BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 29 of 2012

BETWEEN:

THE QUEEN ELIZABETH HOSPITAL BOARD	**Appellant**
AND	
VICKI ANITA MONDORE	**Respondent**

Before: The Hon. Sherman R. Moore, CHB, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2013: June 13

2014: January 31

Miss Debra Gooding, Miss Mary Hunte and Miss Debra Holder for the Appellant.

Sir Maurice A. King, Q.C., in association with Mr. M. Adrian King for the Respondent.

DECISION

Introduction

MOORE JA: Before this Court is an appeal from a decision of **Kentish J** given on 8 May 2012 whereby she denied the appellant leave to set aside an order of **Worrell J** made on 8 November 2008 joining the appellant as the second defendant to an action brought against the Attorney General by the respondent.

Background

[2] On 23 January 2002, the respondent sustained injuries when, in the course of her employment at the Queen Elizabeth Hospital (Hospital), she was assaulted by an unidentified male who used her as a shield to protect himself from another unidentified male who was armed with a gun.

[3] On 8 October 2002, the **Queen Elizabeth Hospital Act, Cap. 54 (Cap. 54)** came into force. **Section 5** of **Cap. 54** established the Queen Elizabeth Hospital Board (Board) to administer and manage the Hospital. By virtue of that section the Board is a body corporate to which **section 21** of the **Interpretation Act, Cap. 1 (Cap.1)** applies, thereby conferring power on the Board to sue and be sued in its own right.

[4] **Section 22 (1) (b)** and **(2)** of **Cap. 54** provides:

> "(1) Upon the coming into operation of this Act
>
> "(b) all rights, powers, privileges and authorities relating to the management or operation of the Hospital that immediately before the commencement of this Act were vested in and exercisable by the Crown are vested in and exercisable by the Board; and
>
> "(2) All civil proceedings commenced before the commencement of this Act in any court of competent jurisdiction by or against the Crown with regard to any matter concerning the Hospital may be continued by or against the Board and process in those proceedings may be amended accordingly."

[5] Notwithstanding the commencement of **Cap. 54** on 8 October 2002, on 30 December 2004, the respondent issued a writ naming the Attorney General as defendant. The action was brought pursuant to the **Crown Proceedings Act, Cap. 197** and the statement of claim, claimed, inter alia, that the Hospital was an agency of the Government for which the Ministry of Health had constitutional responsibility.

[6] On 9 September 2008, the respondent took out a summons for an order that (i) the Board be joined as a defendant in the proceedings pursuant to **section 22 (2)** of **Cap. 54** or, alternatively, that time be enlarged for commencement of proceedings against the Board

and that the Writ of Summons endorsed with Statement of Claim and all other proceedings amended accordingly be served on the Board; and (ii) that time be enlarged for commencement of proceedings against the Board and/or continuation of the existing proceedings against the Board.

[7] On 8 December 2008, **Worrell J** heard the application and granted the order prayed for by the consent of the plaintiff (now respondent) and the Attorney General, the defendant named in the writ. The Board was not a party to this application. On 9 December 2009, the respondent issued an amended writ joining the Board as the second defendant.

[8] On 30 September 2011, the Board filed its defence. By paragraph 5 it denied that it was negligent as alleged by the respondent. In paragraph 6 it averred as follows:

> "(i) That by virtue of Section 5(1) and (2) of the Queen Elizabeth Hospital Act Chapter 54 of the Laws of Barbados the Second Defendant became a party capable of being sued on 8th October 2002 and was such a party at the time when this action was brought by the Plaintiff against the First Defendant on 30th December 2004.
>
> (ii) That that fact notwithstanding, and without the knowledge of the Second Defendant, the Plaintiff on the 30th day of December 2004 commenced the said action against the First Defendant alone at a time when and in circumstances where the Second Defendant was a party capable of being sued.
>
> (iii) That the action having been commenced against the First Defendant after the commencement of the said Queen Elizabeth Hospital Act on 8th October 2002 is not such an action as was contemplated by s.22 of the said Act and is therefore not sustainable against the Second Defendant.
>
> (iv) That almost seven years had elapsed between the accrual of the alleged cause of action and the institution of proceedings against the Second Defendant on 9th December 2009.

