

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV 2010/0294

BETWEEN:

ROSILEE HERBERT

Claimant

and

ATTORNEY GENERAL

Defendant

2011: November 14,

2012: January 26

Appearances:

Lewis Hunte QC with Richard Arthurs instructed by Hunte and Co. for the Claimant

Jo Ann Williams Roberts, Solicitor General with Sarah Potter, Crown Counsel for the Defendant

(Equity-Estoppel- Estoppel by representation- Claimant, a Public Officer retired from the Public Service- claimant alleging government represented to her that she had been retired on medical grounds- Government attempting to enforce bond- whether estoppel by representation arises- whether bond deemed frustrated under the doctrine of frustration by illness or incapacity- The Pensions Act Cap 161s. 6(e)- the General Orders for the Public Service of the British Virgin Islands 1971(raised 1982)

[1] **Joseph-Olivetti J: - “And by our Holy Sabbath have I sworn to have the due forfeit of my bond, if you deny it let the danger light upon your charter and your city’s freedom.¹”** This case concerns a bond but here unlike in the renowned play alluded the Government and not a private citizen is seeking to enforce a bond and the bondsman

- Merchant of Venice Act1V Scene 1 Shylock¹ Shakespeare

Mrs. Herbert has sought the court's protection. However, we were not confronted with such high moral dilemmas as threatened to overwhelm the Duke of Venice when Shylock adamantly demanded the forfeit due under his bond.

[2] By claim form filed 1 December 2010 Mrs. Herbert commenced proceedings against the Attorney General for: (i) a declaration that the bond made between her and the Government has been terminated by frustration caused by her illness; (ii) a declaration that her expectation of receiving her full retirement benefits is a legitimate expectation; (iii) a declaration that she is entitled to payment of her retirement benefits in full; and (iv) prescribed costs.

[3] In turn, on 4 January 2011, the Attorney General counterclaimed for orders that: (i) Mrs. Herbert do specifically perform her obligations under the Bond (ii) costs (iii) such relief as the Court sees fit.

[4] **Main Issues for determination.**

[5] As counsel could not agree on the issues for determination I have had regard to their respective pre-trial memoranda and the pleadings and I am of the view that the issues raised can be properly dealt with under these main grounds:-(i) Whether Government represented to Mrs. Herbert that she had been retired on medical grounds and is now estopped from claiming otherwise; (ii) Did the Government represent to Mrs. Herbert that they had accepted her medical report and that as a result the bond was frustrated

and thus unenforceable by her illness or incapacity?(iii)Whether Mrs. Herbert is liable on the Counterclaim to pay the sums demanded under the Bond.

[6] **The Facts**

[7] Few relevant factual disputes arose. Mrs. Herbert testified on her own behalf and called no other witness. She was not cross-examined. The Government called Mrs. Michelle Donovan-Stevens, the Ag. Director of the Human Resources Department (“the HR Department”) and Ms. Lisa Donovan, the Benefits Administrator in the HR Department.

[8] Mrs. Herbert is now 56 years old. At all material times she was a senior public officer in the employ of the Government. Before her retirement she last worked in the capacity of senior administrative officer in the Ministry of Health and Social Development.

[9] In June 2006 the Government advanced monies to Mrs. Herbert at her request to enable her to pursue a Master’s Degree in Health Care Management from the summer of 2006 to the spring of 2009. In return, Mrs. Herbert entered into a bond with the Government (‘the Bond’) whereby she agreed to serve them for six years on completion of her studies or in default to repay the sum of \$176,533.75 or the appropriate portion thereof. (Notably neither party saw it fit to produce the Bond and it appears that no issue arises on its construction).

[10] Mrs. Herbert completed her studies successfully and served the Government for approximately 1 year thereafter. Then, by letter dated 8 March, 2010 to the Director of Human Resources, Mrs. Herbert wrote:-

“I hereby communicate my desire to retire from the Public Service, effective September 1 2010, due to deteriorating health conditions. I understand that I need to provide six months notice to the government. Within these guidelines, therefore I submit this official letter of retirement. I express gratitude to the government who continually make it possible for British Virgin Islanders to serve.”

