

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-03251

Between

Gillian Lewis

Claimant

And

Chief Fire Officer

1st Defendant

Tobago House of Assembly

2nd Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: Wednesday 3rd March, 2021

Appearances:

Claimant: Ms. J. Roberts-Antoine

First Defendant: Ms. S. Dass and Ms. M. Belmar-Williams

Second Defendant: Ms. K. Anderson

DECISION ON APPLICATION

1. There is one application before the court of January 7, 2021 on the part of the first defendant for an order that the Reply filed on November 27, 2020 be struck out. Further, in its pleaded case the first defendant has raised a preliminary issue that it is not a proper party to the claim. Both defendants have additionally pleaded that the claim is statute barred and ought to be dismissed. In her Reply the claimant has averred that the claim was not filed outside of the limitation period and further that if it was, the court ought to disapply section 3(1)(a) of the Limitation of Certain Actions Act. These arguments shall all be dealt with together.

Proper party to the claim

2. The claim was filed in September 11, 2018 alleging injury arising out of an incident that occurred on the 24th July, 2014 at the Crown Point First Station where the claimant was assigned as officer in charge of the Black Watch shift. When the claimant arrived for work she was informed that the entire compound including the interior walls were allegedly been fumigated for a mosquito infection that day by the Public Health Department of the Tobago House of Assembly. The claimant detected an odour and within two hours began experiencing respiratory difficulty, nausea, tightening of the chest and a burning sensation. These were accompanied by headaches, dizziness and shortness of breath. The claimant alleged that seventeen other co-workers on duty at the time also made similar complaints.

3. The claimant was taken to the Scarborough General Hospital where and ECG and blood tests were done and medication was prescribed. The statement of case at paragraph 13 alleges that the claimant was diagnosed with having reacted to a chemical used in fumigation called Propxyl. She spent the night at the hospital and received further treatment for coughing, painful blisters in her nostrils, diarrhoea and chest congestion. Upon discharge on July 25, 2014, she suffered loss of appetite, diarrhoea, nostril blisters, blood stained mucus, sore throat, dizziness, headaches and burning in the chest. She was at that time given seven days sick leave.
4. She visited the doctor once again on August 4, 2014, was referred for an X-ray and given five days sick leave. Paragraph 20 of the Statement of Case avers that she was diagnosed with pulmonary infection complications and pneumonitis of the right and left lung. The statement of case although having referenced the medical report as having been annexed does not seem to have the said document annexed. It must be noted that despite the claimant being entitled to file an affidavit in opposition to the application to strike, the claimant has failed so to do.
5. Two separate replies were filed by the claimant, one in answer to each defendant. The letter which was omitted from the statement of case was attached as GL1 to the Reply. That letter is entirely typewritten except for the date written thereon by handwriting. It carries the date of October 9th 2014. The letter states that a tentative diagnosis was made on July 26th 2014 and a diagnosis, presumably final was made on August 4, 2014.
6. On January 27, 2021 this court extended the time for the claimant to file and serve submissions on the issues of limitation, property party and the striking out application to February 10, 2021. On that day the claimant filed

and served written submissions but chose to address only the issue of limitation.

7. In determining whether the first defendant has urged the court to apply the test set out by Their Lordships of the Court of Appeal in **The Attorney General of Trinidad and Tobago v Alison Ayers** Civ App P.247 of 2019, in particular the dicta of Justice of Appeal Rajkumar¹.

- a. *Does the description of the first defendant clearly identify who the claimant intended to sue (the objective test).* The answer is pellucid in this case having regard to paragraph 2 of the statement of case which identifies the first defendant as being responsible for all operational duties and responsibilities of the Fire Service. The claimant has thus clearly identified that she intends to sue the CFO because he is responsible for all operations. She has not named the office holder so that she purports to sue the office.
- b. *Whether the description is accurate but the defendant is misnamed.* The answer here is that it appears that the description of the first defendant by the claimant is in fact accurate having regard to the link made to the first defendant at paragraph 2 of the statement of case.
- c. *Whether the first defendant lacks legal capacity.* It is clear to the court that the first defendant is capable being sued in relation to decisions made by the office holder which are judicially reviewable by virtue of the performance of his functions that fall into the realm of public law. Liability for

¹ See paragraphs 23, 29 to 32 and 41 to 43.

negligence is another matter and it does not appear to be a case that the claimant alleges personal liability on the part of the first defendant as she has not named him and has made a general averment in relation to the duties of the office holder only at paragraph 2 of the statement of case.

- d. *Is it alleged that the first defendant played a role in the circumstances that led to the commission of the tort.* This is the crux of the matter in this case. The claimant has averred that either the authority who fumigated the premises were responsible for her injuries or the person who permitted them to fumigate the premises and there are full particulars set out at paragraph 20 of the statement of case. It is alleged that the Chief Fire Officer failed to take any or any reasonable care to see that the claimant was reasonably safe in using the premises, that he caused or permitted the premises to be used by the claimant and he failed to maintain a safe place of work². Clearly, particulars of negligence (b) and (c) relates to the alleged actions of the office holder of CFO who is responsible for the operational matters of the Fire Service. These are allegations in the law of Tort and are independent from the allegations made against the second defendant. It is not averred that the second defendant exercised any control over the Fire Service operations inclusive of the occupation of stations. The case against the second defendant is that of negligence in relation to the implementation of the Health and Safety policy in Tobago. There is therefore no mistake as to

² See paragraphs 20 (a), (b), and (c).

name or otherwise so that there is no misnomer or misidentification.

8. It follows therefore that the claimant has not sued the proper person for the alleged tortious acts of negligence, namely the State. Section 4 of the State Liability and Proceedings Act Chap 8:02 reads;

4. (1) Subject to this Act, the State shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject— (a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer;

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.

