

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE  
(CIVIL)

BVIHCV2007/0137

Between

LORETTA FRETT  
(As Executor of the Estate of Jeuel Simeon Frett, deceased)

Claimant

-And-

ATTORNEY GENERAL OF THE VIRGIN ISLANDS  
BVI HEALTH SERVICES AUTHORITY

Defendants

**Appearances:**

Dr. J.S. Archibald QC and Ms. Anthea Smith for the Claimant

Mr. Baba Aziz for the First Defendant, the Attorney General of the Virgin Islands

Mr. Gerard Farara QC and Ms. Tamara Cameron for the Second Defendant, BVI Health Services Authority

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2009: July 29, November 19  
2010: January 26  
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JUDGMENT

CATCHWORDS

Application for summary judgment – test to be applied- deceased died of mesothelioma allegedly contracted during course of employment with government – deceased's employment with government transferred to second defendant by virtue of statutory enactment- factual issues to be tried- matter should proceed to trial - preliminary legal issue of whether there was any relationship between deceased and second defendant when deceased was allegedly exposed to asbestos particles – sections 28 and 29 of the BVI Health Services Authority Act, 2004 applied- summary judgment granted –trial to proceed solely against Attorney General

HEADNOTE

The claimant claims against both defendants for damages under the Causes of Action (Survival) Act and the Fatal Accidents Act as well as interest and costs. The particulars of the claim allege that the deceased developed mesothelioma caused as a result of his exposure to asbestos particles while in the employment of the BVI Government during the period January 2001 and June

2001. On 22 September 2006, he died at the age of 56. It is also alleged that at no time whatsoever, prior to January 2001 or after June 2001, was the deceased otherwise exposed to asbestos and that he did such work after being instructed to do so by an employee of the Health Department of the BVI. The claimant, as executor of her deceased husband's estate, claims that both defendants were negligent and/or in breach of the contract of employment.

Pursuant to CPR 15, the second defendant applies for summary judgment on the basis that the claimant's claim has no real prospect of success. The second defendant admits that the deceased was employed by the BVI Government by virtue of the BVI Health Services Authority Act, 2004 and that the deceased's employment was subsequently transferred to the service of second defendant. However, the second defendant denies that it is liable for the illness and subsequent death of the deceased and argues that none of the acts which led to the deceased's illness and subsequent death took place during the period when the deceased was in its employment. The second defendant further argues that whilst the deceased's employment was transferred to it, none of the liabilities or duties owed by virtue of the previous employment contract passed from the Government to it. The second defendant relies on section 28 of the BVI Health Services Authority Act for its full terms and legal effect. The second defendant also alleges that the claimant's cause of action arose on a date and time when there was no contractual relationship between it and the deceased as the deceased's contract of employment was transferred on 11 November 2004. The second defendant admits that there are conflicting factual issues which are fit for trial but submits there is a legal issue to be dealt with summarily with regards to its relationship with the deceased when he was allegedly exposed to asbestos.

**HELD:**

- (1) There is a multitude of factual issues to be tried. In such a case, the claim should proceed to trial. However, the preliminary legal issue raised by the second defendant, of whether there was a relationship between the deceased and the second defendant at the date when the deceased was allegedly exposed to asbestos particles in 2001, if resolved in the second defendant's favour, will summarily dispose of the claim against the second defendant.
- (2) Section 28 of the BVI Health Services Authority Act applies to the deceased. The section clearly limits the relevant date of employment of the deceased to the date of the coming into force of the BVI Health Services Authority Act which is 11 November 2004 and not a date prior to that, i.e., 2001, when the deceased is alleged to have been exposed to asbestos particles.
- (3) It is plain that section 28 does not fix the second defendant with or transfer any liabilities of the Government which arose prior to the coming into force of the Act.
- (4) A claimant's duty is to set out in the claim form or in the statement of claim a statement of **all** the facts on which the claimant relies. A claimant should properly plead his case and since section 29 was not pleaded, the court should not countenance such practice.
- (5) Out of an abundance of caution, section 29 is addressed. The section is plain and unambiguous. It is clearly distinguishable from section 28. It deals with the Transfer of Government contracts of employment and service to the second defendant and consequently, it has no application to the present case. Indeed, section 29 operates to the express exclusion

of the classes of persons referred to in section 28 and since the claimant admits that section 28 was applicable to the present case, by extension, she admits to the exclusion of section 29.

- (6) Applying section 28, there was no contractual relationship between the second defendant and the deceased at the time when the deceased was allegedly exposed to asbestos in 2001.
- (7) This is an appropriate case to be disposed of summarily. The second defendant has shown that the claim against it has no real prospect of success.