(v) That the alleged cause of action having accrued in excess of three years before the commencement of the action against the Second Defendant the Plaintiff is barred by virtue of Section 20 of the Limitation of Actions Act Chapter 231 of the Laws of Barbados from bringing this action against the Second Defendant."

[9] On 16 February 2012, the respondent took out a summons for an order to strike out the appellant's defence and to allow the respondent to enter judgement with damages, interest and costs to be assessed.

[10] On 8 May 2012, two years after service of the amended writ on the Board, the Board took out a summons seeking that:

"1. The Second Defendant be granted leave to bring this application notwithstanding the effluxion of 2 years since the service of an amended Writ of Summons on it;

2. That the order made ex parte by this Honourable Court on the 6th day of January 2009 that the Second Defendant be added as a party to this action and the time for the bringing of this action against the Second Defendant be enlarged be set aside;

3. That the Defence of the Second Defendant filed on the 30th day of September 2011 be allowed to stand;

4. That all further proceedings in this matter be stayed until final determination of this application;

5. That the cost of this application be costs in the cause."

[11] The summons was heard by **Kentish J** on 14 June 2012 and she made the following order:

"1 That the Second Defendant's application for leave to bring an application notwithstanding the effluxion of 2 years since the service on it of the Amended Writ of Summons is dismissed.

2. That the Second Defendant's application to have the Order made ex parte on the 6th day of January 2009 that the Second Defendant

added as a party to this action and the time for the bringing of this action against the Second Defendant be enlarged set aside is dismissed.

3. That the decision with respect to the Second Defendant's application that the Defence of the Second Defendant filed on the 30th September 2011 be allowed to stand is reserved.
4. That all further proceedings in this matter be stayed until final determination of this application.
5. That the issue of costs is reserved."

[12] It is from the order of **Kentish J** that the appellant has now appealed to this Court.

Judge's Reasons

[13] On 9 October 2012, the Judge gave the following reasons for her decision:

> "Having regard to the nature of the summons and the affidavit in support – both filed on 8 May 2012 – and having heard Counsel for the second defendant and Counsel for the plaintiff, the Court refused the orders sought under paragraphs 1 and 2 of the summons for the following reasons:
>
> (1) The file shows that on 8 December 2008 an order was made by **Worrell J** in the following terms:
>
> "IT IS HEREBY ORDERED by consent:
>
> 1. ...that the Queen Elizabeth Hospital Board be joined as a Defendant in these proceedings pursuant to the provisions of Section 22(2) of the Queen Elizabeth Hospital Act Cap 54 of the Laws of Barbados and that time be enlarged for the commencement of proceedings against the Queen Elizabeth Hospital Board and that the Writ of Summons endorsed with Statement of Claim thereon and all other proceedings herein be amended

accordingly and served on the Queen Elizabeth Hospital Board;

2. ... that time be enlarged for the commencement of proceedings against the Queen Elizabeth Hospital Board and continuation of these existing proceedings against the Queen Elizabeth Hospital Board."

(2) On 10 December 2009 the second defendant was served with a sealed and certified copy of the Amended Writ of Summons filed 9 December 2009 (see affidavit of Kenny S. Linton filed 29 January 2010).

(3) On 30 September 2011 the second defendant filed its defence in the action.

(4) On 16 February 2012 the plaintiff filed a Summons with supporting affidavit of Amiri Moses Dear for orders, inter alia, that the Defendant's defence be struck out on the grounds that it discloses no reasonable grounds for defending the claim (which application is yet to be heard).

(5) On the 8 May 2012 the second defendant filed its summons with supporting affidavit of Debra Patricia Gooding.

The Court was of the opinion firstly that the second defendant having been made aware of the Order of **Worrell J** on the 10 December 2009 ought not to have waited until 8 May 2012 to file its application (some 2 years and 5 months) after becoming aware of the Order.