[11] By letter of 28 April, the Ag. Senior Assistant Human Resources Manager on behalf of the Director of Human Resources responded to Mrs. Herbert by requesting her to submit a medical report or letter from a registered doctor in the Virgin Islands attesting to and I quote, **“the medical necessity of your retirement from the Public Service within the next six months no later than 17 May, 2010”**.

[12] On 17 May Mrs. Herbert submitted a letter dated May 14 from Dr. Paula Trotman–Hastings, a general medical practitioner, practicing at the time at a private clinic in Road Town. The letter from Dr. Trotman-Hastings was terse. It stated simply:-

“Kindly be advised that Mrs. Herbert is a patient in our clinic. Over the past eight months, I have seen her on six separate occasions concerning her health. She has been advised that it would be in her best interests to avoid stress at this time and, if possible, to cease work. Your understanding in the matter is greatly appreciated.”

[13] Mrs. Donovan-Stevens testified that having regard to Dr. Trotman-Hastings’ report they formed the view that Mrs. Herbert did not qualify for retirement on medical grounds as provided for in the Pensions Act Cap 161 section 6 (e) and therefore Rule 8.8 of General Orders for the Public Service of the British Virgin Islands 1971 (revised in 1982) “the General Orders,” did not apply. However, in their opinion Mrs. Herbert at the time qualified for retirement under section 6 (a) of the Pensions Act based on her years of service she having served in excess of 25 years (in fact she had served for 36 years) and therefore the HR Department sought advice from the Public Service Commission (“the PSC”) as to whether Mrs. Herbert should be retired after 36 years of service. They also submitted her letter and that of Dr. Trotman-Hastings and they drew the PSC’s attention to the Bond. This is borne out by the memorandum of 21 May from the HR Department to the PSC. See Exhibit MDS-5. (I note that courts often chide Attorneys- General for failing to be forthcoming with documents provided to the PSC but in this case we do not have any such difficulty).

[14] The relevant part of the memorandum to the PSC for our purposes reads:-

“Subject:- Retirement from the Public Service – Mrs. Rosilee Herbert, Senior Administrative Officer, Ministry of Health and Social Development.

1. Matter on Which Advice is Sought

The Commission is asked to advise whether Mrs. Rosilee Herbert, Senior Administrative Officer, Ministry of Health and Social Development should be retired from the Public Service after 36 years of service commencing on 7th September 1973”.

[15] The PSC in due course met on 8 June and recommended to the Governor that Mrs. Herbert be retired from the Public Service with effect from 1 September. The Governor accepted that advice and recommendation on 25 June and approved Mrs. Herbert’s retirement from the Public Service. And, by letter of 28 July the HR Department wrote to Mrs. Herbert informing her that her retirement from the Public Service was approved by the Governor and that she should, **inter alia**, meet Ms. Lisa Donovan on 18 August to discuss her retirement/pension benefits.

[16] On 1 September Mrs. Herbert met with Ms. Lisa Donovan. No explanation was given by any of the witnesses why the meeting did not come off as first scheduled but that is of little moment now.

[17] Markedly, Mrs. Herbert did not testify to what, to my mind, was a very significant meeting, and if one looked at her evidence in chief one would not have known that such a meeting ever took place. I therefore regard her evidence as wholly self serving. Ms. Lisa Donovan testified about the meeting and in cross examination it was never suggested to her that the meeting did not take place or that her recall of what transpired was inaccurate. I therefore accept Ms Donovan's evidence on that aspect as it is further supported by her email of 6 September to Mrs. Herbert which confirmed their discussions and which also forwarded an earlier email of 10 January 2010 she had referred to at the meeting.

