

IN THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 241 OF 2017

(VILMA ANDURAY CLAIMANT

(Suing as Next Friend of Jasmine Anthony, a minor

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BETWEEN (AND

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(DR. SALVADOR PAGUADA 1ST DEFENDANT/
(ANCILLARY CLAIMANT

(BOARD OF DIRECTORS OF 2ND DEFENDANT/
(KARL HEUSNER MEMORIAL HOSPITAL ANCILLARY DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Ms. Audrey Matura-Shepherd for the Claimant

Mr. Derek Courtenay SC for the 1st Defendant/Ancillary Claimant

Ms. Liesje Barrow Chung and Mr. Jaraad Ysaguirre for the 2nd Defendant/Ancillary Defendant

Facts

[1] The substantive claim in this matter is a claim for damages of negligence brought by the Claimant, Ms. Vilma Anduray, on behalf of the minor, Jasmine Anthony against the 1st Defendant, Dr. Salvador Paguada and the 2nd Defendant, the

Board of Directors of Karl Heusner Memorial Hospital. Ms. Anduray is the mother of the minor, Jasmine Anthony. The minor was brought to the KHMH suffering from severe stomach pain. Dr. Paguada operated on her, following a diagnosis of appendicitis. Upon performing surgery on the patient's abdomen, Dr. Paguada discovered that her appendix was normal, but one of her ovaries was twisted and was now nephrotic. As that ovary was already dead, and fearing that the child's life was in danger, Dr. Paguada removed the ovary. Upon learning that the doctor had removed one of the child's ovaries, the parents of the minor became very upset, claiming that he did not consult them before removing the ovary and that his surgery had significantly reduced their daughter's ability to have children in the future. Ms. Anduray as the mother of the minor has therefore brought this action against Dr. Paguada and the hospital seeking damages for negligence. This is an application by the parties for the determination of two preliminary issues by the court prior to the substantive trial:

- i) Whether the Ancillary Defendant, the Board of Directors of Karl Heusner Memorial Hospital, named in these proceedings is capable of being sued and consequentially, whether the Court has jurisdiction.
- ii) Whether the Ancillary claim was instituted in compliance with the relevant sections of the Public Authorities Protection Act and within the time limit specified in the Limitation Act.

Legal Submissions on behalf of the Claimant

[2] Mrs. Matura-Shepherd contends that the lawful entity that can sue and be Sued is the Karl Heusner Memorial Hospital Authority (herein “the Authority”) and not the Board of Directors. She cites Sections 3 and 4 of the Karl Heusner Memorial Hospital Authority Act, Chapter 38 of the Laws of Belize (herein KHMH Act) as follows:

S 3. (1) There shall be and is hereby established a body to be known as the Karl Heusner Memorial Hospital Authority (hereinafter referred to as “the Authority”) which shall be an autonomous institution governed by the provisions of this Act.

(2) The Authority may exercise any of the functions entrusted to it by or in accordance with the provisions of this Act or any Regulations made thereunder and may execute any other duties incidental or ancillary to, or consequential upon the performance of its functions.

S4. (1) The Authority shall be a body corporate having perpetual succession, a common seal and subject to the provisions of this Act, shall have power to acquire, hold and subject to the approval

of the Minister, dispose of whatever kind and to enter into contacts and do all things necessary for the attainment of its objectives.

(2) The Authority may sue or be sued in its corporate name and shall for all purposes be described by that name.

