[2024] JMSC CIV. 63

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2023CV01044

BETWEEN	**IRINA ALBERTOVNA KALBUS**	**CLAIMANT**
AND	**HOSPITEN JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**DR. ROBERTO LEDO BATTLE**	**2ND DEFENDANT**

IN CHAMBERS

Miss Kashina Moore for the claimant instructed by Nigel Jones & Company.

Mr. Stuart Stimpson and Miss Sashara Eccleston for the 1st defendant instructed by Hart Muirhead Fatta.

Mr. John G. Graham, KC and Miss Peta-Gaye Manderson for the 2nd defendant instructed by John G. Graham & Company.

April 2, 2024, and May 28, 2024

Application for security for costs, claimant resident out of the jurisdiction- no evidence of any assets within this jurisdiction- evidential burden of each party- claimant failing to provide evidence of her financial circumstances.

ORR, STEPHANY J (AG)

[1] Before me for are two applications for security for costs filed by the defendants.

I have granted the orders with slight amendments and have outlined my reasons below.

BACKGROUND TO THE APPLICATION

[2] Mrs Kalabus commenced this claim against both defendants and she seeks damages for negligence and breach of contract. In her claim form filed on March 23, 2023, she alleges that the 1st defendant administered an intramedullary nail fixation/stabilisation surgery at the 1st defendant's hospital on December 21, 2017. She further alleges that both defendants were negligent in the treatment they administered to her as a result of which she has suffered loss and damages.

[3] Both defendants filed their defences on October 9, 2023, and September 29, 2023, respectively and have denied liability for the claimant's damages. Both have joined issue with several aspects of the claimant's claim.

[4] It is unnecessary for me to go into the details of the claim or the defences for the purposes of this application as little turns on the pleadings.

[5] At the first case management conference on February 20, 2024, the parties requested time to engage in mediation/discussions and the hearing was adjourned to April 25, 2024, to facilitate mediation/discussions. At that hearing, Dr. Ledo Battle had already filed his application for security for costs which was filed on February 8, 2024.

[6] Mr. Stimpson for the 1st defendant indicated at that case management conference that he intended to also file an application for security for costs on behalf of the 1st defendant. This application was subsequently filed on April 5, 2024.

[7] Both applications were heard at the further case management conference on April 25, 2024.

DR. ROBERTO LEDO BATTLE'S APPLICATION

[8] Dr. Ledo Battle's application was first in time and so I have considered his application first.

[9] The 2nd defendant's application was supported by an affidavit provided by counsel Miss Peta-Gaye Manderson where in summary she stated that the claimant provided her address as 391 Extonville Road, Allentown New Jersey in the United States of America of America.

[10] She said also that the 2nd Defendant has filed a defence to this claim and has a good prospect of successfully defending the claim. He has already incurred legal fees in defending the claim and will incur further costs before the trial of this claim.

[11] Miss Manderson projected that the claim would likely subsume three trial days and estimated the legal fees likely to be incurred by the 2nd defendant at $6,486.575.00.

[12] Miss Manderson went on to detail her estimate of the costs and included the hourly rate charged by each counsel. There were fees for two counsels, including one Kings Counsel.

[13] She said that the 2nd defendant was fearful that if he succeeded on his defence, the claimant had no assets or means within this jurisdiction to recover these costs.

[14] In his oral and written submissions, Mr. Graham, KC submitted that this is a complex claim which will involve expert evidence and is not a simple personal injury claim.

[15] The 2nd defendant is likely to incur costs exceeding $6,000,000.00 defending this claim and were he to succeed at trial, he will be severely prejudiced if he is unable to recover costs awarded against the claimant who resides in the United States of America of America (USA) as he would be put to great expense pursing these costs there.

[16] He submitted further that the devaluation of the Jamaican dollar against its US counterpart will also impact the 2nd defendant's costs to pursue these legal fees which will likely be further increased.

