IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. L - 083 of 1978

BETWEEN	LT. COLONEL LESLIE H. LLOYD	PLAINTIFF
A N D	THE JAMAICA DEFENCE BOARD	FIRST DEFENDANT
A N D	EASTON DOUGLAS	SECOND DEFENDANT
A N D	ATTORNEY GENERAL	THIRD DEFENDANT

Mr. R. G. Laugrin and Mr. Gayle of the Attorney General's Chambers for the defendants.

Mr. Hugh Levy for the plaintiff.

Heard in Chambers on the 5th December, 1978.

J U D G E M E N T

Rowe, J:

The defendants applied by summons to strike out the plaintiff's claim as disclosing no cause of action on the ground that the facts and matters relied on by the plaintiff occurred more than twelve months before the issue of the Writ and the claim is statute barred by the provisions of Section 2 of the Public Authorities Protection Act. At the conclusion of the arguments I made an order in terms of the Summons, granted leave to the plaintiff to appeal and promised to put my reasons in writing.

By Writ filed on the 20th November, 1978 the plaintiff claimed against all three defendants a declaration that his Commission has not been lawfully terminated or retired. His statement of claim filed on the same day stated inter alia:-

> "2. On April 27, 1977, and at all material tines he was of the rank of Lietutenant Colonel, holding a commission granted for an indifinite period".
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> "6. On April 27, 1977, the plaintiff was instructed to attend the office of the Honourable Keble Munn, M. P., then Minister responsible for Defence and on attending there, he was summoned before a group consisting of the

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following persons:

Hon. Koble Munn, Minister of National Security.

Hon. Carl Rattray, Attorney General and Minister of Justice.

General Rudolph Green, Chief of Staff of the Jamaica Defence Board.

Mr. Roy McGann, Parliamentary Secretary, National Security and Justice.

Mr. Douglas Collins, then Permanent - Secretary in the Ministry of National Security.

Professor M. G. Smith, and a female whose name is unknown.

"7. The plaintiff was then interrogated by members on a variety of matters.

"8. Later that day the plaintiff received a letter under the hand of the secretary of the Defence Board dated April 27, 1977 which called on him to retire under Regulation 10 of the Defence (Officers) Regulations 1962 which deals with compulsory retirement.

"9. In the face of the threat of consequential termination of his commission, the plaintiff felt constrained to tender a resignation from his commission and did so by letter dated April 28, 1977.

"10. The plaintiff contends that in acting as aforesaid the Defence Board and or its Secretary in issuing the said letter of April 27, 1977, acted contrary to the provisions of the Defence Act and in breach of the rules of natural justice, and that accordingly the plaintiff's commission has not been lawfully terminated or retired".

Seven "Particulars" are then set out of which the 4th may be mentioned:

"(4) Dealing with the matter through the agency of a group of persons who did not properly comprise the Defence Board as established and Constituted by the Defence Act".

In response to the Writ and Statement of Claim, the defendants entered Conditional appearance and this was followed by the Summons to Strike out the plaintiff's claim. It was contended on behalf of the defendants that the act complained of by the plaintiff occurred on April 27, 1977 and on the plaintiff's

own pleadings, was purportedly done by the Defence Board. Further that in calling upon the defendant to retire under Regulation 10 of the Defence (Officers) Regulations as indicated in paragraph 8 of the Statement of Claim, the first defendant was doing on act in pursuance or execution or intended execution of a public duty conferred upon the Defence Board by the Defence Act and Regulations made thereunder. Mr. Langrin contended that the Public Authorities Protection Act could be invoked in the instant circumstances and that due to the lapse of time between April 27, 1977 the date of the letter from the Defence Board and November 20, 1978 the date of the filing of the Writ, the action is now unsustainable.

Section 2(i) of the Public Authorities Protection Act provides as under:

> " When any action, prosecution, or other proceeding 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 -
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> (a) the action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, or in the case of a continuance of injury or damage, within one year next after the ceasing thereof".

These provisions are similar to those contained in the corresponding U. K. Act of 1893.

It is patent from paragraphs 8 and 10 of the Statement of Claim that the plaintiff is maintaining that the letter of the 27th April, 1977 calling upon him to retire issued from the Defence Board. Was the issuance of this letter incontrovertibly done by a public authority in pursuance of, or execution, or intended execution of any law or public duty or authority? If so, the Public Authorities Protection Act applies. The Jamaica Defence Board is established by Section 9 of the Defence Act, its membership is set out in Section 10 and Section 12 empowers the Board to make provision for the performance of its functions.

The Defence Board is by Law responsible under the general authority of the Minister for the command, discipline and administration of, and all other matters relating to, the Jamaica Defence Force (Section 9). In the performance of its functions, the Board is by Section 12 of the Defence Act empowered to consult with persons who are not members of the Board.