[3] Mrs. Matura-Shepherd says that the Civil Procedure Rules make provision for the substitution of a party either upon the discretion of the court, or upon the application of the relevant party already in the claim. Under Rules 19.2 (5) and (6), “the Board of Directors” can be replaced by “the Authority” as the Defendant and this can be done at a case management conference. The learned counsel goes on to state that such substitution can only take place where “the relevant limitation period was current when the proceedings were started” as per Rule 19.4 (2) (a). she further submits that proceedings referred to must be the original proceedings and not the one started by the Ancillary Claim. The claim was discontinued by the Claimant the 2nd Defendant on February 1st, 2018. The discontinuance of proceedings against the 2nd Defendant does not affect that Defendant’s right to apply to have the notice of discontinuance set aside, or to apply for costs. In addition, since the Ancillary Claim is for indemnification which cannot be determined until there is a hearing of the substantive claim, the cause of action has not yet accrued and serves to put the 2nd Defendant on notice of the proceedings.

Mrs. Matura-Shepherd also submits that the Ancillary Claimant can wait until after the conclusion of these proceedings to then seek indemnification under its contract with KHMH since then she will know the extent of her liability. In conclusion, Mrs. Matura-Shepherd argues that the Ancillary Defendant as named in these proceedings cannot lawfully be sued as Section 4 (2) of the KHMH Act makes it clear that only the KHMH Authority can sue or be sued as it states, “The Authority may sue or be sued in its corporate name and shall for all purposes be described by that name.” The court has jurisdiction to make the change as per Rule 19.3 (1) which states that the court may add, substitute, or remove a party on, or without an application.” The learned counsel goes on to conclude that the Ancillary Claimant has wasted the time of the court, having not done its due diligence and proceeded against the Ancillary Defendant in the proper manner as required by Statute. The notice issued by the Claimant against the 2nd Defendant cannot cover the Ancillary Claim, since the entire purpose of the notice of intended suit as required, is to put the Defendant on notice of the nature of the claim it will face with a view that they may be able to resolve without court proceedings, or it allows them preparation time to face trial or seek legal advice from the Attorney General. Ms. Matura-Shepherd asks that the application be refused and costs be awarded to the Claimant/ Respondent on this application.

Legal Submissions On Behalf of the Ancillary Defendant/2nd Defendant

[4] Mrs. Barrow Chung submits on behalf of the Ancillary Defendant, the Board of Directors of Karl Heusner Memorial Hospital, that the Ancillary Defendant as named in these proceedings is not a proper party to the suit. Section 4 (2) of the Karl Heusner Memorial Hospital Authority Act states:

“4 (2) The Authority may sue or be sued in its corporate name and shall for all purposes be described by that name.”

The 1st Defendant has brought a suit against the Board of Directors of Karl Heusner Memorial Hospital who is not a proper party to the suit as the directors never personally entered into any contract with the 1st Defendant. The 1st Defendant was engaged by the Authority. The Board of Directors of Karl Heusner Memorial Hospital lacks the capacity to be sued. It is further submitted that the Board cannot be sued for acts done by the Authority.

[5] Mrs. Barrow Chung contends that the Authority is considered a public authority enjoying the protections afforded under the Public Authorities Protection Act. The Authority was never sued in these proceedings. The Ancillary Claim has been brought against the Board, which does not have the capacity to be sued. It was not necessary at the point when the Board was a named Defendant to assert that it did not have capacity to be sued for actions of the Authority in the original

claim because the Claimant, Ms. Anduray, had discontinued the matter against the Ancillary Defendant, the Board. No notice of intended proceedings was ever served on the Ancillary Defendant after the filing of the notice of discontinuance and such notice is a requirement under the Public Authorities Protection Act:

“3. No writ shall be sued out against, nor a copy of any process be served upon any public authority for anything done in the exercise of his office, until one month after notice in writing has been delivered to him, or left at his usual place of abode by the party who intends to sue out such writ or process, or by his attorney or agent, in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person who is to bring the action, and the name and place of abode of the attorney or agent.”

