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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1982/J284

BETWEEN IVANHOE JACKSON PLAINTIFF

A N D THE MINISTER OF HOUSING DEFENDANT

SUIT NO. C.L. 1982/T109

BETWEEN THOMAS LINTON PLAINTIFF

A N D THE MINISTER OF HOUSING DEFENDANT

R.C. Rattray Q.C. and Brenda Warren of Rattray, Patterson and Rattray for both Plaintiffs.

Mrs. Marjorie Harrison, Director of State Proceedings, for the Defendant.

Hearing in Chambers on: 12th & 20th July, 1983.

BINGHAM J:

The Director of State Proceedings by way of amended summonses consequent upon an order granted by Mr. Justice Downer on 19th May, 1983, sought the following relief in both these matters:

1(a) That the Judgments entered against the defendant on 23rd March, 1982, and 1st December, 1982, respectively be set aside on the ground that they were irregularly obtained without leave of the Court and that the actions therein be dismissed on the ground that they are unsustainable in law.

In the alternative an order is sought that:

1. The Judgments entered against the defendant on 23rd March, 1982, be set aside on the ground that they were irregularly obtained without leave of the Court.

2. That the defendant have leave to file and deliver a defence within fourteen (14) days of the date hereof.

There were some additional alternative reliefs sought in the amended Summons in C.L. T109/82 in so far as they relate to a Counter-Claim by which the defendant seeks liberty to avail itself of the Counter-Claim and to deliver a Defence and Counter-Claim within fourteen days of the date of hearing and adjudication on the Summonses.

Before the substantive questions are gone into it may be useful by way of background information to attempt a summary of the catalogue of events leading up to the hearing of these two summonses.

Both matters were heard together and the arguments presented on both sides were by virtue of the close similarity of the subject matters taken as applying the one to the other.

Both claims allege a breach of contract. In C.L. J284/82, the date of the alleged breach is stated as being January 1981. In C.L. T109/82 the date of the alleged breach is stated as being December 1980.

The Writs were filed on 1st September, 1982, and 12th October, 1982 respectively, and both having been filed more than one year after the cause of action arose, this meant in effect that any attempt to resort to the procedure as set out under the Crown Proceeding Act in relation to suits against the Crown, and in particular under Section 13(2) of the Act, would have in all probability been met by the statutory defence available under Section 2(1)(a) of the Public Authority Protection Act, as being out of time and therefore statute barred.

3.

As the Minister of Housing is sued in his official capacity, by virtue of his office, that fact without more, would tend to suggest that section 13(2) of the Crown Proceedings Act had to be resorted to and the proper defendant ought to be the Attorney General, as under this section the Minister cannot be sued in his own name. The definition of "officer" in the Act includes a Minister of the Crown.

The both actions having been caught therefore, by the provisions of the Public Authorities Protection Act, which limit the period within which action against the Crown must be brought, both plaintiffs could not now resort to doing indirectly what could not be accomplished directly against the Attorney General.

Mr. Rattray in his usual frank manner has stated that this is the reason why the suits have been launched against the Minister of Housing by virtue of the Minister being a Corporation Sole under Section 3(1) of the Housing Act. When the time for Appearance to be filed in both matters ran out, affidavits of debt were filed and Judgment entered in default of appearance. Although the defendant was sued in his official capacity as "Minister of Housing" no leave was sought and obtained as is required by Section 258(a) of the Civil Procedure Code which requires leave being sought and obtained before entering Judgment against the Crown. This has been so as Mr. Rattray contends that as the Minister was being sued as a Corporation Sole under the Housing Act and as in that capacity he acted as a Principal and not as an agent for and on behalf of the Crown, that under the general rule relating to agency as a Principal he could sue and was liable to be sued.

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It is for this reason that both summonses were filed by the Director of State Proceedings acting on behalf of the Minister and the reliefs sought.

I must at the outset thank both Mr. Rattray and Mrs. Harrison for the assistance given to me in the determination of this matter. Both ought to be commended for their industry and the clarity of their submissions which made their arguments easy to follow. If I do not in this Judgment deal with all the arguments which were canvassed before me on both sides, I respectfully beg the forgiveness of both these persons. It does not mean that I have attempted to gloss over any of the arguments raised or to research as I am sure that they have done the several cases and statutes which have been referred to by them.

The journey that I have been taken on in this matter is not one being traversed for the first time, neither are the arguments new. These same arguments were presented by two equally eminent Attorneys before the then Chief Justice of this country, Sir Herbert Duffus, in E200/72, L.C. McKenzie Construction Co. Ltd. vs The Minister of Housing and the Commissioner of Lands (unreported). In that case the plaintiff's company sought an injunction against the defendants in order to prevent the Minister from exercising his powers of acquisition under the Housing Act to repossess a property known as Hampstead Park which the plaintiff's company had contracted to purchase under an agreement for sale from the former Minister of Housing in 1968. Consequent upon a change of Government in 1972 general elections, the Minister of Housing now sought under his powers under the Housing Act to acquire the said property in the National Interest.