[17] The claimant ought not to be permitted to pursue costly litigation without advancing security in circumstances where the claimant has not identified any assets she owns within this jurisdiction

[18] The claimant has not advanced any evidence of impecuniosity to support the submission that if the order for security for costs is made her claim will be stifled.

[19] The nature of the claim, use of expert evidence and the amount of money at stake, particularly when one considers the claim for special damages alone warrants two counsels. Two counsels are necessary to record accurate notes of evidence, especially during cross examination.

[20] No witness statements have been filed and the 2nd defendant's defence has joined issue with the claimant's claim, and he has a real prospect of succeeding on his defence.

[21] The court has the power to fix an amount for security for costs which will not stifle the claimant's ability to pursue her claim.

[22] The order should be made in the interest of fairness and justice in favour of the 2nd defendant.

[23] The 2nd defendant in his application for security for costs asked that the court award the sum of $3,500,000.00 as security for his costs. Mr Graham, KC *submitted* that this was an appropriate sum in all the circumstances.

HOSPITEN JAMAICA LIMITED'S APPLICATION

[24] The first defendant's affidavit evidence mirrored that of 2nd defendant. Miss Sahara Eccleston who provided an affidavit for the 1st defendant outlined that the claimant resided overseas in the United States of America, the 1st defendant has filed a defence and has a good prospect of defending the claim. They have already incurred costs and will likely incur further costs as she also estimated that the trial will last for three days.

[25] She provided an estimated bill of costs for senior and junior counsel and the hourly rate for both counsels. She estimated the likely fees to trial to be $5,048,500.00.

[26] In his oral and written submissions on behalf of the 1st defendant Mr. Stuart Stimpson outlined that the claimant has not challenged the jurisdiction of the court to make the order for security for costs and has only challenged the amount for the security.

[27] The court he said needs to be satisfied of the prospect of success on the documents filed to date. On the face of the documents now before the court, it can be demonstrated that at this stage the claimant does not have a high probability of success against the 1st defendant.

[28] She has not met all of the special requirements under CPR 8.11 as she has not filed a proper medical report or any report from which it can be deduced that her alleged injuries post- surgery were because of the treatment she received at the 1st defendant's facility.

[29] The document which she seeks to rely on as a medical report is really 99 pages of data and is not a proper medical report.

[30] In contrast, the 1st defendant has a high probability of success in defending this claim and the court can arrive at such an assessment without any great detailed review of the material before it.

[31] The claimant consented to the treatment received and the associated risks by virtue of the fact that she signed a treatment authorization form dated December 20, 2017, wherein she acknowledged the risks of surgery and consented to these risks.

[32] The claimant's discharge report dated December 24, 2017, indicates that the claimant was showing improvement and could lift her leg. She was advised to continue treatment in her home country which she has done and is attempting to

use this claim to burden the 1st defendant with the cost of her further treatment for alleged injuries for which there is no clear causal connection to the 1st defendant.

[33] There is also no clear causation or a dispute to the causation on the documents before the court.

[34] The claimant has provided no evidence that her claim would be stifled due to a lack of means where the order for security for costs is made.

[35] This is a technical and complex case which requires two counsels, particularly in the detail required in the preparation of the witness statements. The issues that arise on the claim concern systems of care and treatment across jurisdictions.

[36] The 1st defendant has asked for security in the sum of $2,500,000.00 and the court is at liberty to reduce this amount, this does not however negate the fact that in all the circumstances of this case an order for security for costs should be made.

[37] Mr. Stimpson also adopted the submissions of the 2nd Defendant.

THE CLAIMANT'S RESPONSE

[38] In responding to both applications Miss Marsha Chambers of counsel filed two affidavits which asserted similar evidence.

[39] She disputed the defendants' assertion that they had a good prospect of succeeding on their defences. She did not however explain how she came to this conclusion.

[40] She went on to join issue with the estimated fees sought by the 2nd defendant as security for costs stating that the nature of the claim did not require Kings Counsel as it was a simple personal injury claim. Further, there was no necessity for Kings Counsel to be assisted by junior counsel.