The Ancillary Claim against the Ancillary Defendant is for an indemnity by virtue of the employment agreement between the Authority and Dr. Paguada, the 1st Defendant in the original claim. But on the evidence before the court, no clause speaks to the Authority agreeing to indemnify the 1st Defendant. In addition, it is submitted that there is no agreement between the Board of Directors and Dr. Paguada as the agreement was strictly between the Authority and Dr. Paguada. No claim has been brought against the Authority, and the period for doing so has long expired. Dr. Paguada has no cause of action against the Board of Directors as the Board of Directors was never a party to the agreement between the Authority and

Dr. Paguada. The further submission is indemnity claimed could only arise through vicarious liability which is a claim in tort. For a claim in tort to be properly instituted against a public authority, there must be compliance with section 3 of the Public Authorities Protection Act, and there is no evidence of such compliance. The Limitation Act also bars claims from being made against public authorities after the expiration of one year from the date on which the cause of action accrued:

“27 (1) No action shall be brought against any person for any act done in pursuance or execution or intended execution of any Act or other law, or of any public duty or authority or in respect of any neglect or default in execution of any such Act or other law, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued...”

As the Ancillary Claim was instituted on July 18th, 2018 against the Ancillary Defendant, and that was well in excess of the one year period since the 1st Defendant was served with the original claim on or about May 2nd, 2017; it is submitted that it was at that point that the cause of action accrued. It is therefore submitted that the court in this instance lacks jurisdiction and ought to dismiss the claim against the Ancillary Defendant since it has been established that the Board of Directors does not have the capacity to be sued nor were members of the board identified. In addition, the Board of Directors, the Ancillary Defendant, even if properly identified cannot be held accountable for persons contractually employed

by the Authority. It is further submitted that the Ancillary Claimant, Dr. Paguada, is time barred from proceeding against the Authority as the time period for making a claim has lapsed as stipulated by the Limitation Act. As there has been no service of notice on the Ancillary Defendant, there has also been no compliance with the requirements of the Public Authorities Protection Act. The ancillary claim should be dismissed as there is no real cause of action between the Ancillary Defendant and the Ancillary Claimant. There is no agreement between these parties and the time for ratifying or amending the claim or bringing proceedings against the Authority has expired. The ancillary claim should therefore be dismissed.

Legal Submissions on behalf of the Ancillary Claimant/ 1st Defendant

[6] In his submissions filed in response to the submissions of the Ancillary Defendant, Mr. Courtenay SC argues that no objection was taken to the propriety of naming the Board of Directors as a party until the joinder in the capacity of the Ancillary Defendant, nor was any step taken by the Claimant to alter the description of the 2nd Defendant. For a period of more than a year from March 20th, 2017, when the Claimant formally gave notice of intended proceedings up to the latest date February 1st, 2018, the parties offered no challenge on the present grounds to the manner in which the proceedings had progressed, including an application and an order for entry of judgment. It is submitted that the Board of Directors who would have been concerned with these proceedings are in fact the

directors component of the organs comprising Karl Heusner Memorial Hospital Authority, and much like its Chief Executive Officers are duly authorized and can bind the Authority. While the Authority is a body corporate with perpetual succession and a common seal and has the usual right to acquire and hold property and the power to sue or be sued in its corporate name, it is submitted that in these proceedings it is the Board whose activities are the subject of the issues between the parties. It is the Board who is responsible and liable for the principal engagements of the Authority as is clear from Section 12 of the KMH Act. Section 10 of the KMH Act describes the Board as the principal policy making organ of the Authority, and section 12 confers on the Board responsibility for:

“The overall administration, management, maintenance, and development of the Hospital, and for ensuring that the quality, and standards of the services provided be cost-effective to the beneficiary patient, the Hospital and the Authority.”

This section specifically includes at Section 12 (k):

“Supervising and overseeing the recruitment, appointment and employment of members of staff of the Authority.”

