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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: C.L. 1996 - A -102

BETWEEN	**THE ADMINISTRATOR GENERAL OF JAMAICA (ADMINISTRATOR OF THE ESTATE OF GEORGE GORDON CHAMBERS, DECEASED)**	**PLAINTIFF**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

Ms. Dundeen Ferguson, instructed by Ferguson, Campbell & Co, for the Plaintiff. Ms. Katherine Francis instructed by the Director of State Proceedings, for the Defendant.

Heard on February 16, and March 16, 2005

ANDERSON, J.

The real issue before me in this matter is whether the action is statute-barred, and accordingly ought to be struck out. It arises out of an unfortunate incident on or about the 2nd day of March 1992, when the deceased George Gordon Chambers, then a member of the Jamaica Defence Force (JDF) received injuries to which he succumbed, when a JDF armoured car driven by a Private Walters and in which the deceased was a passenger, overturned. The deceased, having died intestate, Letters of Administration were granted on the 10th day of April, 1996 and the writ of summons was filed on July 10, 1996.

The Administrator General on or around April 2, 1998 was granted a judgment in default of defence against the defendant. On January 25, 2002, Wesley James, J. ordered that the default judgment be set aside. The matter was eventually set for case management conference on October 3, 2003 and at that time the learned judge, Marva McIntosh, J. ordered that "there be a trial of the issue of the limitation of this Action under the Public Authorities Protection Act ("the Act") on a date to be fixed by the Registrar". When that issue came up for trial on the morning of 16th February, 2005, counsel for the plaintiff applied for an adjournment on the basis that she was not prepared to proceed, as she had been unable to complete the research necessary. That application was denied, but I agreed that the plaintiff would have some time to prepare and we would commence at 12 noon.

On the resumption, Mrs. Francis for the defendant submitted that the action was time-barred by virtue of section 2(1) of the Act. That section provides:-

> Where any action, prosecution, or other proceedings is commenced against any person for any act done in pursuance, or execution, or intended execution, of any law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, duty, or authority, the following provisions shall have effect:
>
> (a) the action shall not lie or be instituted unless it is commenced within one year next after the act complained of......

It was submitted that "this section relates to the limitation period applicable to the commencement of an action, prosecution or other proceedings against the Crown such as the instant matter". Counsel for the defence cited the Privy Council decision ***YEW BON TEW v KENDERAAN BAS MARA [1982] 3 ALL E.R. 833***, as authority for the proposition that the right to rely on the provisions cited above, is an "accrued right", by virtue of which the Crown becomes entitled to resist any action on the basis that it is filed outside the period of limitation. In this regard, it was submitted that the amendment of the Act, in 1995[1], whereby the period of limitation was extended to six (6) years from the date of the act complained of, did not and could not assist the Plaintiff. Counsel also cited the decision of the Jamaican Court of Appeal in ***MOTION NO: 26 of 2001 in WILBERT CHRISTOPHER v THE ATTORNEY GENERAL***. In that case, Langrin J.A. said:

> "The question to be determined in this regard is whether the Public Authorities Protection Amendment Act, 1995 is to have retrospective effect, as the cause of action arose in 1994. Section 25(2) (c) of the Interpretation Act provides that:
>
> > Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not –
> >
> > (a) revive anything not in force or existing at the time at which the repeal takes effect.
>
> The Public Authorities Protection Amendment Act 1995 s. 2 shows no contrary intention and accordingly, the Act is not to have retrospective effect".

His Lordship continued.

> "In the case of ***Lemuel Gordon v The Attorney General for Jamaica, SCCA 96/94*** (unreported) delivered 20th December 1995, Carey J.A. noted

[1] The Public Authorities Protection Amendment Act

that the proper approach to the amending enactment is not to determine whether it is procedural or substantive, but to see whether, *if applied retrospectively, it would impair existing rights*. (Emphasis mine) The Crown's agents when acting in execution of their duties acquire a vested right by reason of the statutory limitation period of twelve months and should be able to assume that they are no longer at risk from a stale claim. There is an accrued right to plead the lapse of a limitation period which is in fact an absolute defence".

