JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 60 & 61 of 1983

BEFORE: The Hon. Mr. Justice Zacca - P.
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

BETWEEN:	LINTON THOMAS	PLAINTIFF/APPELLANT
A N D:	THE MINISTER OF HOUSING	DEFENDANT/RESPONDENT
	A N D	
BETWEEN:	IVANHOE JACKSON	PLAINTIFF/APPELLANT
A N D:	THE MINISTER OF HOUSING	DEFENDANT/RESPONDENT

Carl Rattray Q.C., & Miss Brenda Warren for the Plaintiffs/Appellants

R.G. Langrin & Wendel Wilkins for Defendant/Respondent

March 5, 6 & June 22, 1984

ROWE J.A.

The two appeals raised identical points of law and were taken together. Bingham J., had on July 20, 1983 set aside default judgments which had been entered against the respondent in favour of each of the appellants, on the ground that they had been irregularly obtained and had gone on to dismiss each action on the ground that each/one was unsustainable in law. Mr. Rattray advanced two grounds in support of these appeals. Bingham J., he said, erred in law when he held:

> "(a) that the Minister of Housing could not be sued in his capacity as a Corporation Sole and;
>
> (b) that the Minister of Housing when contracting as a Corporation Sole was a servant or agent of the Crown."

Both appellants described themselves as building contractors. Although the contractual sums in each case were dissimilar, both appellants alleged that they contracted with the respondent in his capacity as a Corporation Sole incorporated and existing under the Housing Act of 1968, to construct houses in the Charlemont Housing Scheme, St. Catherine, and that prior to the

completion of the contract or contracts, the respondent unilaterally terminated the contract or contracts whereby they suffered loss and damage. The appellant Thomas in a specially endorsed Writ filed on October 12, 1982 claimed that his contracts were terminated in December 1980 while the appellant Jackson filed his specially endorsed Writ on August 31, 1982. Both Writs were served on the respondent and appearances were entered on his behalf by his attorneys the Director of State Proceedings. Judgments in default of defence were entered in the case of Jackson on December 1, 1982 for $48,092.23 with costs to be taxed and in the case of Thomas on March 23, 1983 for $45,854.60 with costs to be taxed. By Summons which were later amended the respondent sought and obtained orders setting aside the default judgments and in addition dismissing both actions as being unsustainable in law.

In support of his grounds of appeal, Mr. Rattray submitted that section 3 of the Housing Act creates the Minister responsible for Housing, a Corporation Sole, with perpetual succession and capacity to acquire, hold and dispose of land or property of whatever kind. The Minister's powers under the Housing Act, he said, enable the Minister to prepare proposals for the creation of Housing Schemes and under section 14 of the Act where land has been acquired for the purposes of the Act, the Minister can erect houses on those lands for the purpose of giving effect to such Schemes. What the Minister did in contracting with the appellants was, in his view, clearly done for the purposes of the Act. Mr. Rattray further submitted that a Corporation Sole is a separate legal entity and that when such a Corporation is created by statute which sets out its duties and powers, as does the Housing Act, and the Statute contains incidents such as a separate fund to meet the Corporation's needs and from which its liabilities can also be met, and such a Corporation Sole

contracts in its own name, it is not acting as a servant or agent of the Crown but rather as a principal and consequently its legal position cannot fall under the umbrella of the Crown Proceedings Act. In its present form, the Housing Act contains no provision that the Minister of Housing can sue or be sued, but, argued Mr. Rattray, that is immaterial, as it is an incident of every corporation, unless expressly prohibited by statute, to possess the right to sue and to be sued, and he drew attention to the provisions of section 28 of the Interpretation Act.

The Housing Law, Law 67/55 became effective on April 1, 1956. It provided for the appointment of a Director of Housing who would be a Corporation Sole with power to acquire, hold and dispose of land and other property of whatever kind for the purposes of the Housing Law. That Law made specific provision in section 3 (3) that:

> "The Director may sue and be sued by the name of the Director of Housing. ....."