[41] Miss Chambers also said that despite the 2nd defendant's decision to retain King's Counsel, the estimated schedule of fees amounting to $2,978,500.00 was a more

appropriate and reasonable estimate of the fees that would be incurred in this claim. She also provided a statement of the estimated fees. It is notable that this estimate only made provision for one junior counsel.

[42] In relation to the 1st defendant, she also stated that the claim did not require junior counsel and provided an estimate of the proposed fees for one counsel in the same amount of $2,978,500.00.

[43] In her oral and written submissions on behalf of the claimant Miss Moore accepted that the claimant resided out of the jurisdiction and had no assets in this jurisdiction. The claimant was not challenging the court's jurisdiction to make the orders for security for costs. She submitted however that the court was not obligated to make such an order.

[44] She submitted that the claimant had a cause of action against the defendants that was maintainable in law and was not a frivolous case. The circumstances giving rise to the claim arose from the defendants' actions and inaction. The claimant had a real prospect of success, and the court should not make the order for security for costs.

[45] In her oral submissions, Miss Moore highlighted that there were several issues joined between the parties that would require expert evidence including the standard of care expected, whether the defendants met this standard, whether the claimant consented to the risks involved with surgery and whether these risks were explained to the claimant before surgery. She argued that although both defendants have joined issue with the claimant's claim this does not mean that her claim has no merit.

[46] Concerning the claimant's medical report, Miss Moore submitted that the medical report prepared by Rothman Orthopaedics speaks to when the doctor first saw the claimant and gives a history of her surgery both before surgery and the consequences of the surgery administered by the 1st defendant at the 2nd defendant's hospital.

[47] On the issue of the 2nd defendant's representation by Kings Counsel, Miss Moore in her oral submissions conceded that a litigant is entitled to the counsel of his choice. She said however that this claim did not require two counsel as the law in relation to medical negligence is settled. The claimant is not embarking on unchartered waters and the case is not a complex one by virtue of the volume of documents that are included in the claim. She said also that there will be opinion evidence.

[48] She also submitted that the granting of the order for security for costs would stifle the claimant's genuine claim. She asked the court to also consider whether the application was being used as an oppressive tool in an attempt to stifle the claimant's claim.

[49] Miss Moore asked the court to also weigh the injustice to the claimant who sought treatment in this jurisdiction and suffered injury, her need for compensation for this loss and expenses, and the injustice she will suffer if prevented from pursuing her claim; against the defendants and any difficulty they might experience in recovering their costs if they are successful where no security for costs is ordered.

[50] In closing, she reminded the court that where the court determines that it is just to make the order, the court does not have to order a substantial amount and should consider the alternative estimate of costs put forward by the claimant. She suggested the sum of $1,500,000.00 as security for costs for each defendant.

ANALYSIS AND DISCUSSION

[51] The authority to grant an order for security for costs is found in Part 24 of the Civil Procedure Rules. Rule 24.3 sets out conditions that must be met for the court to grant the order, however, the rule is silent as to how the court's discretion should be exercised. Accordingly, in interpreting Rule 24 the court must consider the overriding objective (**Attorney General of Jamaica v Rashaka Brooks** 2013JMCA Civ 16) and the guidance provided by decided cases.

[52] In **Mannings Industries Inc. and Manning Mobile Company Limited Jamaica Public Service Limited** 2002/M058, Brooks J (as he then was) in explaining how the court should interpret Part 24 suggested that the court should first determine whether any of the specific conditions listed at Rule 24.3 (a) – (g) existed and where one or more of these conditions were established on the evidence, the court should only then go on to consider whether if in all the circumstances of the case it was just to make the order.

[53] Thus, while the presence of any of the conditions listed under Rule 24.3 (a) – (g) might trigger the court's discretion to grant an order for security for costs, the presence of such a condition does not mean that the court must grant the order for security for costs. The court is required to go further and consider whether it is just to make the order.