(2) No proceedings shall lie against the State by virtue of subsection (1)(a) in respect of any act or omission of a servant or agent of the State unless the act or omission would apart from this Act have given rise to a cause of action in tort against that servant or agent or his estate.

(3) Where the State is bound by a statutory duty which is binding also upon persons other than the State and its officers, then, subject to this Act, the State shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.

(4) Where any functions are conferred or imposed upon an officer of the State as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the State in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the State.

(5) Any written law which negatives or limits the amount of the liability of any Government department or officer of the State in respect of any tort committed by that department or officer shall, in the case of proceedings against the State under this section in respect of a tort committed by that department or officer, apply in relation to the State as it would have applied in relation to that department or officer if the proceedings against the State had been proceedings against that department or officer.

9. In that regard the claimant was duty bound to name the Attorney General as the nominal defendant having regard to the pleaded case. This was not a case of the right defendant having been called by the wrong name. The case was therefore void ab initio against the first defendant who the claimant clearly intended to sue. While there appeared to be a cause of action it was not against a properly constituted defendant on the pleaded case. as she truly intended to bring action against the state. To that end the claimant has misidentified the first defendant.
10. As a consequence, substitution will not assist the claimant. The claim against the first defendant will therefore be dismissed. There is therefore no need to determine the application to strike made by the first defendant.

The limitation point

11. The relevant parts of the Limitation of Certain Actions Act Chap 7:09 are as follows;

3. (1) The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say: (a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort;

5. (1) Subject to subsection (6), this section applies to any action for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or any enactment or independently of any contract or any such enactment where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) Subject to subsection (3), an action to which this section applies shall not be brought after the expiry of four years from—
(a) the date on which the cause of action accrued; or
(b) the date on which the person injured first acquired knowledge of the accrual of the cause of action.

7. (1) In this Act, a person first acquired knowledge when he first became aware of any of the following facts:
(a) that the injury in question was significant;
(b) that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
(c) the identity of the defendant;

(2) For the purposes of this section an injury is significant if the person would reasonably have considered it sufficiently serious to justify his instituting proceedings against a defendant who did not dispute liability and was able to satisfy a judgment.

(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably be expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of such medical or other expert advice as it is reasonable for him to seek, but there shall not be attributed to a person by virtue of this subsection, knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain that advice and where appropriate to act on that advice.

12. The second defendant (THA) submitted that the claimant alleged that she was diagnosed with pulmonary infection after the visit to her private doctor on August 4, 2014. Therefore, pursuant to sections 3(a) and 5(2) of The Limitation of Certain Actions Act, the time limited for the claimant to file a claim would have expired four years after that date. For reasons best known to the THA, it submitted that the statement of case was filed on July 8, 2019 some eleven months after the period of limitation had elapsed without mentioning the claim form. This formed the factual basis for the reckoning of time throughout its submissions. However, the claim form which is the originating document that begins the claim was in fact filed on September 11, 2018 about one month after the date the time for filing allegedly expired according to the THA.

13. The claimant filed no affidavit and so the court has had to examine the pleaded case to determine whether the claim was filed out of time.

Paragraph 10 sets out that the claimant was admitted to hospital immediately after the incident on July 24, 2014, where a series of blood tests were conducted, an Echo Cardiogram and other medical examinations were performed. Intravenous therapy was administered along with medication. The only reasonable inference from the pleaded case is that the incident caused her to suffer some issue that required medical attention. The pleaded case is that seventeen other co-workers also suffered similar symptoms at that day at that time. They were all transported to the same hospital immediately thereafter. So it is not to say that the claimant would not have appreciated the link between her medical discomfort and the incident. This is also clear from paragraph 12 of the statement of case that avers that she enjoyed good health prior to the incident.

14. More importantly, the claimant averred that she was diagnosed with having reacted to a chemical used in fumigation called Propxyl used in the said spraying exercise at paragraph 13 of the statement of case and she remained overnight at the hospital.

15. The claimant has submitted that the date of August 4th could not be the date on which the claimant became aware of the accrual of the cause of action because “This diagnosis was never fully explained to her at the said time”³.

16. The court must apply the provisions of section 7 in making such a determination. The pleaded case gives no assistance in relation to any of the criteria for knowledge set out at section 7. The averment alone of course is therefore no answer to the issue as the answer requires a finding

³ See paragraph 8 of the Reply filed November 27, 2020.

of fact in the absence of evidence by the claimant. The court is of the view that it should make findings on pleadings and that fairness demands that the claimant be heard on the factual issue and that the THA be given the opportunity to cross examine the claimant thereon. The court therefore certifies that the issue of fact of the date upon which the claimant first acquired knowledge of the accrual of the cause of action shall be tried as a preliminary point and the parties shall be heard thereafter. The following order shall therefore be made;

- i. The claim against the first defendant is struck out.
- ii. The name of the first defendant shall be removed from all intituling in documents filed hereafter and the Tobago House of Assembly shall be named and described therein as "Defendant".
- iii. The claimant shall pay to the first defendant the costs of defending the claim in the sum of 55% of the prescribed costs of the claim the value of the claim being one for \$50,000.00
- iv. The claimant shall pay to the first defendant the costs of the application to be assessed by a Registrar in default of agreement.
- v. The claimant shall file and serve affidavits in relation to the preliminary issue by March 26, 2021.
- vi. The second defendant to file and serves affidavits in answer if necessary by April 16, 2021.
- vii. Leave is granted to the parties to cross examine opposing parties on their affidavits.
- viii. Each party is permitted twenty minutes cross examination only.
- ix. The preliminary issue shall be tried on April 12, 2021 at 9:30 a.m. by virtual hearing.

Ricky Rahim

Judge