Ms. Francis submitted that the incident having occurred on March 2, 1991, the writ and statement of claim having been filed by the Plaintiff on 17th July 1996, the plaintiff should have filed by March 2, 1992, and was accordingly outside the limitation period of one year. That limitation defence, being a special defence, had been specifically pleaded in the defence filed by the Defendant January 29, 2002 and the Plaintiff would have become aware of this pleading. Indeed, the need to specifically plead such special defence is well recognized. {See for example, ***Mitchell v Harris Engineering Co. Ltd.[1967] 2 All E.R. 682*** (C.A.)}

In anticipation of the submissions on behalf of the plaintiff, counsel for the Attorney General further submitted that it was not necessary either in relation to an action under the Law Reform (Miscellaneous Provisions) Act, nor the Fatal Accidents Act to await the grant of letters of administration. This was because under the former, the plaintiff could have applied to be appointed in an *ad litem* capacity while in the latter, the action could have been brought by or in the name of a "near relation".[2] Plaintiff's Counsel also prayed in aid the provisions of the Crown Proceedings Act, section 8, which protected the Crown from liability in relation to a tortious act "done or omitted to be done by a member of the armed forces of the Crown while on duty as such", such act "causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown", providing certain conditions are fulfilled. Those conditions are set out in section 8 (1), paragraphs (a) and (b). Finally the defendant submitted that the Court had the authority to hear this interlocutory matter since "in the ordinary run of actions for personal injuries, any question concerning the operation of the limitation period can be

[2] Fatal Accidents Act, section 4(1)(b)

dealt with and disposed of on the hearing of an appropriate application at the interlocutory stage": See **Simpson v Norwest Holst Southern Ltd, [1980] 2All E. R. 471**".

Ms. Francis in ending her submissions, and again anticipating the submissions of the Plaintiff's attorney, also pointed out that the entry of an unconditional appearance was not fatal to the Defendant's application that the matter be stopped on the trial of this preliminary point, as being statute-barred. She compared the position here to that where a defendant pleaded in his defence the failure of a plaintiff to comply with the Statute of Frauds. There, as here, she said, the fact that an unconditional appearance had been entered would not be a bar to the court accepting the defence.

Mrs. Ferguson for the Plaintiff submitted that the Defendant could not now avail itself of the limitation defence since it had entered an unconditional appearance to the writ. It was her view that if the defendant wished to plead the limitation defence, it should have entered a conditional appearance, and it was thus now estopped from pleading the statute as a defence. I do not believe that that is correct. There is all the difference between the situation where a defendant is, for example, served a writ outside the jurisdiction without leave of the court, and an unconditional appearance is entered, and one where, as here, there is a complete defence in law, such as a statute of limitations. On this point therefore, it is a finding of the Court that the entry of an appearance does not bar the defendant from setting up the defence of the limitation period.

It was also submitted by counsel for the Plaintiff that the action was not statute-barred since the writ had been filed within a few months after the grant of Letters of Administration. It was her submission that the provision of the Fatal Accidents Act[3] required the grant of Letters of Administration and that the suit was brought within six (6) months of the grant thereof. She cited ***INGALL v MORAN [1944] 1 All.E.R.97***, a case under the Law Reform (Miscellaneous Provisions) Act. In that case, the writ was issued two (2) months prior to the grant of letters of administration, which was itself

[3] F.A. Act sec. 4(1)

granted about fourteen months after the date of the act complained of. Counsel for the Plaintiff in that case urged upon the Court a submission that:

> "In the case of a cause of action arising in favour of the estate of a deceased person at or after his death, time will at once begin to run, if there be an executor, even though no probate has been obtained.......... but if there be no executor time will only run from the actual grant of letters of administration".

It was also suggested that the practice in the Chancery Division was to allow an administrator to sue before he had obtained a grant of administration. The English Court of Appeal rejected the argument that the issue of the Letters related back to the time of the issue of the writ so as to validate it. It also held that the limitation period had expired before the grant and that the institution of the suit was a nullity. Goddard L.J. (as he then was) referred to the case of ***Chetty v Chetty [1916] 1 A.C. 603***, where Lord Parker in delivering the judgment of the Judicial Committee of the Privy Council, in contrasting the role of the executor who derives his title from the will of the deceased, with that of an administrator, stated:

> "It is quite clear that an executor derives his title and authority from the will of the testator and not from any grant of probate.............. An Administrator, on the other hand, derives title solely under his grant, and cannot therefore institute an action as administrator before he gets his grant. The law on the point is well settled: See Comyn's Digest Administration, B.9 and 10: Thompson v Reynolds; 1827 3 C & P, 123; Woolley v Clark, [1822] 5 B & Ald., 744".

However as Goddard L.J. continued, after referring to three different administration suits:[4]

> All these cases were administration suits relating to the administration of estates. They show that actions brought by persons who would be beneficiaries in the administration are not defeated, either where the person entitled to obtain letters is plaintiff, or where such a person is made a defendant, because a grant has not been made at the date of the writ. The action is brought to protect the estate. The modern practice would be to issue a writ asking for the appointment of a receiver pending a grant of letters, and, if brought by a person who would be a beneficiary in the administration, there would be no objection to the action because the person entitled to take out letters is, and must be, made a defendant though the grant has not yet been made.