[54] In **Shurendy Quant v The Minister of National Security and The Attorney General of Jamaica** [2015] JMCA Civ 50, Sinclair-Haynes, JA (Ag) as she then was at paragraph [88] of her judgment endorsed and adopted the reasoning of the Caribbean Court of Justice in **Marjorie Knox v John Deane and Others** [2012] CCJ 4 (AJ) where Nelson JCCJ at paragraph [40] said:

> *"The fourth determining factor is that the award of security for costs must, in the final analysis, be 'just in all the circumstances. In the instant case, in this respect the courts are anxious to preserve access to justice for persons resident abroad or impecunious who are brought before the courts to defend litigation and are desirous of continuing their defence, so to speak, by way of appeal. More especially is this so because both at first instance and on appeal nowadays foreignness and poverty are no longer per se automatic grounds for ordering security for costs. It is well to recall the discretionary terms in which Rule 62.17 is cast and two statements of the proposition at first instance:*
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> *(a) It is no longer an inflexible rule that if a foreigner sues within the jurisdiction he or she must give security for costs:* ***Aeronave S.P.A v Westland Charters Ltd. and***
>
> *(b) A defendant is not entitled to security simply because the plaintiff is poor and there is danger that costs may not be recoverable:* ***Cowell v Taylor****"*

[55] Indeed, in **Shurendy Quant**, (supra) the Court of Appeal set aside the order for security for costs made at first instance in circumstances where the claimant was ordinarily resident in another jurisdiction, he was unable to leave that jurisdiction because of criminal charges laid against him there and he had no assets in this jurisdiction to satisfy the defendants costs where they succeeded. The court considered the peculiar circumstances of that case and concluded that it was unjust to make the order for security for costs and set it aside.

[56] It is therefore important to remember that each claim must be considered on its own peculiar evidence and facts.

[57] In determining whether it is just to make the order for security for costs, the court is really balancing any real or likely prejudice a defendant may experience in recovering his costs to defend a claim against any real or likely prejudice that the granting of the order will stifle the claimant's claim.

[58] Phillips, JA phrased it this way in **Symsure Limited v Kevin Grant** [2016] JMCA Civ 8 at paragraph [50] where she said:

> *"As a consequence, at the end of the day, the court is really being asked to conduct a balancing exercise weighing the injustice to the claimant, on the one hand, if prevented from proving a genuine claim, as against the injustice to the defendant, on the other hand, if no security is obtained and the defendant's costs cannot be paid at the end of the trial if the defendant is successful. It is the role of the court to ensure that the exercise of its discretion is not used as an instrument of oppression stifling a genuine claim of an indigent person. But equally, a court should not permit an indigent person to use his/her impecuniosity as a weapon to pursue a claim which is a sham and cause costs to be incurred which can never be paid.".*

[59] The factors the court must consider in determining whether it is just to grant an order for security for costs have been discussed in several cases and were outlined by Phelps JA in **Symsure Limited v Kevin Grant** (supra) where she adopted the factors outlined by Belgrave J in **Harnett, Sorrell and Sons Ltd. v Smithfield Foods Ltd.** and can be summarised as follows:

1) Whether the plaintiff's claim is bona fide and not a sham

2) Whether the plaintiff has a reasonably good prospect of success.

3) Whether there is an admission by the defendant on the pleadings or elsewhere that money is due.

4) Whether there is a substantial payment into court on an "open offer" of a substantial amount.

5) Whether the application for security was being used oppressively to stifle a genuine claim.

6) Whether the plaintiff's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of the work.

7) Whether the application for security is made at a late stage of the proceedings

8) The genuineness of the application should be considered in relation to when the application was made. If it was not made timeously, one may conclude that it was made to stifle the claim.

9) The success of the claim, though not in any detail

10) Any delay in making the application, which should be made at a very early stage in the proceedings. Delay in making the application may be a reason to refuse the application particularly if it is made very close to the trial date and the sum asked for is exorbitant or very high as it may cause suspicion as to the genuineness of the claim

11) The question of enforcement of the costs is also important and the efforts which may have to be made to obtain recovery of the costs can influence the court's discretion as to whether to grant the order.