[18] Ms. Donovan's remit was to work out Mrs. Herbert's retirement benefits and in doing so she was obliged to take into account any monies Mrs. Herbert owed to the Government. At the meeting Ms. Donovan informed Mrs. Herbert that her gratuity was \$121,731.25 with an annual pension of \$22,215.50 and that she had an outstanding obligation of \$144,057.67 under the Bond. Mrs. Herbert indicated that she had been retired on medical grounds but Ms. Donovan explained to her that her instructions were that she (Mrs. Herbert) had been retired on her years of service. Mrs. Herbert appeared to accept that as the proper basis of her retirement then and acknowledged her bond

obligation but disagreed with the amount and was referred to a detailed accounting sent to her by email in January 2010. Mrs. Herbert then sought to negotiate terms of repayment. She requested that her gratuity remain intact and that monthly deductions be made from her pension. It was agreed that her repayment options would be communicated to her by week's end.

[19] Mrs. Herbert later met on 8 September with Mrs. Donovan-Stevens to discuss concerns regarding her bond obligations and her claim that she had been retired on medical grounds. Again, Mrs. Herbert made no mention of that meeting in her evidence and Mrs. Donovan-Stevens did not do so directly. However, Mrs. Donovan-Stevens exhibited her letter of 9 September to Mrs. Herbert which documented what took place. See MDS8. By that letter Mrs. Donovan-Stevens advised Mrs. Herbert, **inter alia**, of her bond obligations and offered her generous repayment options, extended the option to her to apply for retirement on medical grounds and informed her of the procedure to be followed if she wished to do so. She was asked to respond by 23 September. Mrs. Herbert's lawyer, Mr. Hunte QC, responded on 21 September indicating that his client had been retired on medical grounds and as a result the Bond could not be legally enforced. Mrs. Donovan-Stevens sought to resolve matters by response letters of 4 October and 8 October but they bore not the hoped for fruits and Mrs. Herbert instituted this claim.

[20] **Submissions**

[21] Mr. Lewis Hunte QC, learned counsel for Mrs. Herbert in essence submitted that Mrs. Herbert was retired on medical grounds in keeping with her request as Government had so represented to her in the correspondence which was exchanged between her and the HR Department prior to 1 September 2010. Counsel advanced that accordingly an estoppel arose against the Government in the circumstances. Counsel also submitted that Mrs. Herbert was not compelled to attend before a medical board as that requirement was discretionary (regulation 8). The result was that the Government could not enforce the Bond as they had accepted Mrs. Herbert's doctor's letter and that meant that the Bond was frustrated by Mrs. Herbert's illness. Counsel relied on **Chitty on Contracts 29th edn Vol 1. para 23-037; Amalgamated Investment & Property Co. Ltd. (in Liquidation) v Texas Commerce International Bank Ltd² , Halsburys Laws of England 4 edn. 1 (1) para.92, Words and Phrases Legally Defined 3 edn. Vol 2 – estoppel, and the General Orders.**

[22] On the other hand, Mrs. Williams-Roberts and Ms. Potter, learned counsel for the Government, submitted that Mrs. Herbert was retired on her years of service and not on medical grounds and that no representation had been made to her that she had been retired on medical grounds. Further, they referred to the procedure under Regulation 8.8 which had not been followed and argued that Mrs. Herbert's deteriorating health could not in law be regarded as permanent incapacity for the purposes of section 6(e) of the Pensions Act and therefore the Governor would have

² [1981]3All ER 577

had no authority to retire her on medical grounds. They also submitted that Mrs. Herbert as an experienced senior officer ought to have known that she did not qualify for retirement on medical grounds and therefore she was not misled as to the basis on which she had been retired therefore no estoppel as claimed arose and the bond was enforceable. They cited **Davies Contractor Ltd. v Fareham U.D.C**³, **National Carriers Ltd. v. Panalpina (Northern) Ltd**⁴; **J.Luritzen A/S. v Wijsmuller BV (the Super Servant Two**⁵**and Notcutt v Universal Equipment Co.(London) Ltd**⁶ **the Pensions Act Cap 61 and the General Orders.**