[4]Fell v Lutwidge 2 Atk., 120; Barn. C. 320; Humphreys v Humphreys 3 P. Wms., 351., Horner v Horner, 23 L. J. (Ch) 10

Mrs. Ferguson also cited ***AIREY V AIREY [1958] 2. Q.B.301,*** an authority under the Law Reform (Miscellaneous Provisions) Act in the United Kingdom. In that case, it was held that since the Law Reform (Miscellaneous Provisions) Act had prescribed the limitation period, that is, *six (6) months after the grant of letters of administration*, the six (6) year period under the Limitation Act 1939, had no application. It was Mrs. Ferguson's submission that this case was applicable to the present circumstances. However, I agree with the submission of counsel for the defendant that where a specific statute deals with an issue which is also dealt with in a general statute, it is to the specific statute that we must look. Here the Act is the specific Act dealing with the circumstances of this case and it is accordingly the appropriate statute to be considered, rather than the Law Reform (Miscellaneous Provisions) Act.

I do not see how ***Ingall v Moran***, or indeed ***Airey v Airey***, helps the Plaintiff. Indeed, if one looks at the dicta in the cases, such as that cited above, it becomes clear that the submissions of the defendant are correct on both the point of the passage of the limitation period, as well as the proposition that while the suit could not have been properly instituted by the Plaintiff *as administrator* before the grant, it seems that it could have been instituted by a *representative who was a beneficiary*, until the grant of letters. I accept the proposition that the Plaintiff could have proceeded by way of either the *ad litem* approach or by way of a representative action until the grant of letters of administration.

With respect to the central issue of the limitation period applicable to this action, Mrs. Ferguson submitted that the amendment of the Act in 1995, had the effect of extending the limitation period. I do not agree. I hold that the action is statute-barred. I am supported in coming to this view by the case of Christopher mentioned above and in particular, the reasoning of Langrin J.A., in support of the proposition that the defendant had an accrued right which could not be taken away by a subsequent amendment of the legislation. In further support of this view, I would cite the case of the decision of the ***Marsal v. Apong and Others (Brunei Darussalam) [1998] UKPC 10 (18th February,***

1998). This was a decision of the Judicial Committee of the Privy Council delivered 18th February 1998 in a case from the Court of Appeal of Brunei Darussalam. (PC Decision 63 of 1997). Permit me to cite the case headnote to that case.

> From 1986 to 1989 the plaintiff, a Brunei businessman was imprisoned. On release a curfew order was imposed which remained in force until 1990. In 1994 the plaintiff issued a writ against the Royal Brunei Police Force for, *inter alia,* false imprisonment and negligence which was subsequently struck out as being statute-barred under the Limitation Act 1967 which imposed one year and two years limitation periods respectively for the two actions. The appellant appealed to the Privy Council, claiming that he was entitled to rely on new extended periods of limitation as provided by s 2 of the Emergency (Limitation) Order 1991 which repealed the 1967 Act and increased the time period for acts to six years.
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> In dismissing the appeal, it was held that:
>
> 1. It is clear that the 1991 Order was intended to have, and did have, effect in certain respects on existing causes of action and in the present case the Order was intended to benefit the plaintiff.
> 2. However, 'fairness' also involves a consideration of the position of the defendant.
> 3. An accrued right to plead a time bar, which is acquired after the lapse of the statutory period, can not be taken away by conferring a retrospective operation on a subsequent Order unless such a construction is unavoidable (***Yew Bon Tew v Kenderaan Bas Mara*** considered).
> 4. Section 10 of the Interpretation and General Clauses Act, provided, *inter alia*, that the repeal of any written law should not affect any right accrued under any written law so repealed. Read with s 2 of the 1991 Order, the repeal of the 1967 Act should not have affected any right accrued under any written law.
> 5. Consequently, the limitation defence of the Brunei Police and their right to plead the time bar, which was acquired after the lapse of the statutory period, should not be taken away by conferring on the legislation a retrospective operation. Accordingly, the 1991 Order has no retrospective effect and the plaintiff's action was statute-barred.