[60] In **Traille Caribbean Limited v Cable & Wireless Jamaica Limited** [2020] JMCC Comm 15 Simmonds J as she then was at paragraph [49] explained the role and importance of affidavit evidence which the court considers in this balancing exercise to determine what is just in the circumstances of the case. She explained that:

> *"It is clear to me from the judgments in Cybervale Limited (supra) and Salthill Properties Limited (supra) that while the overall burden of proof is on the applicant, in this case the defendant, once it has been discharged, the burden shifts to the respondent to assert circumstances that would justify the refusal of the order. In* ***Cybervale Limited v Cable & Wireless Jamaica Ltd.,*** *Mangatal J states clearly that the burden on the claimant is an evidential one. This requires "a party to adduce sufficient evidence of a fact to justify the finding on that fact in favour of the party so obliged."*

[61] The court must therefore consider the applicants' evidence and once satisfied that they have met the evidential burden, weigh this evidence against the respondent's evidence to see where the justice lies.

[62] I will therefore first consider the defendants' evidence. There is no challenge to their evidence that the claimant resides outside of this jurisdiction. She resides in New Jersey in the United States of America of America. This satisfies condition 24.3(a).

[63] The 2nd defendant has led unchallenged evidence that there is no evidence of the claimant having any assets within this jurisdiction and therefore, where the claimant is unsuccessful in her claim, he will incur substantial costs in enforcing any order for costs made in his favour. These costs Mr. Graham, KC has also argued will be further impacted and increased by the devaluation of the Jamaican dollar against its US counterpart over time.

[64] Although the 1st defendant's evidence did not speak to whether the claimant has any assets within this jurisdiction, the claimant has not led any evidence that she has any assets within this jurisdiction. Also, Miss Moore did submit that she was not challenging the court's jurisdiction to make the order.

[65] In considering the defendants' position, New Jersey in the United States of America is not a commonwealth jurisdiction. Further, neither the Judgments (Foreign (Reciprocal Enforcement) Act 1936 nor the Judgments and Awards (Reciprocal Enforcement) Act 1923, extend to that jurisdiction.

[66] The defendants will therefore have to retain counsel in a foreign jurisdiction whose currency is of greater value than our local currency (and against which our local currency continues to devalue over time) and commence a claim in that jurisdiction to recover any costs awarded to them, where the claimant does not succeed on her claim.

[67] Difficulties or expenses incurred in enforcing an order for costs is a factor that the court can consider when determining whether it is just to make the order for security for costs.

[68] Mr. Stimpson has raised the issue of the likely success of the claimant's claim and has submitted that on the pleadings before the court, the claimant cannot succeed. I am cautious to find that the claimant cannot succeed on her claim at this stage as only the pleadings are before the court.

[69] On the issue of causation and whether Mrs. Kalabus consented to the treatment provided to her and the attendant risk, there is no evidence in this regard before me and in any event, these are triable issues which are better ventilated and determined at trial or otherwise.

[70] Lastly, Mr. Stimpson challenged the medical report that the claimant intends to rely on. There are two documents attached to the claimant's claim. Only one of these documents appears to have been prepared by a medical practitioner.

[71] It contains hearsay information as the author speaks to Mrs. Kalabus being administered treatment by his unnamed colleague.

[72] Rule 8.11(3) relates to claims for personal injuries and requires a claimant who intends to rely on the evidence of a medical practitioner at trial to attach a medical report relating to the injuries alleged in the claim to his claim form.

[73] This does not preclude the claimant from relying on further or other medical reports at trial.

[74] Rule 8.11(3) should be read with Rule 32.2 and 32.13 which speak to the contents of expert reports. Although the claimant can tender her medical report into evidence pursuant to section 31E of the Evidence (Amendment) Act, her claim being in medical negligence, she will likely need expert medical evidence to establish her claim.

[75] Rules 32.2 and 32.13 set out the guidelines an expert should follow in preparing his/her expert report. Some of the requirements are that the report must be addressed to the Supreme Court and should include the expert's qualifications. No irrelevant information should be included in the report.