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The injunction sought was to prevent the Minister from so acting. A Writ was filed on behalf of the plaintiff's company against the defendants claiming specific performance of the agreement for sale and in the alternative damages for breach of contract.

The application for the Intermin Injunction was refused by the learned Chief Justice.

Although Mr. Rattray has attempted a critical analysis of the Judgment in that matter, when the arguments are examined and the reasoning of the Chief Justice are looked at, it cannot be faulted.

The main question which calls for a determination of the issues in this matter is this - when the Minister of Housing in his capacity as a Corporation Sole contracts does he do so as a completely autonomous body or is he contracting for and on behalf of the Crown as a servant or agent of the Crown.

Both Mr. Norman Hill, before the Chief Justice then, and Mr. Rattray, before me now have sought to attempt to distinguish the status of the Minister where he acts by virtue of his policy making powers which he is endowed with on taking office and those powers which are conferred upon him as a Corporation Sole under the Housing Act. I too agree with the observations of the Chief Justice that although as a Corporation Sole the Minister assumes a legal personality separate and distinct from other Ministers and from his role as a Minister of State and a Member of the Government, that this does not alter his status as such. He remains as much a part of the Crown and of the Government no matter which of these two functions he performs. Any other interpretation

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in my opinion would be unthinkable.

I would base my conclusions on two main grounds and by an examination of the following:

1. The common law position before and after the Crown Proceedings Act.
2. The statutory position as a result of the Crown Proceedings Act.

The whole basis for the arguments by Mr. Rattray for the plaintiff is the contention that where the Minister contracts by virtue of his powers as a Corporation Sole under the Housing Act he acts as a Principal and is not to be regarded therefore, as being a part of the Crown. He contracts for himself and not as a servant or agent for and on behalf of the Crown. He referred to *Graham vs Public Works Commissioner* [1901] 2K.B. 781 as being the authority for this proposition. The headnote in the report reads:

"An action will lie against His Majesty's Commissioner of Public Works and Buildings, who are incorporated by statute for damages for breach of contract entered into by them with a firm of builders for the erection of a public building."

So held by Ridley J. "because the Commissioners must be taken to have made the contract specially themselves, and not as agents for the Crown."

By Phillimore J. "because the Commissioners are in the position of servants of the Crown who may be sued on their contracts for the purpose of obtaining a Judgment declaratory of the right of the subject who has contracted with them."

7.

This case which concerned a Government Official and not a Minister of State can be easily distinguished, as Ministers of State who are made Corporation Sole by statute, where they so act under the powers given to them in the particular statute, are presumed to contract for and on behalf of the Crown and the doctrine of immunity from civil suit attaches to them. They are therefore not liable for suit.

In 3rd Edition of Halsburys Law of England, Volume 9, at page 9, paragraph 12, subhead "Corporations and Crown Status" the following statement appears:

"Unlike Ministers of State (who are often Corporation Sole by Statute) and are part of the Crown when that term is used in the sense of the Government, a Corporation aggregate created by Parliament such as the British Transport Commission, will not be entitled to Crown immunities as being a servant or agent of the Crown."

So irrespective as to whether a Minister of State acts by virtue of his policy making powers or as a Corporation Sole, not only is he presumed to contract for and on behalf of the Crown but he is immuned from civil suits. Most of the cases cited as authorities by Mr. Rattray were decided before the passing of the Crown Proceedings Act 1947 in England and its Jamaican counterpart, The Crown Proceedings Law 1958 and have to be examined in the light of the provisions of these Acts. The Graham case (referred to supra) is now to be regarded as being in the prevailing circumstances of academic interest only (vide Volume 9 of Halsburys Supra, at page 8 under subhead "Examples of Corporation Sole.") Also vide footnote at (0) where the following note is made by the learned Editor:

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"As regards the Crown status of departments of state and the remaining immunities or privileges of Crown servants and the scope of entitlement to Crown privilege, see Title Constitutional Law, Volume 7. As regards procedure in litigation by or against the Crown see Title Crown Proceedings."

For the principle of the law upon which the doctrine of Crown immunity is based (vide 3rd Edition Halsbury Laws of England, Volume 7, page 252, at paragraph 548, subhead "Crown Servants") where the following statement appears:

"At Common Law servants of the Crown cannot be made personally liable upon contracts entered into by them in their official capacity unless from the particular circumstances of the case the intention to render themselves personally liable appears, for they are presumed to contract as agents for the Crown."