Secondly, the Court was also of the opinion that the second defendant, having filed a defence in the action on 30 September 2011 after it had been served with the Amended Writ of Summons and Amended Statement of Claim had by its conduct waived its right to set aside the Order by virtue of which the second defendant was joined as a party and the Amended Writ of Summons served on the second defendant".

The Appeal

[14] The appellant has appealed on four grounds. Those grounds are:

> "(i) The Learned Judge failed to give any or any sufficient weight to the fact that the Respondent/Plaintiff admitted that the Plaintiff had not complied with the provisions of Order 20 r 9 of the Rules of the Supreme Court.
>
> (ii) The Learned Judge failed to give any or any sufficient weight to the Plaintiff's non-compliance with Order 20 r 10 of the Rules of the Supreme Court.
>
> (iii) Failed to give any or any sufficient weight to the provisions of Section 22 (2) of the Queen Elizabeth Hospital Act Chapter 54 of the Laws of Barbados on which the Plaintiff relied in her application for the grant of the Order of Mr. Justice Worrell.
>
> (iv) Failed to give any or any sufficient weight to the provisions of Section 20 (1) of the Limitation of Actions Act Chapter 231 of the Laws of Barbados."

Enactments cited by counsel

[15] In their pleadings and submissions both counsel cited certain enactments. We find it convenient at this stage to set out those enactments other than **section 22(1) (b)** and **(2)** of **Cap 54** as this has already been set out in paragraph 4 above. Those enactments are as follows:

Sections 20(2) and **52** of the **Limitation of Actions Act, Cap 231 (Cap. 231):**

> "(2) Except where subsection (3) applies, no action to which this section applies may be brought after the expiration of the period of 3 years from the later of the following dates
>
> *(a)* the date on which the cause of action accrued; or
>
> *(b)* the date on which the person injured acquired knowledge of his cause of action."

"52. (1) If the court considers that it would be equitable to allow an action to proceed having regard to the degree to which

(a) the provisions of section 20 or 22 prejudice the plaintiff or any person whom he represents; or

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that those provisions shall not apply to the action, or do not apply to any specified cause of action to which the action relates.

(2) The court may not under this section refuse to apply section 22(1) and (2) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 20.".

Order 15 rules 4(1) and **6(1)**; and **Order 20 rules 9(1)** and **10(2)** of the **Rules of the Supreme Court 1982 (RSC)** provide as follows:

"Order 15 r 4(1) Subject to **rule 5(1)**, two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court where

(a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and

(b) all rights to relief claimed in the action, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions.

Order 15 r 6(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or question in dispute so far as they

affect the rights and interests of the persons who are parties to the cause or matter.

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party namely

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well between the parties to the cause or matter.

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

Order 20 r 9 Where the Court makes an order under this Order giving any party leave to amend a writ, pleading or other document, then, if that party does not amend the document in accordance with the order before the expiration of the period specified for that purpose in the order or, if no period is so specified, of a period of 14 days after the order was made, the

order ceases to have effect, without prejudice, however, to the power of the Court to extend the period.

Order 20 r 10(2) A writ, pleading or other document that has been amended under this Order must be endorsed with a statement that it has been amended, specifying the date on which it was amended, the name of the Judge by whom the order, if any, authorising the amendment was made and the date thereof, or, if no such order was made, the number of the rule of this Order in pursuance of which the amendment was made."

Section 4(2) of the **Supreme Court of Judicature Act, Cap. 117A** provides, inter alia, as follows:

"4(2) All the judges of the High Court have, in all respects, equal jurisdiction....."

Submissions on Appeal

The Appellant's Submissions

[16] Counsel's arguments were outlined in her written submissions of 7 June 2013 and amplified during the hearing on 13 June 2013.

[17] Counsel submitted that the order of **Worrell J** was made *ex parte* and, therefore, was incapable of binding the appellant who was not a party to the proceedings and who had no notice of them. She contended that, unless the order is set aside, the appellant would be denied the opportunity to defend the action and, more particularly, to rely on the statutory defences provided under **Cap. 231.**

[18] Counsel's second submission was that the respondent, in contravention of **RSC order 20, rule 10(2)**, failed to endorse the amended writ of summons. She also claimed that the appellant was never served with a copy of the order of **Worrell J** and that she had to obtain a copy of the order from the Supreme Court Registry.