[76] I accept that the appointment of expert witnesses will come at a later stage, however, any claimant who commences a claim should ensure that his/her claim complies with the relevant aspects of the CPR and that all the information that the defendants will need to properly defend the claim are contained in their particulars of claim. In negligence claims, this will include the requirement at Rule 8.11(3).

[77] Claimants must ensure that they are not preparing their cases as they go along as this will require amendments to pleadings which comes at an expense and delays. The court and the defendant must be in a position to ascertain the legal issues arising on the claim at an early stage. In particular, the defendant will need the correct medical report if he is to engage in mediation or settlement discussions. He will also need the correct medical report so that he can begin to instruct his own expert where necessary to secure his own expert report.

[78] Having considered the defendant's evidence and submissions, I must also consider the claimant's evidence and submissions to determine if she raised any circumstances that would justify the refusal of the order.

[79] I have already summarised the contents of Miss Marsha Chambers' affidavits filed on behalf of the claimant in respect of both applications. (see paragraphs 40-43). There was no affidavit from the claimant.

[80] As both Mr. Graham, KC and Mr. Stimpson have pointed out in their submissions, there is no evidence from the claimant that the court can rely on to find that she is unable to satisfy the order for security for costs, that she is impecunious or that the granting of the order would stifle her claim.

[81] Thus, although Miss Moore has submitted that the granting of the orders for security for costs would stifle the claimant's ability to pursue her claim as she is unable to pay the costs sought by both defendants and while she has also asked the court to consider whether the applications for security for costs are being used an oppressive ploy by the defendants to stifle Mrs Kalabus' claim, there is no evidence to ground these submissions.

[82] There is no evidence of Mrs. Kalabus' finances. Of necessity, where she challenged the defendant's applications for security for costs on the grounds alleged, she should have provided evidence of her financial circumstances including her assets, liabilities, and her ability to satisfy the security sought in the defendants' applications. Evidence of an amount of security that she was indeed able to satisfy would be helpful.

[83] In **Traille Caribbean Limited v Cable & Wireless Co. Ltd (**supra) in explaining the necessity for the claimant seeking to challenge an order security for costs being made on the basis that the granting of the order would stifle his claim, Simmonds J as she then was adopted and endorsed the court's decision in **New Tasty Bakery v MA Enterprise,** where Judge Hacon stated:

> *"In any event the claimant's difficulty in relation to its allegation **of** stifling is that no effort has been made by the claimant to produce evidence establishing that it could not have obtained the sum sought in security from another source. With regard to the obligation on a claimant, who alleges that an order for security will stifle the claim, to adduce satisfactory evidence that he not only does not have the means to provide security but also cannot obtain the necessary financial assistance from a third party who might reasonably be expected to provide such assistance if it could, I refer to **Al-Koronky v Time Life Entertainment Group Limited** [2005] EWHC 1688."* [1] (emphasis mine)

And also, the decision in ***Al-Koronky v Time Life Entertainment Group Limited*** (supra), where Eady J stated:

> "31. *An important consideration, especially having regard to the need for equality of arms under the CPR and the Claimants' rights of access to justice under Article 6 of the European Convention, is whether the order sought or indeed any order for security for costs will have the effect of stifling their claim. That is a major factor in the present case. I need to remember, however, that **it is necessary for the Claimants to demonstrate the probability that***
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> ***their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not.***

[84] The claimants in Traille **Caribbean Limited v Cable & Wireless Limited** (supra) and **Teisha Coombs v Russell Investments Limited t/a Pier 1** [2022] JMSC Civ 19 failed to provide any evidence of assets within this jurisdiction or of their financial circumstances or that where the order was made their claim would be stifled.

[85] In both cases, in granting the order for security for costs in favour of the defendants, the court highlighted the fact that the claimant had failed to provide necessary evidence for the court's consideration.

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[86] So too, in this case, there is no evidence of any contending difficulties from the claimant which the court could weigh against the defendants' evidence in order to satisfy itself having regard to all the circumstances of the case as to whether or not it was just to make the order.