The cases cited by the learned Editor in support of this proposition are *Gidley vs Lord Palmerston* [1822] Brod. and Bing. 275; *Palmer vs Hutchinson* [1881] 6 App. Cases 619 P.C. *Dunn vs McDonald* [1897] 1 Q.B. 555C A; were all referred to in the *Graham* case relied on by Mr. Rattray.

So, therefore, where Ministers of State whether Corporation Sole or not, where they so act, are presumed to act as servants or agents of the Crown and are to be regarded as very much a part of the Crown and of the Government and they are therefore immune from civil suits and at common law any civil action brought against them is unsustainable.

I now wish to turn to examine the statutory position since The Crown Proceedings Law 1958.

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As there is no basis therefore upon which a civil suit lay against a Minister of State at common law one now has to refer to the Housing Act 1968 in order to determine whether that Act gives the subject any such right. The Act is silent on this question. Mr. Rattray contends that resort has now to be made to section 28(1) of the Interpretation Act to determine whether such a right is given by statute. It may be useful to set out the relevant provisions of this section.

"Subject to subsection (2) where an Act passed after the commencement of this Act contains words establishing or providing for the establishment of a body corporate and applying this section to that body those words shall operate -

- (a) to vest in that body when established -
- (i) the power to sue in its corporate name."

The power to sue here implies a liability to be sued. This provision in my humble opinion is to be seen as dealing with Bodies Corporate such as registered companies incorporated under the Companies Act. Bodies Corporate being one of the genus known as Corporation Aggregate as distinct from Corporations Sole. (Vide reference to Volume 9 Halsbury Laws of England supra under subhead Corporations and Crown Status.)"

Even if I am wrong in so contending if there is an intention on the part of Parliament to alter a common law doctrine especially one that is so deeply rooted as the doctrine of Crown immunity then it would have to do so in clear and express terms. (Vide observations of Graham - Perkins J. (Ag.) as he then was in *Lewis vs The Minister of Labour and National Insurance* and others [1966] 9 W.I.R. 459 at 462 (D):

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"It is a fundamental proposition of Law that where a statute seeks to extend or create rights at common law or to impose liabilities which did not exist at common law, it must do so in clear and precise language and in the absence of such language, it may not be construed so as to effect any alteration of the common law."

Eldon vs Headley Bros. [1935] 2 K.B. 1 is cited by him as the authority.

The Housing Law 1955 created the office of the Director of Housing and made the holder of that office a Corporation Sole with express powers to sue and be sued. That law was repealed by the Housing Act 1968 (vide 62(a)). Under this Act the Minister of Housing is made a Corporation Sole.

Under section 62 of the Act is set out the transitional provisions.

At section 62(c) the Minister of Housing is given all "the rights, privileges and advantages and all liabilities and obligations to which the Director of Housing was immediately before the commencement of the Act entitled or as the case may be subject."

Whatever rights the Director of Housing as a Corporation Sole had to sue and be sued were expressly taken away by section 33 of the Crown Proceedings Law 1958. That Law repealed a number of Laws by which certain Government Officials including the Director of Housing could sue and be sued. It also abolished the Petition of Right which was the procedural method by which the subject could seek redress by way of civil action indirectly against the Crown. (Vide schedule to the Crown Proceedings Law 1958 for the various Laws and relevant sections of Laws that were repealed).

The Minister of Housing, therefore, where he so acts as a Corporation Sole under the Housing Act 1968 has no greater right than his predecessor, the Director of Housing, possessed, prior to the repeal of the Housing Law 1955. At the date of the repeal of that Law in 1968, the Director of Housing no longer had the express power to sue or to be sued.

It follows therefore, for the reasons which I have attempted to state that the doctrine of Crown immunity which protects Ministers of State where they so contract on behalf of the State by virtue of their office, from civil suits applies in relation to both these Writs and operates to protect the Minister of Housing from suit brought at the instance of both these plaintiffs. This right which the Minister has at common law by virtue of his office and his status as a Minister of the Crown has not been taken away by the Housing Act, or any other Act of the Parliament of this country.

The relief sought, therefore, on both summonses is granted. No leave having been sought under section 258(a) of the Civil Procedure before entry of the Judgments in default, both Judgments are set aside as having been irregularly obtained.

In any event for the same reasons both actions must be dismissed as being unsustainable in law.

There will, subject to there being any waiver by the Director of State Proceedings, be an order for costs in both matters as prayed such costs to be taxed if not agreed, and a certificate for counsel is granted.

Leave to appeal granted. Stay of execution for six weeks.