IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 726 of 1966

BETWEEN	CYNTHIA LEWIS	PLAINTIFF
A N D	VERONICA PALMER & THE MINISTER OF LABOUR AND NATIONAL INSURANCE & THE ATTORNEY GENERAL	DEFENDANTS

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Mr. Dudley Thompson Q.C. and Mr. A. McFarlane for the Plaintiff
The Attorney General Mr. V.B. Grant Q.C. and Mrs. S. Miller for the Second Defendant.

- J U D G M E N T -

On the 30th April, 1966, the Plaintiff issued a Writ of Summons in which she named three Defendants including the Minister of Labour and National Insurance (hereinafter referred to as "the Minister") as the second-named Defendant.

In paragraph 3 of her Statement of Claim the Plaintiff alleges that the Minister is "the Minister of Government charged with the responsibility of the administration of the National Insurance Act 1965, and for receiving sums of money paid or to be paid into the National Insurance Fund established by the provisions of section 38 of the National Insurance Act 1965, aforesaid". The Plaintiff claims as against the Minister "an injunction restraining him from taking any steps to enforce the deductions under the scheme".

The Minister, having entered a conditional appearance to the Writ herein, has caused a summons to be issued in which he asks for an order that the Writ of Summons in this action be set aside as against him and/or that the service thereof be set aside as against him and all subsequent proceedings.....on the ground that the said Writ of Summons is irregular in that:-

(a) (The Minister) is sued in his official capacity....in which capacity the said Minister represents a branch of the Executive Government in Jamaica.

/(b) The Crown.....

(b) The Crown in Jamaica cannot be sued except as is provided by the Crown Proceedings Law, Law 68 of 1958.

(c) By virtue of Section 14(2) of the Crown Proceedings Law 1958, civil proceedings against the Crown shall be instituted against the Attorney General.

It seems clear that the real question I am required to determine is whether there is any right in the Plaintiff to bring these proceedings against the Minister in his official capacity.

I hope that I will be forgiven if I refrain from dealing with all the arguments and authorities advanced by Mr. Grant and Mr. Thompson in the course of their very careful and, if I may say so, very able submissions. I so refrain because in my view the answer to the question depends on a simple but very fundamental proposition of law.

Before examining this proposition, however, there are two matters with which I find it desirable to deal, having regard to certain submissions put forward by Mr. Grant and Mr. Thompson. In the first place it seems to me of the utmost importance to bear in mind that the concept of civil proceedings against the Crown are not necessarily identifiable with the concept of civil proceedings against a servant of the Crown in respect of his official acts. A reference to the principles of the common law and an examination of the preamble to and provisions of the Crown Proceedings Law make the essential differences between the two concepts abundantly clear. If, therefore, I found it necessary to consider the position of the Attorney General as a defendant in this case I would have to approach the matter in a way quite different from that in which I find it necessary to approach the position of the Minister as the second-named Defendant.

In the second place, it is equally important to recognize the essential difference between the camparatively new doctrine of what I may call the liability of the Crown to be sued on the one hand and the somewhat ancient doctrine of the immunity from suit of a servant of the Crown in his official capacity on the other. A failure to recognize this distinction can only succeed in beclouding the precise issue that requires to be resolved in the summons herein.

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I pass now to examine the position of a servant of the Crown at common law. In the realm of contract a Crown servant could not be made personally liable on any contract which he made in his official capacity. The common law principle that an agent who entered into a contract on behalf of a named principal was not a party to the contract applied so as to free from liability a servant of the Crown who contracted in his official capacity. See Macbeath v. Haldimand (1786) 1 Term Rep. 172. On the other hand, he could not, subject to certain well defined exceptions, e.g. where a statute made the Minister of Transport liable as such in respect of certain contracts made by him, be sued in his official capacity in contract. See Palmer v. Hutchinson (1881) 6 App. Cases 619.

The remedy against the Crown was by way of petition of right. This became the subject of statutory provision by the Petitions of Right Act of 1860. Proceedings by way of petition of right were abolished by the Crown Proceedings Act of 1947 which substituted a more or less ordinary action. What is more the clauses in earlier statutes which had abrogated the old common law doctrine as to non-liability by providing that certain Crown servants could sue and be sued in their official capacity were repealed so that claims in contract against such servants have had, since 1948, to be brought within the provisions of the Act of 1947. What is important is that it needed the clear and precise provisions of a statute to bring about this fundamental change in the common law.

In the field of tort an action could not at common law be brought against a servant of the Crown in his representative capacity. See Raleigh v. Goschen (1898) 1 Ch. 73; and Hutton v. Secretary of the State for War (1926) 43 T.L.R. 106. Indeed it is true to say that as a general rule there was no remedy in tort against the Crown at all. A petition of right did not lie for a tort. The servant of the Crown who actually committed or was privy to the tortious act was personally liable although the Crown would, in certain circumstances, assume responsibility.