In 1968, the Housing Law of 1955 was repealed and replaced by the Housing Act 55/68. The Minister responsible for Housing was now created a Corporation Sole and he was clothed with capacity to acquire, hold and dispose of land and other property of whatever kind but the statutory power to sue and be sued was not conferred upon him. Earlier in 1968, the Interpretation Act had been passed as Act 8/68, and its 28th section made a general provision for the incorporation of certain powers and privileges in all Acts passed thereafter which created bodies corporate and which expressly stated that the provisions of section 28 of the Interpretation Act were to be applicable to them. The power first enumerated in section 28 is the vesting in such a corporate body of the power to sue in its corporate name. However, the general enabling power of section 28 was not incorporated into the Housing Act and therefore no reliance can be placed upon that section of the Interpretation Act to delineate the powers and

responsibilities of the Minister of Housing under the Housing Act.

Is there anything internal to the Housing Act to indicate whether or not Parliament intended that the Minister as a Corporation Sole should have power to sue or be sued in his own name? On the state of the law between 1955 and 1958, no question could arise as to the amenability of the Director of Housing to be sued. The law specifically so provided. For the purposes of this judgment, there are other provisions of the Housing Law of 1955 which demand attention. A Housing Fund was established under section 55 of that Law which was said to be "available for the purposes of the law." Detailed provisions were made for the building up of the Housing Fund and the enumerated sources of revenue were:

> "(a) Amounts received directly from government
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> (b) Amounts received by the Director from sales or rental of lands or buildings in Housing Schemes
>
> (c) Interest on investments of the Housing Fund
>
> (d) Any other sums accruing to the Fund (see section 56 of Law 67/55)"

The then Minister of Housing had a duty to prepare Housing Estimates, submit them first to the Governor General in Council for his approval and thereafter to the House of Representatives for final approval. It was then the duty of the Accountant General to issue and apply moneys out of the Housing Fund on the warrant of the Minister for the purposes expressed in the several sub-heads of the Estimates. Consequently the Housing Fund could only be used for the purposes approved by the House of Representatives as contained in the Housing Estimates or as expressed in Resolutions of the House directed to the Minister in sections 58 (5) and 59 of Law 67/55.

Another and very special provision was enacted in section 53 of Law, 67/55. That section exempted the Director of Housing and his servants or agents from personal liability for anything done in the execution or intended execution of the Housing Law and significantly went on to provide:

> "And all damages and costs which may be recovered against the Director in any proceedings in respect of acts so done shall be defrayed from the General Revenue of the Island."

The purpose and intendment of this provision was that the Housing Fund was not to be considered as a source from which damages and costs could be paid and successful suitors could look only to the Consolidated Fund for satisfaction.

Certain important changes in relation to law 67/55 were introduced by section 33 of the Crown Proceedings Act of 1958. The long Title of the Crown Proceedings Act states clearly enough the ambit and purposes of that Act in this language:

> "A Law to amend the law relating to civil liabilities and rights of the Crown and to civil proceedings by and against the Crown, to amend the law relating to the civil liabilities of persons other than the Crown in certain cases involving the affairs or property of the Crown, and for purposes connected with the matters aforesaid."

As is well known the statute then went on to provide inter alia, that in respect of torts committed by its servants or agents the Crown was as fully liable as if it were a natural person of full age and capacity. No longer therefore did the citizen have to tread the circuitous route of Petition of Right or other similar process (See section 11 of the Act of 1958 and the first schedule thereof) and be at the discretion of the Crown in respect of torts committed by the servants or agents of the Crown in the course of their duties or for breaches of contract committed by such persons. Now persons aggrieved had a direct remedy and in accordance with the provisions of section 14 (2) "Civil proceedings against the Crown shall be instituted against the Attorney General."

With these provisions of the Crown Proceedings Act in view, the legislature proceeded to amend sections 3 and 53 of the Housing Act 1955, firstly by deleting subsection 3 of section 3 and secondly by deleting the latter half of section 53. The amendment to section 3 repealed the power of the Director to sue his liability to be sued in his corporate name, while the amendment to section 53 removed the provision that damages and costs recovered against the Director should stand charged on the General Revenue of the Island.

