

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

BRITISH VIRGIN ISLANDS
CLAIM NO.BVIHCV2007/0137

BETWEEN:

LORETTA FRETT as Executor of the Estate of
JEUEL SIMEON FRETT, Deceased

Claimant

AND

THE ATTORNEY GENERAL

Defendant

Before:

Master Cheryl Mathurin

Appearances:

Dr Joseph S Archibald QC and Ms Anthea Smith for the Claimant

Mr. Baba Aziz for the Defendant

2010; November 2nd; December 20th

RULING

[1] **MATHURIN, M:** The facts leading up to this Claim were sadly occasioned by the death of Mr. Jeuel Simon Frett of whom the Claimant (Mrs. Frett) is Executor of his Estate. The Claim is one for damages caused by the negligence/breach of duty under a contract of employment of the Defendant (Attorney General). Mrs. Frett alleges that Mr. Frett died from mesothelioma caused by exposure to asbestos particles during the course of his employment with the Government of the Virgin Islands as Maintenance Officer in the Health Department. The Claim alleges that Mr. Frett contracted mesothelioma when he was charged with responsibility of breaking down walls and

cutting holes in the ceiling in a Road Town building which was to be used as a health centre. He died on the 22nd September 2006 and the claim was instituted by his Estate on the 7th June 2007 wherein it was alleged that his illness and subsequent death were caused by the negligence of the Defendant and the breach of the deceased's contract of employment.

- [2] The Attorney General has applied to strike out the Claim or be granted summary judgment on the basis that the claim was instituted outside of the time limit as stipulated by section 2 of the **Public Authorities Protection Act Cap 62** (the Act) for bringing claims against the Crown. The relevant section in the Act upon which the Attorney General relies states as follows;

"Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty or authority, the following provision shall have effect-

(a) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof."

- [3] The Attorney General submits that it is critical to consider whether the act of the Mr. Frett was one done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority. He refers to the words of the Lord Chancellor in the well known case of **Bradford Corporation v Myers** (1916) 1 AC 242

"While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform. In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute or in the discharge of a public duty, or in the exercise of a public authority. I regard these latter words as meaning a duty

owed to all the public alike or an authority public, and that in the exercise or discharge of such duties this protection does not apply."

[4] This reiterated by the words of Viscount Haldane in the same case where he stated;

"...the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority. What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly easier to define a priori the meaning of being done directly than it is to define the number of grains that will make a heap. But just as it is not difficult to tell a heap when it is seen, so it may be easy at least to say of certain acts that they are not the immediate and necessary outcome of duty or authority in a particular case."

[5] In **Bradford Corporation v Myers** (supra) the appellants, a municipal corporation, were authorized by an Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district. They were also empowered to sell the coke produced in the manufacture of gas. The corporation contracted to sell and over a ton of coke to the respondent, and by negligence of their agent the coke was shot through the respondents shop window. More than six months afterwards the respondents commenced an action in negligence against the corporation. The corporation pleaded section 1 of the Public Authorities Protection Act 1893 as a bar to the action. It was held that the act complained of was not an act done in direct execution of a statute or in the discharge of a public duty or the exercise of a public authority and there, the Public Authorities Protection Act afforded no defence to the action.

[6] Counsel for Mrs. Frett contends that the Act does not apply in these circumstances because it cannot be said that the actions that allegedly led to Mr. Frett contracting mesothelioma were in pursuance of or in the execution of a public duty as stipulated by the Act. He relies on fact that Mr. Frett acted under a private contract of employment and the duty of care was owed to him personally and not to all the public alike. Counsel states that a public authority cannot rely on the six month limitation period of the Act if the authority was merely exercising a power and was not

performing a public or statutory duty. Sir Vincent Floissac in an appeal against by the Attorney General of Antigua and Barbuda referred to the Bradford Corporation case and quoted Lord Atkinson;

"I think that the negligent act complained of here was not done in pursuance of execution or intended execution of any Act of Parliament, since no public duty was imposed upon the appellants to deliver this coke. I think the appellants were not guilty of any neglect or default in the exercise of any Act of Parliament, or public duty, or authority, since no public duty rested upon them."

In that matter straying cattle owned by the Government caused damage to the Respondent and it was held that in engaging the enterprise of rearing cattle at a paddock, the Government was merely exercising a power and was not exercising a public duty. Sir Vincent determined that the Government was under no statutory obligation to embark on this beneficent venture and would not be in breach of its public duty or authority if it discontinued the venture and that as such they were not entitled to the benefit of the relevant Act.

[7] The issue of whether the Crown is a public authority is not in dispute, neither is the issue of whether there was a duty of care owed to Mr. Frett by way of his contract or otherwise. The sole issue for me to consider is whether the Government was acting pursuant to a statutory authority or pursuant to a public duty by allegedly having Mr. Frett breaking down walls and cutting holes in the ceiling of the building which allegedly had asbestos in the walls.

[8] The Attorney General states that the **Public Health Ordinance (Cap 194)** (the Ordinance) confers on the Minister of Health the power to establish and maintain health centres at the public expense and refers me to the specific powers under sections 5(1) and (2) of the Ordinance which states;

"5. (1) The Minister may establish at suitable places in any area -

...

(c) Health centres;

(2) The expenses of establishing and maintaining such services shall be defrayed out of moneys voted for those purposes by the Legislative Council"

- [9] The Attorney General submits that therefore the combined effect of the character of Mr. Frett's employment and the duty of the Minister under the Ordinance to establish and maintain health services in the Territory affords it the protection of the Act.
- [10] It is a proposition which gives me difficulty as the wording of the Ordinance makes it clear that it is the health services with which the Minister was charged with the responsibility of maintaining and therefore any physical works on the building to establish these services would have to be a power ancillary to that statutory obligation. I do not think that the act complained of was done in execution of the public duty to maintain health services since no public duty was imposed on the Minister by the Act to demolish walls and cut holes in ceilings to discharge that duty.
- [11] My thinking on this is buttressed by a perusal of the Ordinance which leaves me as to no doubt that construction repairs and maintenance of physical structures can indeed be a statutory obligation. Section 7 of the Ordinance specifically mandates that for the purpose of construction, repairs and maintenance of sewers pursuant to the public purpose of the Act which gives the Minister the general responsibility for the promotion and preservation of the health of the inhabitants of the Territory.
- [12] In the circumstances, it is my opinion that the Government is not entitled to the protection of the Act in these circumstances and the matter should proceed to trial. The Application is dismissed with costs to the Respondent to be assessed if not agreed. The matter should resume its normal course and as such is adjourned to the 18th January 2011 for further case management.

CHERYL MATHURIN
Master