[87] Counsels' submissions cannot and do not amount to evidence. Submissions must be grounded in evidence. This court cannot speculate on the claimant's financial abilities as this information is peculiar to the claimant and within her knowledge. As Morrison, J said in **Kevin Morrison v Symsure Limited** at paragraph [10] of his judgment

> *"… the application cannot be determined in a sterile and abstract way. There has to be sufficient information upon which it can be grafted."*
>
> *And at paragraph [21]:*
>
> *"Clearly, the court cannot graft figures upon airy nothing. Something material and of substance would have to be put before the court."*

[88] In the absence of any evidence from the claimant as to her financial circumstances and her ability to satisfy the security for costs sought by the defendants, or how the granting of the order will stifle her claim, I have nothing to weigh against the defendants' evidence.

[89] I am unable to consider or find that she is unable to satisfy the security, or any security ordered. Nor can I consider or find that the granting of the order for security for costs is likely to stifle her claim.

[90] I have also considered that both defendants filed their applications early in the proceedings and so there was no delay on their part which the rules suggest should be heard at the case management conference or pre-trial review. There is no evidence that the applications were filed for any other reason than to ensure that the defendants have some security in this jurisdiction for any costs they may incur in defending this claim where the claimant is unsuccessful. There is therefore no basis to find that the defendants' applications were being used as an oppressive tool as has been submitted by counsel for the claimant.

[91] Having considered the evidence of all parties and the factors relevant to this claim, I am of the view that in all the circumstances, the order for security for costs should be made in favour of both defendants they having established on evidence that

(1) the claimant is not resident in this jurisdiction and has no assets in this jurisdiction.

(2) they will likely incur additional expenses in a foreign jurisdiction to recover any costs awarded to them in defending this claim where the claimant is unsuccessful.

(3) And there being no evidence of any competing circumstances from the claimant which this court should consider.

THE AMOUNT OF THE SECURITY

[92] Having determined that the order for security for costs should be granted in favour of both defendants, I must now also determine the amount of the security that the claimant must provide for each defendant.

[93] The 1st and 2nd defendants have included an estimated bill of costs for 2 counsel in the sum of $5,048,500.00 and $6,486,575.00 respectively. The first defendant has asked for security in the sum of $2,524,250.00 which is one- half of their estimated costs. In his submissions Mr. Graham, KC said the 2nd defendant would be prepared to accept security in the sum of $3,5000.000.0 which is a little over half of their estimated bill of costs.

[94] Mr. Graham has sought to justify costs for two counsels by submitting that two counsel are needed to take accurate notes of evidence, particularly during cross-examination. Many of the delays he says in completing trials in this jurisdiction are because of the absence of notes of evidence. He has also submitted that there will be substantial expert medical evidence to consider in this claim.

[95] Mr. Stimpson has submitted that two counsel are required because of the detail in which the witness statements will have to be prepared and the nature of the expert evidence.

[96] Miss Moore has conceded that the 2nd defendant is entitled to retain counsel of his choice and thus the fact that he has retained Kings Counsel, Mr. John Graham, or the use of senior counsel no longer seems to be a challenge for the claimant.

[97] She has however submitted that there is no need for two counsels as the claim is in medical negligence and the law in relation to medical negligence is well settled. She says that the case is not a complex one and therefore security for costs should only be awarded in relation to one counsel. She invited the court to make an order for security for costs in the sum of $1,500,000.00 for each defendant. This sum is almost one-half of the proposed estimate of fees for one junior counsel as outlined in Miss Chambers' affidavit.

[98] In considering the three estimated bills of costs that have been put before the court, the number of hours claimed by counsel for the defendants save perhaps two instances is not unreasonable. Both estimates list the hourly rate for each counsel (senior and junior counsel) and the fees for each counsel. On the other hand, the claimant's estimate of fees reflects the fees for one junior counsel only. Also, the number of hours listed to carry out certain tasks (e.g. preparation of witness statements) is in some instances unrealistic given the complexity of the task.