[23] **Discussion**

[24] The law. We are first concerned with estoppel by representation. In **Tai Hing Cotton Mill Ltd v.Liu Chong Hing Bank**⁷ cited at **Words and Phrases** op cit p.179, Lord Scarman explained the concept:-

“And their Lordships would reiterate that unless conduct can be interpreted as amounting to an implied representation, it cannot constitute an estoppel: for the essence of an estoppel is a representation (express or implied)intended to induce the person to whom it is

³ [1956] 2 All ER145

⁴ .[1981]AC675

⁵ [1990] 1 Lloyd's Rep.1

⁶ .[1986] 3AllER 582.

⁷ [1985] 2 All ER 947 at 959 PC

**made to adopt a course of conduct which results in
detriment or loss”**

[25] And in **Moorgate Mercantile Co. Ltd. v Twitchins**⁸ Browne LJ stated:-**“For the purpose for this case, I think that the elements of estoppel by representation can be stated as follows. A person seeking to rely on an estoppel by representation must prove: (1) that a representation was made to him by or on behalf of the person against whom he seeks to rely on the estoppel; (2) that it was the intention of the person making the representation that the person to whom the representation was made should act on it as correct; (3) that the person to whom it was made did act on it; (4) that the representation was not correct and that as a result of acting on it he suffered detriment”.**

[26] I gratefully adopt the approach of Browne LJ. The first consideration then is whether the Government made a representation, express or implied, to Mrs. Herbert to the effect that she was being retired on medical grounds. Mr. Hunte submits that this representation was conveyed in the correspondence exchanged prior to 1 Sept 2010 culminating with the letter of 28 July. We are therefore called upon to construe this correspondence but clearly it must be interpreted having regard to all the circumstances prevailing at the time both before and after the alleged representation. That the entire context must be examined is clear from the case itself and in particular the dicta of Lord

⁸ [1975] 3 ALL ER 314 at 326, CA,

Denning MR in **Amalgamated Investment** where he considered both prior and subsequent conduct of the parties to the contract of guarantee. See paras. Pages 582(b) and 583(c)

[27] Apart from the correspondence I have also had regard to the evidence of Mrs. Herbert herself and to that of Mrs. Donovan- Stevens in making the following findings. There can be no doubt that the HR Department understood that Mrs. Herbert wanted to retire due to her deteriorating health and thus first considered whether she met the criteria for retirement on medical grounds by requesting a medical report. However, after having sight of Dr. Trotman-Hastings' report they determined (correctly to my mind) that she was not entitled to do so under section 6(e) of the Pensions Act and so saw no need to engage Rule 8.8 to convene a medical board to examine her. As nevertheless they deemed her underlying wish was to retire they sought advice from the PSC on whether she ought to be retired on her years of service as she undoubtedly qualified on that ground. Of course and properly so Mrs. Herbert was not privy to the correspondence between the HR Department and the PSC. The PSC recommended that Mrs. Herbert be retired on the basis of her years of service and the Governor accepted that recommendation and accordingly approved her retirement. As far as the Government was concerned there can be no doubt that Mrs. Herbert was retired on her years of service.

[28] Perhaps the unfortunate thing in all this is that the HR Department did not see fit to tell Mrs. Herbert of their views and their proposed course of action as fairness dictated that they should have. Had they done that it is unlikely that this dispute would ever have surfaced. What would it have cost the HR Department to so inform her and by so doing save everyone a great deal of time, inconvenience and money? I hazard, little.

[29] Now did the correspondence between the HR Department and Mrs. Herbert convey to her that she had been retired on medical grounds? I have considered the relevant correspondence carefully. Her letter of 8 March in effect gave notice of her wish to retire because of her deteriorating health. In response the HR Department asked her to submit a medical report showing the medical necessity for her retirement. Accordingly, she submitted the medical report of Dr. Trotman –Hastings. The report to my mind does not speak to any permanent medical condition which would have brought Mrs. Herbert's case within section 6(e) of the Pensions Act. Cap.161 and thus bring into play General Orders rule 8.8.