#### **Cases referred to and considered in the judgment**

- (1) Swain v Hillman and another [2001] 1 All ER 91.
- (2) Boston Life and Annuity Company Limited v Dijon Holdings Limited (BVIHCV2006/0070) – unreported.
- (3) Alfa Telecom Turkey Limited v (1) Cukurova Finance International Limited (2) Cukurova Holdings AS, HCVAP2009/001, in the Court of Appeal of the Territory of the Virgin Islands. Judgment delivered on 16 September 2009.
- (4) Three Rivers District Council v Bank of England (No. 3) [2001] 2 All E.R. 513.
- (5) The Bank of Bermuda Limited v Pentium (BVI) Limited and Landcleve Corporation, BVI Civil Appeal No. 14 of 2003, Judgment delivered on 20 September 2004.
- (6) Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited [2009] Privy Council Appeal No. 0018 of 2009 –from the Eastern Caribbean Court of Appeal (British Virgin Islands) –Judgment delivered on 26 November 2009.

#### **Introduction**

- [1] **HARIPRASHAD-CHARLES J:** The key issue which arises in this application is whether the claim brought by the claimant, Loretta Frett (as Executor of the estate of her late husband, Jeuel Simeon Frett (“the deceased”)) against the second defendant, BVI Health Services Authority (“BVIHSA”) should be struck out as not disclosing any reasonable ground for bringing the claim and that Mrs. Frett has no real prospect of succeeding on the claim. In short, BVIHSA seeks an order for summary judgment on its defence pursuant to Part 15 of the Civil Procedure Rules 2000 (“CPR 15”).

#### **The Summary Judgment Test**

- [2] CPR 15 sets out a procedure by which the Court may decide a claim or a particular issue without a trial. CPR 15.2 sets out the grounds for summary judgment. It provides:

"The court may give summary judgment on the claim or on a particular issue if it considers that –

- a) the claimant has no real prospect of succeeding on the claim or the issue;  
or
- b) the defendant has no real prospect of successfully defending the claim or the issue."

[3] Under CPR 15.2, the court has a very salutary power to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful.

[4] CPR 15.2 (a) states that the court may give summary judgment on a claim or an issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue. In **Swain v Hillman and another**<sup>1</sup>, Lord Woolf MR said that "the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success." At page 95b, Lord Woolf MR went on to say that summary judgment applications have to be kept to their proper role. They are not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. Further, summary judgment hearings should not be mini-trials. They are simply to enable the court to dispose of cases where there is no real prospect of success. The court has to caution itself against the exercise of a preliminary trial of the matter without discovery, oral examination and cross-examination.

[5] In **Boston Life and Annuity Company Limited v Dijon Holdings Limited**<sup>2</sup>, this court, in considering an application for summary judgment cited the elucidating judgment of Judge LJ in **Swain**, at page 96a-c where he said:

"To give summary judgment against a litigant on paper without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion to the court to give summary judgment....If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that

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<sup>1</sup> [2001] 1 All ER 91 at page 92.

<sup>2</sup> BVIHCV2006/0070-per Hariprashad-Charles – judgment delivered on 14 May 2007 [unreported].

success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court."

- [6] Therefore, the court has to be cautious since it is a serious step to give summary judgment. In **Alfa Telecom Turkey Limited v (1) Cukurova Finance International Limited (2) Cukurova Holdings AS**<sup>3</sup>, Gordon J.A. [Ag.] quoted with approval the following dicta of Lord Hope in **Three Rivers District Council v Bank of England (No. 3)**:<sup>4</sup>

"The rule '...is designed to deal with cases which are not fit for trial at all'; the test of 'no real prospect of succeeding' requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is an assessment of the case as a whole which must be looked at; accordingly, 'the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality.'"

- [7] Gordon J.A. [Ag.] alluded to the fact that the court is mindful of the overriding objective. In **Bank of Bermuda Ltd v Pentium**<sup>5</sup>, Saunders CJ [Ag.] put it this way:

"A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim."

## The Pleadings

- [8] By a Claim Form filed on 7 June 2007 and amended on 31 October and 3 December 2007 respectively, Mrs. Frett claims against the first defendant, the Attorney General and BVIHSA (collectively "the defendants") for damages under the Causes of Action (Survival) Act<sup>6</sup> and the Fatal Accidents Act<sup>7</sup> as well as interest and costs.

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<sup>3</sup> HCVAP2009/001, In the Court of Appeal of the Territory of the Virgin Islands, Judgment delivered on 16 September 2009, per Gordon J.A. [Ag.]

<sup>4</sup> [2001] 2 All E.R. 513, paras 95 and 158.

<sup>5</sup> BVI Civil appeal No. 14 of 2003, Judgment delivered on 20 September 2004.

