

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN**

3 Cause No: G336/2006

4
5 **BETWEEN:**

6 **THOMAS FARRELL**

7
8 **FIRST PLAINTIFF**

9
10 **CATHERINE FARRELL**

11
12 **SECOND PLAINTIFF**



13
14 **AND:**

15 **CHARLES BODDEN**

16
17 **DEFENDANT**

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20 **Appearances:**

21 **Ms. Denise Owen of Broadhurst Barristers**
22 **on behalf of the Plaintiffs**

23
24 **Mr. Waide DaCosta on behalf of the**
25 **Applicant/Defendant**

26
27 **Before:**

The Hon. Mr. Justice Charles Quin

28 **Heard:**

19th July 2012

29
30 **JUDGMENT**

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33 1. This is the hearing of the Defendant's Summons dated the 16th July 2012 in which
34 the Defendant is seeking the following Orders:

35 i. That the time for the hearing of the Summons be abridged;

36 ii. That the Court grant leave for the Defendant to rely upon the expert
37 testimony of Dr. Allen E. Rubenstein, dated the 2nd May 2012 at the
38 trial of this matter;

- 1 iii. That the Court grant leave for the Defendant to rely upon the expert
2 evidence of Dr. Robert L. Michaels, Orthopaedic Surgeon, dated the
3 15th June 2012 at the trial of this matter.
- 4 2. On the 6th April 2012 the Court acceded to an application by the Defendant to
5 adjourn the trial date of the 16th April 2012. A new trial date was set for the 30th
6 July 2012 with a time estimate of five (5) days.
- 7 3. The Court also ordered on the 2nd April 2012 that the Defendant’s medical evidence
8 dealing with the First Plaintiff’s cognitive difficulties was to be served by the end
9 of April 2012.
- 10 4. In addition, the First Plaintiff’s supplementary orthopaedic medical evidence was to
11 be filed “*as soon as possible*”, with the Defendant’s orthopaedic medical evidence
12 to be filed within three weeks after receipt of the First Plaintiff’s orthopaedic
13 medical evidence.
- 14 5. On the 24th April 2012 the Defendant’s attorneys contacted the Plaintiffs’ attorneys
15 seeking to arrange examination of the First Plaintiff by their neurological expert.
- 16 6. On the 2nd May 2012 the First Plaintiff was examined by Dr. Rubenstein, the
17 Defendant’s neurologist.
- 18 7. On the 11th May 2012 the Plaintiffs served their orthopaedic evidence – two reports
19 from Dr. L. Rose, dated the 9th and 13th April 2012.
- 20 8. In accordance with the Order of the Court dated the 2nd April 2012, the Defendant’s
21 evidence in response to these orthopaedic reports was due to be served on the 1st
22 June 2012.

1 *Submissions by Counsel for the Plaintiffs*

2 16. Counsel for the Plaintiffs strenuously, and with significant justification, opposes the
3 Defendant's application outlined in the Summons. Counsel for the Plaintiffs
4 submits that there is no justification for the delay on the part of the Defendant in
5 producing expert evidence. She contends that the Plaintiffs have been blameless in
6 the previous delays in relation to these proceedings, and further submits that the
7 Defendant has flouted the Court's orders in relation to the timetable for the serving
8 of this expert medical evidence. Counsel for the Plaintiffs also contends that the
9 Defendant's medical evidence could easily have been adduced earlier and therefore
10 the further delay is not comprehensible.

11 17. Counsel for the Plaintiffs confirms that her clients are adamantly opposed to any
12 adjournment of the trial and further, costs cannot overcome the prejudice presently
13 affecting the Plaintiffs.

14 18. The Plaintiffs contend that the Defendant's failure to comply with the Orders of the
15 Court had secured the Defendant an unfair advantage and caused prejudice to the
16 Plaintiffs.

17 19. In support of her argument counsel for the Plaintiffs cites the Judgment of Waller
18 L.J. in *Worldwide Corporation Ltd. v GPT Ltd.* [1998] EXCA Civ 1894 and
19 another English Court of Appeal decision of *Beachley Property v. Edgar* [1997]
20 P.N.L.R. 197.