Under the Housing Law of 1955, the Director of Housing was vested with the performance of highly sensitive, highly relevant and extremely important governmental functions. While generally the Crown could not be sued, the scope of the functions of the Director of Housing were such that the legislature conferred upon him the special power to sue and afforded those with whom he would contract or those who would be injuriously affected by his actions, the power to sue him. Significantly, however, the Housing Fund was not to be burdened by the result of such litigation and the governmental nature of the Director's functions was further underlined by the statutory recourse to General Revenue for satisfaction of adverse judgments and costs. There could be but one explanation for the amendments introduced into the Housing Act by section 33 of the Crown Proceedings Act, and that is that the Director of Housing, although still a Corporation Sole, would therefore be in the same position as other servants or agents of the Crown for whose torts or breaches of contract, the Crown could be directly sued through the Attorney General. That interpretation would explain why all reference to the General Revenue in section 53 of the Housing Law 1955 would thereafter be un-necessary.

Between 1958 and 1968 there was no express statutory authority for the Director of Housing to sue or to be sued in his capacity as a Corporation Sole. In the latter year, the Housing Act was passed. It repealed the Housing Law of 1955, and substituted the Minister of Housing for the Director of Housing. The Housing Fund established under the 1968 Act was similar to that in the 1955 Law and the purposes for which the Housing Fund could be applied were also similar. I repeat, the Housing Fund established under the Housing Act of 1968 can only be applied for the purposes allocated and enumerated in the Housing Estimates. This would exclude the possibility that the Housing Fund is available to the Minister for any purpose he may in his direction approve or the possibility that a Judgment creditor could garnishee the Housing Fund.

Mr. Rattray identified three capacities in which, he urged the Court to say, the Director of Housing was permitted to act in 1955. These he said were, firstly, as a Corporation Sole, secondly, as a servant or agent of the Crown and thirdly, as an individual. The statute negatives any personal liability, but Mr. Rattray argued that the provision in section 3 (3) of the Housing Act was intended to relate to his position as a servant or agent of the Crown, as no special statutory provision was necessary to cover the situation when he acted as a Corporation Sole.

On this line of argument, the repeal contained in section 33 (2) of the Crown Proceedings Act 1958 was applicable only to those situations where the Director was being sued as a servant or agent of the Crown and not when the proceedings were brought against him as a Corporation Sole. In further support of this argument, Mr. Rattray referred to section 62 (c) of the Housing Act of 1968 which provides that:

> "as from the commencement of this Act (1/2/69) the following provisions shall have effect:
>
> (c) the Minister shall have all the rights, privileges and advantages and all liabilities and obligations, to which the Director of Housing was immediately before the commencement of this Act entitled or, as the case may be subject."

and submitted that the decision of Duffus C.J. in McKenzie v. Minister of Housing etc, E 200/72 unreported, was relevant, and was to be preferred to the submission of Mr. Norman Hill then appearing as Counsel for the Ministry of Housing, the defendant. Mr. Hill had submitted that the transitional provision quoted saved only acts done by the Director while the Housing Law of 1955 was a subsisting Law. Duffus C.J. did not agree that the subsection limited the transitional powers to matters "pending at the time the Act came into force." For myself, I do not see to what else this saving provision could be referrable. Certainly it could not mean that Parliament had gone through the laborious process of drafting entirely new Housing legislation, in the process of which it repealed the original Law and substituted a new statutory regime and nevertheless by the transitional provision put the Minister in the same legal position as the Director for all purposes as if the new Act had not been passed. To so conclude would be to accuse the legislature of an act in futility.

Mr. Rattray's most potent submission was that the authorities establish that when departments or ministers of government are incorporated by statute without an express provision to sue or be sued they are entitled to sue in their own name and are liable to be sued, and he relied upon Graham & Others v. His Majesty's Commissioners of Public Works and Buildings (1901) 2 K.B. 781 and upon Minister of Works and Planning v. Henderson & Others (1947) K.B. 91.

Graham v. His Majesty's Commissioners, supra, concerned an alleged breach of building contracts by the defendants who were a statutory corporation. Ridley J., said of the facts in that case:

> "The Commissioners of Works make these contracts, in the course of their duty, in all parts of the country in respect of works required for His Majesty's Government. I think the true inference is that they make them in their own capacity."

and later he said:

> "I think this is a case in which the defendants have expressly contracted for themselves."

As the law stood in 1901, unless the Commissioners could be found to be acting as principals the plaintiffs could not recover damages. Since the passing of the Crown Proceedings Act there is direct remedy against the Crown in contract and in tort.