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A means was eventually found to mitigate the obvious hardships created by the Crown's immunity in tort but even this did not survive. The so-called fiction of the nominated defendant was condemned by the House of Lords in 1946 in Adams v. Naylor (1946) A.C. 543. It was this case more than any other factor that was responsible for the 1947 Act.

The position in Jamaica up to 1958 was, with some exceptions, substantially the same as it was in England up to 1947. A servant of the Crown who committed a tort was, and indeed is, liable to be sued but this was subject to the overriding principle that the action must be brought against him in his private capacity. The essence of this principle was twofold: (i) the relation of master and servant did not exist between superior and subordinate officials, and, (ii) the public revenues could not be made liable without the consent of the Crown to remedy wrongs committed by its servants. See Atkin L.J's. judgment in Mackenzie-Kennedy v. Air Council (1927) 2 K.B. 517. The principle as such could of course be modified by statute as indeed it was, e.g. by Section 6 of the Telegraph Law Cap. 37 which provided that "...the Postmaster-General may sue and be sued by his said style of office without naming him....." See also Section 29 of the Main Roads Law Cap. 231 which provided that in any suit or action by or against the Director of Public Works it was sufficient to describe him as Director of Public Works without naming him.

These statutory provisions which made such a revolutionary inroad into the principles of the common law were themselves repealed by the 1958 Crown Proceedings Law the effect of which was to make not only a dramatic change in the doctrine of the non-liability of the Crown in tort, but to prescribe the means by which an injured person's remedy might be pursued. Here again, this radical change in the established dogma of the common law was effected by the direct and precise terms of an Act of Parliament.

But Mr. Thompson contends that the Crown Proceedings Law has even more far-reaching effects on the common law principle in that a servant of the Crown may now be sued in his official capacity in respect

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of his official acts. It is a fundamental proposition of law that where a statute seeks to extend or to 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. See Lord Eldon v. Hedley Bros. (1925) 2 K.B. 1. An examination of the Crown Proceedings Law does not reveal any intention in the legislature to attach liability to a servant of the Crown in his official capacity in respect of his official acts. In my view, there is no warrant for holding otherwise.

Mr. Thompson contends further, that certain sections, among them, section 43(12) of the National Insurance Act 1965, invest the Minister with a right to sue in certain circumstances and that this right necessarily involves a corresponding liability to be sued in his official capacity. He relied very strongly, I think, on Minister of Supply v. British Thomson-Houston Co. (1943) K.B. 478, in support of his submission that it was a fundamental principle of natural justice that "he who can sue may be sued". This is perhaps an eminently desirable jurisprudential end for any system of law to seek to achieve. Unhappily, however, in the context of the question that falls for decision in this case, such an approach ignores the true purport of the Crown Proceedings Law. There is, for example, no section of that Law that makes the Crown generally liable in tort. What the law does, and perhaps this is not quite fully recognized, is to preserve the general common law principle that "the King can do no wrong" and to carve out of that general principle certain very well defined exceptions as appear in Section 3 of Part 2 under the title of "Substantive Law". If, therefore, it can be held that the Minister can be sued in his official capacity, it can be so held only on the authority of the precise and unambiguous language of some statute. It is on this background that Minister of Supply v. British Thompson-Houston Co. (supra) must be examined. Be it observed that the precise question that the Court of Appeal set out to answer in that case was whether the defendant was

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right in contending as against the Minister of Supply that "it is true that there is a statute which gives you such a right to sue, but that same statute makes you equally liable to be sued. Therefore, you cannot object to our counterclaim". The answer to this question depended not on any principle of natural justice but rather on the interpretation of Section 20 of the War Department Stores Act 1867, which provided that the Secretary of State for War "may institute and prosecute any action... and may defend any action, suit or proceeding". This section was made to apply to the Minister of Supply by the Ministry of Supply Act 1939 and the Ministry of Supply (Transfer of Powers) (No.1) Order 1939 so that the position of the Minister of Supply was assimilated to that of the Secretary of State for War under the Act of 1867. McKinnon L.J. said at page 618:-

> "It is true that the section does not use the plainer words 'may sue and be sued', which appear in some similar enactments; but the words (quoted supra) seem to me to involve the clear implication that such 'action suit or proceeding' may be brought against the Minister by the other party to the contract. Unless it can be so brought, there is nothing which he 'may defend'."

It is not a little difficult to see by what process of reasoning the Court of Appeal could have arrived at any other rational conclusion. It is even more difficult, if not quite impossible, for me to read into the Court's judgment any suggestion that where a statute gives a right in these circumstances to sue it must follow that it also creates in the person to whom it gives that right a corresponding liability to be sued.