Section 16 of the Defence Act expressly provides for the making of Regulations to deal with the commissioning of officers, their terms of service, appointment, transfer, promotion, retirement, resignation, removal from office and for such other matters concerning officers as may seem necessary to the Governor General. Regulations were promulgated under this Section on the 25th September, 1962 as the Defence (Officers) Regulations 1962 and Regulation 10 thereof is instructive:-

> "10. (..) An officer shall not be called upon to retire his commission except by the Defence Board.
>
> (2) An officer may at any time be called upon by the Defence Board to retire or resign his commission for misconduct or for reasons other than misconduct.
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> (3) In the event of an officer failing to retire or resign when called upon to do so under this regulation, his commission shall be terminated".

It was the submission of the defendants that the letter which was written to the plaintiff on April 27, 1977, was written on the authority of the Defence Board, was in conformity with regulation 10 of the Defence (Officers) Regulations; and that the plaintiff, in his Statement of Claim, has expressly admitted these facts.

The plaintiff's attorney is resisting the summons submitted that the defendant's application was misconceived and that the true purpose of the defendants was to deny the plaintiff the opportunity of having his case heard. He argued that the Rules of the Supreme Court require that if a defendant wishes to rely on the statute of limitations it is a matter which should be

specially pleaded and if considered appropriate, argued as a preliminary issue at the commencement of the trial or as one of the issues at trial. The second point upon which the plaintiff relied was that it was incumbent upon the defendants to satisfy the Court having regard to the pleadings that the Defence Board as constituted on April 27, 1977 was properly constituted and entitled to act as such Board. He said that the plaintiff was vigorously attacking the constitution of the Defence Board which purported to interview him, and was contending that that particular Board was not a properly constituted public authority.

His third and final point was that even if the Board was held to be a properly constituted Defence Board, it was arguable as to whether the Public Authorities Protection Act applied in the instant case as that statute only avails where the public authority is exercising a positive duty and not merely an incidental power. In his view the matter admitted of the most ample argument which must be ventialated in a Court of trial. Mr. Levy cited as examples of positive duties to be found in the Defence Act, the provisions of Sections 173 and 137. Section 173 which deals with redress of complaints by Officers provides:-

> " 173 - (1) If an officer of the Jamaica Defence Force thinks himself wronged in any matter by a superior officer of authority and on application to his commanding Officer does not obtain the redress to which he thinks he is entitled, he may make a complaint with respect to that matter to the Defence Board.
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> (2) On receiving any such complaint it <u>shall be the duty</u> of the Defence Board to investigate the complaint and to grant any redress which appears to them to be necessary or, if the complainant so requires, the Defence Board shall make its report on the complaint to the Governor General in order to receive the directions of the Governor General acting on the recommendation of the Privy Council thereon:

So far as Section 137 is concerned, he referred to the opening words of the section which states:

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(1) Subject to the provisions of this section, the Defence Board may make rules (within Act referred to as Rules of Procedure).....

In answer to the Court, Mr. Levy said that so far as Section 9 (i) of the Defence Act establishes the Defence Board, any acts done by the Board relating to the command, discipline and administration of the Defence Force were not to be classified as possitive duties but merely as incidental functions of the Board.

Mr. Langrin cited, and distinguished, the case of Bradford - Corporation v. Myers (1916) 1 A. C. 242, while Mr. Levy cited the same case and relied upon it in support of his submissions. In that case a municipal Corporation was authorised by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhibitants of the district and they were also empowered to sell the coke produced in the manufacture of the gas. The Corporation contrated to sell and deliver a ton of coke to Myers and by the negligence of their agents the coke was shot through Myers' shop window. After the expiration of the period specified in the Public Authorities Protection Act (U.K) 1893, Myers brought an action against the Corporation and the Corporation pleaded the statute.

It was held that the act complained of was not an act done in the direct execution of a statute, or a discharge of a public duty or the exercise of a public authority, and that the Public Authorities Protection Act, 1893 afforded no defence to the action. At p. 246 of the report - Lord Buckmaster L. C. said:

" The position, therefore, is this:

> The appellants are authorised by Act of Parliament to carry on the undertaking of a gas company, and they are bound to supply gas to the inhabitants in the district. They also have power to sell coke, though if there were any other use to which it could be put they are not bound to do so, and the accounts which they are directed to furnish contemplate that the coke will be sold in the ordinary way. Now the act complained of was negligence in breaking the respondent's window, and that arose in the execution of a private obligation which the

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> appellants owed by contract to the respondent, for breach of which no one but the respondent was entitled to complain".

And at page 248 the learned Lord Chancellor continued:-

> " The act complained of arose because one of the servants of the appellants, acting in the course of an errand on which they had power to send him but on which they were not bound in the execution of any Act or in the discharge of any public duty or authority to send him, in breach of his common law duty to his fellow citizens, caused damage by his personal negligence".

Then Viscount Haldane at page 250 said:

> " It seems to me that the language of Section 1 does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it in the power of a public authority to make, but which it need not have made at all".

In my view this case is authority for the proposition that if a public authority does an act which is the direct result of a public duty or authority conferred upon it by law, such an act would fall within the provisions of the Public Authorities Protection Act. In other words when a public authority is exercising or purporting to exercise any of its primary functions in the manner authorised by law, the Public Authorities Protection Act applies but that Act may not apply where the public authority is merely exercising an optional incidental function.