Phillimore J., in the same case reached the same conclusion as Ridley J., and in the course of his judgment attempted to lay down a broad juridical base for the suit against the Commissioners. He said:

> "Now, the only question for us is whether the Commissioners of Public Works and Buildings are not of the class of persons well described by Lindley L.J. in Dixon v. Farrer as 'a normal defendant sued as representing one of the departments of the State." There is no reason in principle why they should not be. As I have pointed out, there is nothing derogatory to the Crown, and there is very great convenience, in the establishment of such bodies. The mere fact of their being incorporated without reservation confers, it seems to me, the privilege of suing and the liability to be sued." (emphasis mine)

Phillimore J., recognized that the fruits of any such judgments could not be satisfied by execution as no execution could go against the property of the Crown. To this should be contrasted the attitude of the appellants in the instant case who had attempted to levy execution against the property of the Ministry of Housing.

Some 45 years elapsed until the decision of Wynn-Parry J., in Minister of Works and Planning v. Henderson. The plaintiff was the statutory successor of the Commissioner of Public Works and Building and he brought an action against squatters who had illegally occupied the Duchess of Bedford House, seeking an injunction to restrain them from occupation and trespass upon the premises. The defendants objected to the action on the ground that the Minister of Works was not competent to sue in his capacity as such Minister and that the action should have been brought by the Crown through the Attorney General. Wynn-Parry J., did not accede to this argument. He quoted the passage from Phillimore J., already referred to herein and commented.

> "That is a decision which has stood unchallenged in the courts since it was given. True, it is commented on adversely by Robertson in his work, but the statement made by Phillimore J., is one of general application and sitting here as a Judge of first instance, I feel bound to follow the reasoning of that learned judge, which, indeed commends itself to me."

When he came to deliver judgment in Gilleghan v. Minister of Health (1932) Ch. 86. Farwell J., would have been prepared to follow the reasoning of Phillimore J., in Graham v. Public Works Commissioner (1915) 1 K.B. 45 at 52 without expressing an opinion of his own as to the correctness thereof and he would leave the question open for a decision of the Court of Appeal, but he was able to distinguish the position of the Minister of Health who was constituted a corporation sole for the one purpose of holding and acquiring land.

Said Farwell J.,

> "That is the only purpose for which he is created a corporation sole. If it had been intended to create him a corporation sole for all purposes, with the usual results, there would be no object to sub-section (4). That being so, I do not think that the fact that the Minister of Health is constituted a corporation sole for the one purpose of holding and acquiring

> "and is sufficient to take this case out of the well established rule, and the provision that the Minister may sue and be sued by the name of the Minister of Health is wholly insufficient to do so."

The decision in Gilleghan v. Minister of Health goes much further that the respondent's arguments in the instant case as there is no statutory provision in the Housing Act of 1968 that the Minister may sue and be sued.

Mr. Langrin's responses to the several submissions made on behalf of the appellants were that the Minister of Housing derived his authority from section 77 of the Constitution of Jamaica and that the subject of Housing was part of his general responsibility and he is therefore in his capacity as Minister of the Crown the person to carry out the purposes and policy of the Housing Act. Further, having regard to the history of the Housing Acts and the deliberate repeal of the power to sue and be sued first contained in the Housing Law of 1955, there is now no general power in any statute enabling the Minister of Housing as a Corporation Sole to sue or be sued. He referred to numerous statutes in Jamaica where a Corporation Sole is created and in some of which the power to sue and be sued is enacted whereas in others it is omitted.

Each statute creating a Corporation Sole must be individually examined to discover whether from its terms the Corporation Sole is empowered to sue and is liable to be sued. Accordingly I do not think that an examination of the several statutes referred to by Mr. Langrin in which a person or an official is created a Corporation Sole either with or without power to sue or liability to be sued, can lend assistance to the interpretation of the relevant provisions of the Housing Act.

Mr. Langrin sought to support his arguments with the decision of Upjohn J., in Merricks v. Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food (1955) 1 Ch. 567. The salient facts are that under powers conferred by the Agricultural Marketing Act 1931 and 1938, a substantial scheme for the marketing of potatoes was approved by the Minister who laid it before each House of Parliament. The plaintiff issued a writ seeking to prevent the Minister from proceeding with the substantial scheme. The defendant was sued both in his personal capacity and as a Corporation Sole, the Minister being so constituted by a relevant act of Parliament.