Goddard L.J. based his decision on two grounds, namely: (i) where a statute says that a minister may sue and defend any action that is equivalent to saying he may sue or be sued. (ii) These words mean what they say and do make the minister liable to be sued as such.

It is true that earlier in his judgment he observed that "it would seem only consistent with the most elementary principles of justice that, if that right be conferred on the Minister, a corresponding obligation should also be imposed. If he may sue, why should he not also be liable to be sued...", and that this observation standing

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by itself may appear to lend some colour to Mr. Thompson's submission. In my view, however, Goddard L.J. was not enunciating any new principle of construction, nor was he attempting to depart in any way from an established principle of the common law. In the sentence immediately following he says - "The section provides, therefore, that he may defend any action...." and thus attempts to show that it was those same elementary principles of justice that led the legislature to action by making the Minister liable to be sued. It is clear that the learned Lord Justice did not read into the section words that were not there because of any principle of natural justice. He was merely construing specific words according to their plain ordinary and grammatical meaning. No such words as may be construed as imposing any liability on the Minister to be sued appear in the National Insurance Act of 1965 or in any other statute of which I am aware.

It is not without interest to note that a similar argument was advanced before the British Caribbean Court of Appeal on behalf of the respondents in Inland Revenue Commissioner and Attorney-General v. Lillyman and Others (1964) 7 W.I.R. 496. In dealing with this argument the President said, at page 522 -

> "Counsel for the respondents did not dispute the proposition that unauthorised acts by government officers may be the subject of actions against them in their personal but not in their official capacity unless otherwise provided by law but pointed to section 4 of the National Development Savings Levy Ordinance 1962 No. 16 (B.G.), which charges the Commissioner and the officers and persons appointed for the administration of the Income Tax Ordinance with the administration of the Savings Levy Ordinance except in so far as it relates to the issue and redemption of savings bonds and allied matters, and to Section 13, and maintained that as the Commissioner could sue for the recovery of the levy he could likewise be sued in any action arising under the Ordinance. I find no such intention expressed in the Ordinance and consider the objection by the Commissioner well taken."

The President clearly thought that a statutory right to sue did not involve, in the absence of an express provision, a liability to be sued.

Another case relied on by Mr. Thompson, was Hochoy v. N.U.G.E. and Others (1964) 7 W.I.R. 174. I would have thought that this decision of the Court of Appeal of Trinidad & Tobago was rather violently

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in conflict with the plaintiff's position in this case. I will do no more than quote a short passage from the judgment of Phillips J.A. at p. 186 -

> "I agree with the learned trial judge that the action was brought against the appellant in his personal capacity in respect of his official acts, and I consider it necessary to add that it is only on this basis that the action could have been brought. I do so for the purpose of refuting the suggestion, implicit in the submissions of the learned Solicitor-General, that it is competent to institute legal proceedings against the Governor-General in his official as distinct from his personal capacity. From any such proposition I must express my profound dissent. There is nothing in the law which either constitutes the office of Governor-General a corporation sole or makes it permissible for him to be sued, if at all, in the name of his office."

This passage is, in my judgment, eminently applicable, mutatis mutandis, to this case and I respectfully adopt the views therein stated as my own.

I now state my answer to the question I posed earlier in this judgment. I hold that the plaintiff cannot maintain these proceedings against the Minister of Labour and National Insurance in his official capacity and order that the Writ of Summons issued herein and the service thereof be set aside as against him.

Before, however, parting with this matter I have to confess that throughout the hearing of the summons herein, I have had no little difficulty in understanding the precise ground on which it was sought to make the Minister liable. The Statement of Claim does not allege any of the familiar grounds on which liability is almost always founded, e.g. acting in excess, or in contravention, of a statute or some regulation. It does not in so many words allege a tort or a breach of contract - quasi or otherwise, or indeed of an implied trust. In effect, the Minister is alleged to be acting (albeit prima facie **lawfully**) in pursuance of the provisions of an Act of Parliament which Act itself is alleged to be ultra vires the Constitution of Jamaica. I make this observation because the plaintiff seeks by way of relief against the Minister an injunction restraining him from taking certain steps. Section 17 of the Crown Proceedings Law invests the Court a power to give the same relief against the Crown as against an

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ordinary person but by a proviso to the section a declaratory judgment is substituted for an injunction so that those earlier authorities which indicated the possibility of an injunction against a servant of the Crown in his official capacity must now be regarded as of no effect. In view, however, of the conclusion at which I have arrived this is now only of academic interest.

In the result, therefore, I apprehend that if the Plaintiff succeeds in her action against the first and third Defendants, it can be no great loss to her in not having been able to proceed against the Minister.

There will, subject to any waiver by the Attorney-General, be an order for costs as prayed, and a Certificate for Counsel. The costs will be taxed or agreed.

Dated the 24th day of June, 1966.

(C.H. GRAHAM-PERKINS)
PUISNE JUDGE (AG.)