The Defence Board is responsible for the command structure and the discipline of the Defence Force. The Defence Board is the only authority empowered by law to call upon an officer to resign or to retire his commission. If in a proper case the Board neglected to act under these regulations, the greatest harm could be done to the whole nation as conceivably, its security could be undermined and endangered. When the Defence Board acts or purports to act in pursuance of Section 10 of the Defence (Officers) Regulations 1962, the Board would, in my view, be indubitably exercising one of its primary functions, one which is a direct result of the public duty conferred upon it by the Defence Act and

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the Regulations made thereunder. The argument of the plaintiff that only the positive acts enumerated in the Defence Act, for example those contained in Section 173 of the Act would be caught by the Public Authorities Protection Act is without merit. To hold otherwise would be to hold that the plentitude of powers given by Section 10 of the Defence Act would be but subsidiary functions of the Board, an argument which is palpably untenable.

To my mind there is no avenue through which the plaintiff can escape from the provisions of the Public Authorities Protection Act. The defendants by entering a conditional appearance and then following up with the summons to strike out the claim, have made crystal clear their posture that if the action proceeds to trial they will be pleading the statute and relying upon it. Should I in those circumstances permit the action to continue with the attendant costs and waste of time until the day of trial, when in my view the plea that the action is statute barred is bound to succeed?

A similar question arose in the case of Riches v. Director Public Prosecutions (1973) 2 All E. R. 935. The facts were that in 1963, at the instigation of the Director of Public Prosecutions, criminal proceedings were commenced against the plaintiff and others in connection with lime subsidies under the Agriculture Act 1947. He was convicted in July 1964 and fined. On April 7, 1965 the plaintiff's conviction was quashed by the Court of Criminal Appeal. On March 6, 1972 the plaintiff brought an action against the Director of Prosecutions claiming damages for malicious prosecution. The Director applied to the master to strike out the statement of claim under R. S. C. Order 18 r.19, and under the inherent jurisdiction of the Court on the grounds that it disclosed no reasonable cause of action against the Director, that it was vexatious and an abuse of the process of the court, and that the facts and matters relied on occurred more than six years before the issue of the Writ and the Claim

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(if any) was barred by the Limitation Act 1939.

The Court of Appeal held that it was open to the Court to strike out a statement of claim as disclosing no reasonable cause of action where the facts alleged fell outside the limitation period, although in certain circumstances a plaintiff might be held to have a reasonable cause of action, for example where it could be shown that there might be an escape from the statute of Limitation under one of the exception enumerated in that Act. Where however, it was clear that the defendant was going to rely on the Statute of Limitations and there was nothing before the Court to suggest that the plaintiff could escape from it, the claim would be struck out.

Lawton L. J. gave the following reasons for his decision, at page 940 of the report:

> " I would like to add a few words about the problem which arises under the decision of Dismore v. Milton (1938) 3 All E.R. 762. That case has led in my judgement to much waste of time over the years which have gone by since it was decided. The object of R. S. C. Order 18 r. 19, is to ensure that defendants shall not to be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested set of facts which arises from time to time is when on the statement of calim it is clear that the action is statute barred and the defendant tells the Court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within any of the exceptions set in the Limitation Act, 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of the defence occupies time and wastes money; and even more useless and time consuming from the point of view of the proper administration of justice is that there should then have to be a summons for directions, an order for an issue to be tried, and for that issue to be tried before the inevitable result is attained. It seems to me that when that situation arises the comments of Lord Blackburn in Metropolitan Bank Ltd. v. Pooley are applicable. He said that a stay or even dismissal of proceedings "may often be required for the very essence of justice to be done". The White Book, having called attention to that statement by Lord Blackburn, goes on to say that the object is "to prevent parties being harrassed and put to expense by frivolous vexatious or hopeless litigation". It would be contrary to the public

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> interest that justice should be shackled by rules of procedure when the shackles will fall to the ground the moment the uncontested facts appear; and that is just this case".

I say with greatest respect that I entirely agree with the reasoning of Lawton L. J. quoted above and in my view the present litigation being hopeless ought not to be allowed to continue. The uncontested fact in this case is that the plaintiff is alleging that the issuance of the letter of April 27, 1977 is the proximate act which led to his forced retirement from the Defence Force. The plaintiff for his own reasons neglected to file his claim until more than twelve months had elapsed from the time his cause of action (if any) arose.

I have not been called upon to examine or determine the merits (if any) of the plaintiff's claim against the defendants and I have refrained from straying on to those pastures. I am convinced that one of the essential functions of the Defence Board is to determine who shall remain officers of the Defence Force. It may be called a statutory duty or a statutory authority and is not to be confused with a private duty owed to a private contractor or with some activity far removed from the essential functions of the public authority.

Having regard to the points of law taken by the defendants I am convinced that the continuance of the plaintiff's action would be an act in futility and though not unmindful of the consequences to the plaintiff, I order that his Statement of Claim be struck out as disclosing no reasonable cause of action.

I. D. Rowe,
Judge.
14th December, 1978.