The Attorney General of the day who later became Lord Chancellor and still later a distinguished Lord of Appeal in Ordinary took objection to the proceedings as a preliminary point, and submitted that the wrong defendant was before the Court, all parties conceding that if the Minister was acting as a representative of the Crown, by virtue of section 2 of the Crown Proceedings Act (U.K.), the action could not succeed as the proper defendant would in that case be the Ministry of Agriculture. Equally distinguished Counsel for the plaintiff made submissions which are referred to in the judgment and which I will do well to recall:

> "Mr. Walker Smith's submission is that the action is not against the Minister in his representative capacity at all: It is against the Minister in another capacity. He submits that the Minister has two other capacities: first, he may have an official capacity, not as representing the Crown but as a person designated to carry out certain functions prescribed by Act of Parliament, that is to say, a person designated to carry out the function of laying before each House of Parliament a draft of the Scheme and, if the scheme be approved, to make an order, that, he submits, is done as a person designated and not as a person representing the Crown."

> "Alternatively, he submits that the functions of the defendant are purely personal and not in any official capacity at all."

Upjohn J., found that from start to finish Mr. Heathcoat-Amory was acting as an officer representing the Crown, then he went on to discuss the probability of there being the three capacities urged upon him by the plaintiff's counsel. He said:

> "I am not at all satisfied that it is possible to have the three categories which were suggested ..... I understand the conception of the first and third categories, but I confess to finding it difficult to see how the second category can fit into any ordinary scheme. It is possible that there may be special Acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity; but in the normal case where the relevant or appropriate Minister is directed to carry out some function or policy of some Act he is either acting in his capacity as a Minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former. I find it very difficult to conceive of a middle classification."

Mr. Rattray sought to distinguish this case on the basis that the Minister of Housing has been given power to engage in major commercial activity, that he is the only Minister of Government with such extensive powers and that what is alleged against him in the instant case goes beyond mere formulation of policy and brings the respondent squarely within the special category acknowledged by Upjohn J.,

I think that the weakness in this argument lies in his further submission that the Minister of Housing is in the same position as the former official, the Director of Housing. It is true that a part of the Minister's responsibilities is broadly similar to those of that former official, but as I have sought to demonstrate earlier, that official could not be sued as a Corporation Sole after 1958.

In suit No. E 200/72 L.C. McKenzie Ltd sued the Minister of Housing a Corporation Sole established under the Housing Act 1968 and the Commissioner of Lands seeking an injunction to restrain them from taking steps to compulsorily acquire certain lands known as Hampstead Park in St. Andrew. The Attorney General applied in limine for an order to strike out the proceedings against both defendants on the ground that the entire proceedings were misconceived as both defendants were entitled to the protection of the Crown Proceedings Law of 1958 whereby no order for injunction could be granted against the Crown and if any action lay, the proper defendant was the Attorney General. Duffus C.J., posed to himself the important question to be kept in the forefront of his mind as he examined the status of the Minister of Housing thus:

> "Does he function under this Act as an autonomous and completely independent body or does he perform his various functions as a servant or officer of Her Majesty?

The learned Chief Justice found the clear answer to his question to be:

> 'I am unable to accept the proposition that the mere fact of incorporation by itself puts an end to the relationship of principal and agent in respect of acts done by the Minister pursuant to the powers given to him by the Act. In my view whatever functions he performs under the Act are performed as a servant or agent of the Crown."

Towards the end of his judgment Duffus C.J., placed the matter beyond doubt when he said:

> "..... the Minister of Housing has no power to sue or liability to be sued and the provisions of the Crown Proceedings Act apply to him therefore the person to sue or to be sued in respect of all matters arising under the Housing Act of 1968 is the Attorney General."

That judgment was delivered on November 13, 1972 and has ever since informed and influenced the practice in respect of suits i in matters arising from the implementation of the powers of the Minister of Housing under the Housing Act. It is a decision which in my view accords with principle and authority and ought to be affirmed.

It is for these reasons that I was of opinion that the appeal should be dismissed with costs to the respondent to be agreed or taxed

Zacca P.

I agree.

Campbell J.A. (Ag.)

I agree.