[19] Counsel argued that, since the order of **Worrell J** ought not to have been allowed to stand due to the misapplication of **section 22(2)** of **Cap. 54**, the appellant ought not to be denied the opportunity to invoke statutory defences under **Cap.231**. She also argued that under **section 22(1) (b)** of **Cap. 54**, the appellant was a body corporate and capable of being sued from 8 October 2002, almost two years prior to the commencement of the

action. She referred to paragraph 7 of Sir Maurice's affidavit where he deposed that he "became aware that **Cap. 54** had established the Board…" Sir Maurice, she said, made this admission some six years after the cause of action arose.

[20] She also referred to paragraph 11 of the same affidavit where Sir Maurice deposed that to his belief an enlargement of time would not prejudice the then defendant. Counsel submitted that the appellant was unaware of those proceedings and, at the time, was therefore unable to say what prejudice it would suffer by the enlargement. Counsel also denied that the appellant was always aware that a claim would or could be instituted against it.

[21] Analogously, counsel submitted that **Kentish J** failed to give sufficient weight to the provisions of **section 20** of **Cap. 231** and, as such, deprived the appellant of the opportunity to rely on its statutory defences. She cited ***Liff v Peasley*** **[1980] 1 WLR 781**.

The Respondent's Submissions

[22] Counsel for the respondent did not file any documents in relation to the appeal and advanced all his submissions orally during the hearing on 13 June 2013.

[23] In response to the appellant's argument regarding the endorsement of the amended writ of summons, Sir Maurice contended that the writ was so endorsed and contained the words "amended pursuant to the order of the Court". He however, conceded that the endorsement does not appear on the amended writ served on the appellant, but nonetheless contended that an endorsed writ was filed with the Court of Appeal Registry.

[24] Sir Maurice said that the most significant part of the decision of **Kentish J** dated 9 October 2012 with which he entirely agreed and which he adopted for the purposes of the argument, appear in the last two paragraphs on page two, which are already set out in paragraph 13 above.

[25] Counsel submitted that, rather than filing a defence and then seeking to set aside the order of **Worrell J**, the respondent should have immediately filed a fresh action to set aside the order. He referred to **S*trachan v The Gleaner Company Limited et al*** **[2005] 66 WIR 268** and contended that the order of **Worrell J** must stand until reversed by this Court.

Discussion

[26] The outcome of the present appeal does not depend upon the determination of whether the Attorney General was the correct defendant or upon the correctness of the consent order of **Worrell J.** We, however, feel constrained to note that:

(a) **Cap. 54** came into operation on 8 October 2002 and the appellant's writ naming the Attorney General as the defendant was issued on 30 December 2004. Clearly, pursuant to **section 5(2)** of **Cap. 54** the correct defendant was the Board.

(b) The consent order of **Worrell J** purporting to join the Board as second defendant is of doubtful effect, being an order agreed between the respondent/plaintiff and the Attorney General as defendant ex parte the Board.

[27] The appellant, in its grounds of appeal (paragraph 14 above), has complained of four points on which the trial judge failed to give "any or any sufficient weight" to its argument.

[28] In light of (a) the absence of notes of the proceedings in the High Court, (b) the absence from the judge's reasons for decision of any reference to the matters complained of in the grounds of appeal and articulated in the submissions of counsel and (c) the fact that by her order made on 14 June 2012 **Kentish J** reserved decisions on paragraphs 3 and 5 of the summons taken out by the Board on 8 May 2012 and stayed all proceedings until final determination of the application, we are of the view that there are issues affecting the action that are still to be determined by the High Court. It follows that those issues should first be so determined.

Disposal

[29] In the circumstances this case is remitted to the High Court and shall be set down for hearing before **Kentish J** at a date convenient to that court and the parties in the month of February 2014.

[30] The costs of this appeal to be the respondent's to be assessed if not agreed.

Justice of Appeal

Justice of Appeal **Justice of Appeal**