21 20. I am also grateful to counsel for the Plaintiffs for providing the helpful case of
22 *Ketterman v. Hansel Properties Ltd.* [1998] 1 All E R – a House of Lords decision
23 in which the exercise of the Court's discretion to allow an amendment to a case was

1 considered by Lord Griffith. Counsel asserts that a similar approach should be
2 adopted in considering the discretion to admit expert evidence, and relies upon the
3 dicta of Lord Griffith at page 62 of this Judgment where he states at paragraph C:

4 *“Whether an amendment should be granted is a matter for the discretion of the*
5 *trial judge and he should be guided in the exercise of the discretion by his*
6 *assessment of where justice lies. Many and diverse factors will bear on the*
7 *exercise of this discretion. I do not think it is possible to enumerate them all or*
8 *wise to attempt to do so. But justice cannot always be measured in terms of*
9 *money and in my view a judge is entitled to weigh in the balance the strain the*
10 *litigation imposes on the litigants, particularly if they are personal litigants*
11 *rather than business corporations, the anxieties faced by facing new issues, the*
12 *raising of false hopes, and the legitimate expectation that the trial will*
13 *determine the issues one or the other.”*

14
15 Lord Griffith continued at paragraph E:

16 *“Another factor that a judge must weigh in the balance is the pressure on the*
17 *courts caused by the greater increase in litigation and a consequent necessity*
18 *that, in the interests of the whole community, legal business should be*
19 *conducted efficiently. We can no longer afford to show the same indulgence*
20 *towards the negligent conduct of litigation as was perhaps possible in a more*
21 *leisured age. There will be cases in which justice will be better served by*
22 *allowing the consequences of the negligence of the lawyers to fall on their own*
23 *heads rather than by allowing an amendment at a very late stage of the*
24 *proceedings.”*

25
26 21. I have given this matter very serious attention and find that I must consider the
27 interests of both parties and the overall interests of justice in this case. It is clear, to
28 use Waller LJ’s words in *Worldwide Corporation*, that the Plaintiffs and their
29 attorneys have been “*mucked about*” at the last moment and just before the trial is
30 about to start. However, the expert evidence, which the Defendant seeks to adduce,
31 is, obviously very important to the Defendant’s case, particularly on the question of
32 quantum. The Defendant’s counsel has frankly conceded that the delay in obtaining
33 this medical evidence is the fault of the Defendant’s attorney and his office.

1 However, taking all the circumstances of this case into consideration, I find that I
2 am unable to conclude that “*justice will be better served by allowing the negligence*
3 *of the lawyers to fall on their own heads, rather than by allowing [the late*
4 *admission of expert evidence] at a very late stage of the proceedings.”*

5 22. It is my view that the overall justice of the case persuades me to accede to the
6 Defendant’s application and to admit the late expert medical evidence. However, in
7 view of the fact that it has come at a late stage I will give the Plaintiffs and their
8 experts as much time as they feel is necessary to consider these late medical reports
9 to file any final responses to them.

10 23. I order that the trial on liability and quantum is to commence on the 30th July 2012.
11 If the Plaintiffs need further time on the question of quantum the Court will grant
12 the Plaintiffs whatever time they need to respond to the late evidence from the
13 Defendant. If the Plaintiffs find that they need an adjournment on the question of
14 quantum, the Court will treat any such application on behalf of the Plaintiffs with
15 great sympathy.

16 24. For the aforesaid reasons I make a “wasted costs” Order pursuant to GCR O.62 r.11
17 and that the Plaintiffs’ costs be paid before the trial set for the 30th July 2012 in any
18 event.

19 25. Accordingly, I make the following Order:

20 i. That the time for the hearing of the Defendant’s Summons dated the
21 16th July 2012 be abridged.

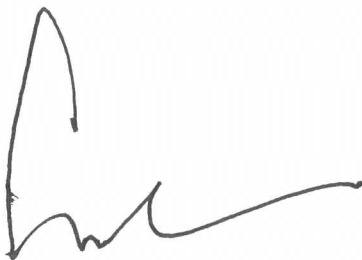
22 ii. That the Court grants leave for the Defendant to rely upon the expert
23 evidence of Dr. Allan E. Rubenstein dated the 2nd May 2012 and the

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expert evidence of Dr. Robert L Michaels, dated the 15th June 2012, at
the trial of this matter.

iii. That there is a “wasted costs” order made against the Defendant’s
attorneys and to be paid on or before the 30th July 2012.

Dated this the 20th July 2012



Honourable Mr. Justice Charles Quin
Judge of the Grand Court