[30] Section 6 provides that no pension, gratuity or other allowance shall be granted under the Act to any officer except on his retirement in one of the following cases. The relevant case here is contained in para (e) which states- “on medical evidence to the satisfaction of the Governor or the Secretary of State that he is incapable by reason of infirmity of mind or body of discharging the duties of his office and that such infirmity is likely to be permanent”

[31] And, the General Orders rule 8.8 provides:- **“If an officer is reported by a Government Medical Officer to be incapable by reason of infirmity of mind or body of discharging efficiently the duties of his office and such infirmity is likely to be permanent the case will be referred to the Chief Establishment Officer, who may require the officer to appear before a Medical Board appointed by the Chief Medical Officer. The recommendations of the Medical Board will be referred in the prescribed form to the appropriate Service Commission.”**

[32] I now turn to the last correspondence, the letter of 28 July, the relevant portion I set out as it forms a significant part of Mrs. Herbert’s case:-

“ Dear Mrs. Herbert, I refer to your appointment as Senior Administrative Officer, Ministry of Health and Social Development.

Reference is also made to your letter dated 8th March, 2010 tendering your retirement from the Public Service. I am directed to inform you that His Excellency the Governor, after consultation with the Public Service Commission, has approved your retirement from the Public Service effective 1st September 2010”.

[33] What does this letter convey? It first references her appointment and then her letter of 8th March. This is usual in formal correspondence to bring to the addressee’s mind the subject, matter of the correspondence. It does not by itself signify any agreement with

the referenced correspondence. Then the letter informs her that the Government has approved her retirement from the Public Service. Noticeably, the letter does not expressly refer to the basis on which her retirement was approved. Therefore, the representation argued for by Mr. Hunte can only be based on inference from the letters **in toto** as there was no express statement in either of the two letters from the HR Department to Mrs. Herbert that she was being retired on medical grounds.

[34] In law, a representation, to form the basis of an estoppel, must be clear and unequivocal. And I can find no evidence of a clear and unambiguous statement or representation (whether expressed or implied) that she was being retired on medical grounds in the correspondence set within the context of the relationship between the parties.

[35] Mrs. Herbert knew or ought to have known that her medical report did not meet the criteria for retirement on medical grounds under the Pensions Act and so could not have been misled in any way by the correspondence. This finding is based on the relationship between the Government and Mrs. Herbert. First, as argued on behalf of the Government, Mrs. Herbert was a senior public officer in a senior administrative position. See her job specification and description (Ex. MDS1). The minimum qualification for that position was a bachelor's degree in administration or its equivalent and five years work experience in an administrative capacity. Further the job

demanded that the holder have, “a sound knowledge of Government operations and policies”.

[36] In addition, the General Orders themselves stipulate that all public officers must familiarize themselves thoroughly with the General Orders. See Rule 1.3. And therefore she is deemed to be fully conversant with the criteria to be met and procedure to be followed when a public officer wishes to retire on medical grounds.

[37] And noticeably, when Ms Donovan told Mrs. Herbert that she had been retired on her length of service (albeit she told her that on the day immediately after her retirement became effective) she did not cavil unduly and agreed terms for repayment of her debt .That to my mind was not the actions of someone who had been misled.

[38] Furthermore, estoppel is an equitable doctrine and equity grants relief only where it is fair and just to do so. See Lord Denning in **Amalgamated** at page 584 (h) and (j). Mrs. Herbert was given the opportunity to apply for retirement on medical grounds after she queried the basis on which her retirement was granted but she opted not to take that up. I note that this option was extended to her days after her retirement became effective when any detriment suffered could have been mitigated by her. If the retirement was granted on a basis which was not favorable to her then an opportunity to correct it was made and she did not see fit to avail herself of that opportunity. And, the fact that it was made after the retirement became effective does not mean that she

could not have taken it up as if the parties did not agree on the basis of her retirement there was nothing in law to prevent them from revisiting the situation which the Government made it clear they were prepared to do. Mrs. Herbert opted instead to entrust her fortunes on the often frail and seldom certain bark of litigation.