[99] If the claimant is no longer taking issue with the defendants' counsel of choice, the proposed estimated bill of costs for one junior counsel does not take into account that neither Mr. Graham, KC nor Mr. Stimpson could be described as junior counsel. The security for $1,500,000.00 which is a little more than one-half of the estimated fees for one junior counsel as proposed by the claimant would be woefully inadequate in the circumstances.

[100] It is not every case that requires two counsels. The court will usually only award costs for two counsels in complex cases. The complexity of a case is determined

by several factors, including: (a) the number of issues arising on the claim, (b) the complexity of the issues, (c) the number of witnesses, (d) whether the parties will rely on expert evidence, (e) the complexity of the expert evidence, (f) the number of expert witnesses, and (g) any unusual legal or evidential issues arising on the claim. These are just some of the considerations.

[101] Importantly, in those jurisdictions that assign weights to cases based on their complexity and generally, it is accepted that the weight assigned to a claim may change as it progresses towards trial. This is because at the initial stage all that is before the court are pleadings. Once the parties begin to comply with the case management orders and interlocutory applications are heard and determined, the issues that the court must determine are only then properly identified. It is at this later stage that the number and complexity of the issues are revealed as well as any unusual legal or evidential issues. Also, the expert evidence is before the court and can also be used to assess the complexity of the case.

[102] At this early stage, I would not assess this case as being a simple one, having regard to the issues that counsel has identified as arising on the claimant's case. I accept that there will be expert medical evidence across jurisdictions and perhaps several experts, but it is still too early to find that this is a complex case.

[103] For the purposes of awarding security for costs only, I am therefore prepared to award costs for one senior counsel. I have also taken into consideration that one counsel is also Kings Counsel.

[104] In considering the amount of the security to be paid by the claimant, I am guided by the dicta of Morrison, JA in **Cablemax Limited & Ors. v Logic One Limited** (unreported) Court of Appeal Jamaica, SCCA91/09 delivered January 21, 2010, where he cautioned that

> *"[i]n considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order, a substantial amount, provided that it should not be a simply nominal amount."*

[105] In the circumstances, I would order security for costs in the sum of $2,000,000.00 for the first defendant and $2,500,000.00 for the 2nd defendant.

[106] I have also considered that the claimant resides overseas and while most if not all commercial banks now utilize electronic transfers, I accept that there may be some delay in transferring funds across jurisdictions and these funds appearing as credited to a local account. I will therefore increase the period for which the claimant must give the security to 45 days to facilitate the transfer of the funds and the creation of the accounts in the joint names of counsel for each defendant.

DISPOSITION

[107] In disposing of this application, my orders are as follows:

1) The claimant shall give security for the 1st defendant's costs in the sum of $2,000,000.00 within 45 days and by July 15, 2024.

2) The said security of $2,000,000.00 is to be paid into an interest-bearing account at a financial institution to be agreed by counsel for both parties in the names of Nigel Jones & and Company and Hart Muirhead Fatta and is to be held in this account until the determination of this claim or the further order of this court.

3) The claimant shall give security for the 2nd defendant's costs in the sum of $2,500,000.00 within 45 days and by July 15, 2024.

4) The said security of $2,500,000.00 is to be paid into an interest-bearing account at a financial institution to be agreed by counsel for both parties in the names of Nigel Jones and Company and John G. Graham and Company and is to be held in this account until the determination of this claim or the further order of this court.

5) All further proceedings in this claim are stayed from today until the security ordered has been given.

6) Unless the security for costs is paid as ordered herein this claim is struck out against each defendant without the need for the further order of this court.

7) Upon the defendants/applicants providing affidavit evidence of the claimant's default there shall be judgment for the defendants with costs to be agreed or taxed.

8) The costs of these applications are in the claim.

9) A further case management conference is scheduled for July 17, 2024, at 10:00 am for 30 minutes.

10) Counsel for the 1st defendant is to prepare, file and serve this order on all parties.