Mr. Courtenay SC submits that section 15 of the KMH Act does provide the Board of Directors, like the Authority, with the protection of the Public Authorities Protection Act, and no individual member of the Board is personally liable for any

act or omission of the Authority or the Board if the act or omission is made in good faith in the course of the operations of the Authority, as per s.17 (1) of the KHMH Act. The learned counsel further contends that the converse of section 17 (1) is true, that is, that the members of the Board who are not acting in good faith are liable to be sued, other than certain officers named in section 17 (2). In the alternative, Mr. Courtenay SC submits that the circumstances of this case indicate that the parties who have acted have done so with full knowledge of who the parties are and their respective functions, obligations and liabilities and what has occurred is no more than a descriptive mistake as to the name of one of the parties. Rule 20.2 (3) or Rule 20.2 (4) of the Civil Procedure Rules would apply and the required alterations would be conveniently made in case management conference. There is no allegation by the Ancillary Defendant or by the Claimant that they would suffer prejudice as a result of the Ancillary Claim proceeding, or that either of them will be taken by surprise by the introduction of an obvious claim for indemnity which was not initially canvassed on the 1st Defendant's behalf when instructions were given by the Ancillary Defendant for the preparation of the defence to the claim. The learned counsel further submits that Section 4 (2) of the KHMH Act permits the Authority to sue or be sued in its corporate name. In that respect the language used "may sue or be sued" is permissive and not mandatory. The members of the Board are not subject to suit in their personal capacity, only if

and to the extent that they did not act, or omit to act in bad faith. The pertinent question arising on consideration of the 2nd Defendant's objection is, it is submitted, whether the KHMH Authority can or may be held liable for a claim arising out of an operation conducted on its premises, using its facilities and engaging the professional services of its surgeon solely on the basis of the description of the particular organ of the Authority which is named in the suit. Finally, it is submitted that under the provisions of the KHMH Act, the Chief Executive Officer of the hospital is appointed by the board and is responsible for the day to day affairs of the hospital and the authority, including the appointment and employment of senior members of staff under section 8. In this connection, it is to be noted that the agreement governing his employment by the authority is signed by the CEO "on behalf of the Management of the KHMH". It is the board which is responsible for the management of the authority's functions. In relation to the limitation statute, Mr. Courtenay SC states that the discontinuance by the Claimant against the 2nd Defendant on February 1st, 2018 had the effect of preventing the 1st Defendant from pursuing his claim to be indemnified against any judgment which might be recovered by the Claimant in these proceedings. He goes on to state that while the 1st Defendant is aggrieved at the circumstance that he must pursue his claim for indemnity in separate proceedings, the 1st Defendant has

been advised that pursuit of his Ancillary Claim in the present proceedings would face legal obstacles of non-compliance with the Limitation Act.

Ruling

[7] Having considered all the submissions for and against this application, I answer the following questions:

i. Whether the Ancillary Defendant, the Board of Directors of Karl Heusner Memorial Hospital, named in these proceedings is capable of being sued and consequentially, whether the Court has jurisdiction.

I find that while the KHMH Act clearly states in section 4 that the Authority may sue or be sued, in its own capacity, the Board of Directors can also be sued. As Mr. Courtenay SC rightly points out, the language of the KHMH Act is permissive and not mandatory, and the Board of Directors is responsible for the day to day affairs of the hospital. However, as Ms. Barrow-Chung has stated, there is no contract between the Board of Directors of KHMH and Dr. Paguada. The Contract is clearly between the KHMH Authority and Dr. Paguada.

ii. Whether the Ancillary claim was instituted in compliance with the relevant sections of the Public Authorities Protection Act and within the time limit specified in the Limitation Act.

I agree with all the submissions made that the Ancillary Claim was not instituted in compliance with the relevant sections of the Public Authorities Protection Act and

within the time limit specified in the Limitation Act. The Ancillary Claim is therefore struck out from this Claim for non-compliance with the requirements of these two statutes. Dr. Paguada is free to pursue his claim for reimbursement from the hospital in separate proceedings.

Costs awarded to the Claimant and 2nd Defendant to be paid by the 1st Defendant.

Dated this day of December 2019.

Michelle Arana
Supreme Court Judge