[39] I thus can find no basis on which to conclude there was any such implied representation made to Mrs. Herbert on which she acted to her detriment. In all the circumstances of the case Mrs. Herbert cannot claim the benefit of any estoppel by representation.

[40] Having found that no representation was made to Mrs. Herbert as claimed there is no need to consider the alternative case based on the doctrine of legitimate expectation prayed in aid by Mr.Hunte as that too was grounded on the alleged representation made to her.

[41] The doctrine of legitimate expectation is stated in **Halsburys Laws Vol. 1 (1) para. 92**, and it is abundantly clear that some representation or promise to the effect claimed must be established by the person seeking to rely on the doctrine :-

._“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation or from consistent

past practice. In all instances the expectation arises by reason of the conduct of the decision maker, and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded”.

[42] Did the Government represent to Mrs. Herbert that they had accepted her medical report and that as a result the Bond was frustrated and thus unenforceable by her illness or incapacity?

[43] The law on the doctrine of frustration as a result of illness or incapacity is set out in **Chitty on Contracts** 29th edn. para. 23-037 –

“Illness or incapacity: The question whether a contract of employment has been frustrated by the employee’s illness or incapacity depends on whether it was of such a nature or likely to continue for such a period, that future performance of his contractual duties would be either impossible or radically different from that envisaged by the contract.

In applying this test, the court will treat as relevant factors the terms of the contract (including any sick pay provisions) the nature and expected duration of the employment, the period of past employment, and the prospects of recovery. Thus, permanent illness may frustrate an apprenticeship, while a short period of illness may frustrate a shorter-term contract. A periodic contract of employment which is

determinable by the employer by short notice may nevertheless be frustrated by illness or injury which incapacitates the employee”.

[44] I have found that no representation (express or implied) was made to Mrs. Herbert that she was being retired on medical grounds. Therefore the argument that the Government by that representation impliedly accepted the medical report with the result that the Bond is deemed to be frustrated by her illness has no merit as clearly the Government did not accept the report and they did not represent to Mrs. Herbert that they had done.

[45] The Government, to illustrate the application of the doctrine cited **Notcutt v Universal Equipment Co. (London) Ltd.** Notcutt is easily distinguishable on the facts but the law on the doctrine of frustration was treated as settled. The Court of Appeal held that the short term contract of employment was frustrated by operation of law as soon as it became clear that the employee’s illness would prevent him from ever working again. The same cannot be said of Mrs. Herbert having regard to her medical report.

[46] Moreover, she who comes to equity must come with clean hands and in all the circumstances the equities cry out against a finding that the **Bond** was frustrated by her illness as it is extremely doubtful whether Mrs. Herbert having regard to her own medical report can in all justice claim to be incapacitated permanently and so unable to perform her obligations to serve under the Bond.

[47] **Whether Mrs. Herbert is liable on the Counterclaim if the Bond is not deemed frustrated by her illness or incapacity.**

[48] Having regard to my findings and conclusions on the claim it follows, like the night the day, that Mrs. Herbert has no defence to the counterclaim as the Bond is valid and enforceable as it has not been frustrated by her illness or incapacity or any representation to that effect. She must therefore perform her obligations under the Bond and pay to the Government the sum of \$144,057.67 and prescribed costs.

[49] **Conclusion**

[50] For the foregoing reasons, Mrs. Herbert's claim is dismissed. She is also liable for costs on the claim but as I have awarded prescribed costs on the counterclaim and as the matters were inextricably intertwined I will not make a separate order for costs against her on the claim as the costs on the counterclaim would be just and reasonable to provide for the entire case. The Government is entitled to judgment on its counterclaim and prescribed costs. Counsel for the Government must draw up and submit a draft order within 2 days.

Rita Joseph-Olivetti

Resident High court Judge

Territory of the Virgin Islands