matter being struck out as Dr. Kassapidis diagnosed him in February 2019 with COPD, a diagnosis which was confirmed three months later.

34. Second, Mr. Santucci, who has all the disclosure from all the Defendants, is unable to show damage. He argues that it is only on further disclosure that damage can be shown. However, there is no further disclosure to be made according to counsel for each of the Defendants. I rely on *Tiuta International Limited,* a case about alleged negligence of a surveyor in

conducting a valuation, where the defendant successfully struck out claims based on the absence of arguable claims of loss. Lord Sumption stated "*In my opinion the result of the facts as I have set them out is perfectly straightforward and turns on ordinary principles of the law of damages. The basic measure of damages is that which is required to restore the claimant as nearly as possible to the position that he would have been in had he not sustained the wrong.*" In the extract from *Practical Law UK Practice Note Overview on Claims in Negligence* it stated "*The claimant's claim will fail if either: (i) the claimant would have suffered the same loss even in the absence of the defendant's negligence; and (ii) the true cause of the claimant's loss was something other than the defendant's carelessness.*". In my view, the case against the Second and Third Defendants should be struck out as it shows no loss sustained by Mr. Santucci as a result of their actions.

Frivolous or vexatious

Abuse of Process

35. Third, in considering a strike-out application on these grounds I am entitled to review the evidence. In a nutshell, Kassapidis 1 shows that Dr. Kassapidis was first asked by Mr. Santucci to support his claim against the BHB, but he declined to act as an expert. Robinson 1 also exhibits correspondence to the same effect that Mr. Santucci through his counsel was seeking and secured an expert to support his claims against BHB for its misdiagnosis, not against the Second and Third Defendants. In my view, on the face of it, once Dr. Kassapidis declined to act as an expert to Mr. Santucci, he then widened his target area to include them as defendants.

36. In *Jackson and Powell on Professional Liability 9th Ed.*, at para 13-057 it states that *"... If a patient asks his doctor about a risk, the doctor's duty is to give an honest answer. ... The duty to answer questions truthfully applied equally after treatment has been given. Thus, if some mishap has occurred, the patient is entitled to be given details.*" The evidence shows that Mr. Santucci was provided with all the documents of his case from the Second and Third Defendants. I am satisfied that there was no duty on the part of Dr. Kassapidis to act as an expert for Mr. Santucci.

37. In my view, Mr. Santucci has brought the case against the Second and Third Defendants on spurious grounds because Dr. Kassapidis declined to be his expert, a practice which cannot be supported by the Court. I rely on the case of *The Performing Rights Society v Bermuda Cablevision Limited* to find that the claims are obviously frivolous and vexatious. Also, I rely on the case of *Michael Jones v Stewart Technology Services Ltd* and the reference to Lord Diplock's passage in *Hunter v Chief Constable* where the Court can use its inherent powers to prevent misuse of its procedure. In my view, this is such a case in which I should deploy such inherent power.

Case Management

38. Fourth, I am of the view that I should exercise my discretion on the strike-out applications having regard to the principles of good case management. I rely on the reference above to the case of *David Lee Tucker v Hamilton Properties Limited* where the Court stated "… *The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.'*

Conclusion

39. Generally, in my view, this is a case where it is plain and obvious that it should be struck out as against the Second and Third Defendants. For the reasons above, I grant the Second Defendant's and Third Defendant's applications to strike out the Writ and the SOC as against them.

40. In light of my reasoning above, I dismiss the Plaintiff's Summons.

41. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs in respect of all the applications shall follow the

event in favour of the Second Defendant and Third Defendant against the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed.

Dated 11 April 2024

LARRY MUSSENDEN
CHIEF JUSTICE