In that case, it should be noted that the Privy Council cited with approval, ***Yew Bon Tew v Kenderaan Bas Mara***. In particular, I would adopt the following words of Lord Slynne of Hadley in this case:

> In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. Their Lordships see no compelling reason for concluding that the respondents acquired no `right' when the period prescribed by the Ordinance of 1948 expired, merely because the Ordinance of 1948 and the Act of 1974 are procedural in character ... The purpose was not to deprive a potential defendant of a limitation defence which he already possessed."

By way of comparison, I cite with approval and note, in particular, the similar effects of the relevant legislative amendment in Brunei and here in this jurisdiction, as suggested in the judgment of Langrin J.A. in ***Christopher***, [5]where the learned Justice of Appeal said:

> The question to be determined in this regard, is whether the Public Authorities Protection Amendment Act, 1995 is to have retrospective effect, as the cause of action arose in 1994. Section 25(2)(c) of the Interpretation Act provides that:
>
> > "Where any act repeals any other enactment, then unless a contrary intention appears, the repeal shall not –
> >
> > (a) revive anything not in force or existing at the time at which the repeal takes effect

Finally, the case of ***Pearce v Secretary of State For Defence and Another [1988] 2 W.L.R***. was cited in support of the proposition that Section 8 of the Crown Proceedings Act applied to give protection to the Defendant on the basis that both the injured passenger and the driver of the armoured vehicle which had overturned, were members of the armed forces and so no action could lay. It seems clear that a prerequisite of the Defendant claiming that protection would be the issue of a certificate by the Minister. No such certificate has been proffered to the Court and that defence clearly fails.

I am however satisfied that the limitation defence must succeed and this action be struck out. The Privy Council decision in ***Lemuel Gordon*** does not assist the Plaintiff. There the Board overturned the decision of the Court of Appeal as to whether an action against

[5] See above

servants of the state (policemen) should be struck out. There the Privy Council was directing its attention to the issue of whether the tortfeasor(s) in that case were or were not acting in pursuance of their duty. The Board was of the view that the Court of Appeal fell into error when it decided that the striking out by the judge at first instance should be upheld on the basis that, either the tortfeasors (policemen) were acting in the performance of their duty, in which case they were entitled to the protection of the Act; or they were acting outside the scope of their duty and accordingly the state could not be fixed with vicarious liability. These questions, the Board felt, were triable issues and it was wrong to strike out the matter without the court pronouncing upon them. In the instant case, there is no such issue to be determined and so no help is available from that authority.

In ***Finnegan v Cementation Co. Ltd. [1953] 1 Q.B. 688***, a widow who had taken out letters of administration in Southern Ireland following the death, intestate, of her husband, sued in England "As Administratrix". It was held that as she had not got Letters of Administration in England, she was not competent to sue as Administratrix, and the time for filing suit under the Fatal Accidents Act having passed, she was now barred from bringing the action altogether. Singleton L.J., observing the harshness of the limitation rules as it applied to particular cases stated.

> In the result, sorry though I am, and sorry as Birkett J. was to be compelled to come to this conclusion (*that a suit was incompetent- my words*) the appeal in my opinion must be dismissed with costs.

He continued:

> I would add that these technicalities are a blot upon the administration of the law, and everyone except the successful party dislikes them. They decrease in numbers as the years go on, and I wish I could see a way around this one.

To the foregoing, I would only add and adopt the dicta of Singleton L.J. quoting from Lord Greene, M.R. in a similarly difficult case,[6]:

> I should not be averse to discovering any proper distinction which would enable this unfortunate slip to be corrected. Apart from the fact that the solicitors for the defendants in fairness pointed out the difficulty, there appear to be no merits on their side. But the Statute of Limitations is not concerned with merits. Once the axe falls, it falls, and a defendant who is

[6] Hilton v Sutton Steam Laundry [1946] K.B. 65 at page 73

> fortunate enough to have acquired the benefit of the Statute of Limitations is entitled, of course, to insist on his strict rights. He is similarly entitled to insist upon the strict application of the rule that the court will not deprive him of those rights by allowing amendments in pleadings.

I adopt the reasoning above as it relates to the limitation period under the Act. And I am satisfied that, as counsel for the Defendant submitted, the accrued right cannot normally be taken away by an amendment of the statute. The principle is acknowledged in ***Pearce*** cited above in relation to a change in employer brought about by statute where it was stated as a "principle", namely "that accrued rights were not taken away unless the statutory provision in question expressly or by necessary implication so provided".

In the premises, I hold that the action by the Plaintiff is barred pursuant to the provisions of the Act, and I order that the action must be struck out.

Since this interlocutory matter was heard pursuant to the case management order of the learned judge, Marva McIntosh J., I believe that it is fair that each party bears his own costs.