<sup>6</sup> Cap. 10 of the Laws of the Virgin Islands

- [9] The particulars of the claim, as alleged, are that the deceased developed mesothelioma, a pernicious cancer caused as a result of his exposure to asbestos particles while in the employ of the Government of the British Virgin Islands ("BVI Government") as a maintenance officer at the Road Town Health Clinic, in particular during the period January 2001 and June 2001. In 2004, the deceased became ill and was unable to work from that time. On 22 September 2006, he died at the age of 56. It is also alleged that at no time whatsoever, prior to January 2001 or after June 2001, was the deceased otherwise exposed to asbestos and that he did such work after being instructed to do so by an employee of the Health Department of the BVI.
- [10] It is further alleged<sup>8</sup> that the deceased, at all material times, was employed by the BVI Government and by virtue of the BVI Health Services Act<sup>9</sup> ("the Act"), the deceased's employment was transferred to the service of BVIHSA.
- [11] Mrs. Frett claims that both defendants were negligent and/or in breach of the contract of employment in that they (i) failed to provide the deceased with a safe place of work; (ii) were in breach of their duty of care, in that they caused or permitted the deceased to be exposed to conditions in which they knew or ought to have known that asbestos was present in visible quantities where the deceased had to work and was injurious to health; (iii) failed to provide the deceased with any protective and safety gear and/or equipment and/or clothing to prevent exposure and inhalation of asbestos; and (iv) failed to make any or any proper enquiry or to obtain proper and sufficient expert advice as to the known or suspected dangers of exposure to asbestos, and/or methods or systems capable of protecting the deceased against contracting an asbestos related disease.
- [12] BVIHSA filed its Defence on 25 September 2007. Fundamentally, it admits that the deceased, at all material times, was employed as a maintenance officer at the Road Town Clinic and by virtue of the Act, the deceased's employment was transferred to the service of BVIHSA.

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<sup>7</sup> Cap. 26 of the Laws of the Virgin Islands

<sup>8</sup> See paragraph 4 of the Amended Statement of Claim

<sup>9</sup> No. 14 of 2004

- [13] BVIHSA however denies that it is liable for the illness and subsequent death of the deceased. It argues that none of the acts which led to the deceased's illness and/or subsequent death took place during the period when the deceased was in its employment. BVIHSA further argues that whilst the deceased's employment was transferred to BVIHSA, none of the liabilities or duties owed by virtue of the previous employment contract passed from the BVI Government to it. BVIHSA relies on section 28 of the Act for its full terms and legal effect.
- [14] At paragraph 5 of its Defence, BVIHSA also alleges that Mrs. Frett's cause of action arose on a date and time when there was no contractual relationship between the deceased and BVIHSA as the deceased's contract of employment was transferred to BVIHSA on 11 November 2004. Therefore, the acts which led to the deceased's illness and death occurred prior to the coming into being of BVIHSA and are wholly outside its knowledge or control.
- [15] Further or alternatively, BVIHSA denies the following factual issues:
- a) At no time was the deceased ever instructed or required to knock down walls or cut any holes in the ceiling. The deceased was not asked to do any maintenance work or otherwise involving any exposure to asbestos;
  - b) The deceased was not asked or directed to do work involving any exposure to asbestos;
  - c) The remedial works carried out by the deceased at the Road Town Health Clinic were very minimal and exclusively involved the removal of kitchen cabinets to facilitate the installation of file shelving and the partial reconfiguration of the reception area;
  - d) It is a fact that the ceiling and walls at the Road Town Health Clinic are comprised of masonry and sheetrock;
  - e) The deceased was provided with industrial as well as disposable face masks and protective overalls but he refused to wear them;
  - f) The deceased lived and worked in the United States for many years prior to his return to the BVI and could have been exposed to asbestos during that time;

- g) Statistically the exposure to asbestos which resulted in pulmonary or less commonly mesothelioma is 20 to 50 years prior to the development of the disease. Consequently, if the deceased was exposed to asbestos in 2001 at the Road Town Health Clinic as alleged, it is medically highly unlikely based on current medical knowledge that this exposure would have resulted in the illness which manifested only three years later and led to his death.

[16] From the above paragraph, it can be gleaned that the pleaded case of the parties indicates that there is a multitude of factual issues to be tried. Under such circumstances, the claim should proceed to trial as Dr. Archibald, Learned Queen's Counsel for Mrs. Frett correctly submits. But this is not the end of the matter as BVIHSA relies on the following preliminary issue of law to support its claim for summary judgment.

**Relationship (if any) between the deceased and BVIHSA when deceased was allegedly exposed to asbestos**

[17] BVIHSA alleges that the question of whether there was a relationship between itself and the deceased at the material time when the deceased was allegedly exposed to asbestos could be answered satisfactorily without hearing oral evidence. I agree that this is an issue of law which can be dealt with summarily.

[18] Learned Queen's Counsel, Mr. Farara appearing for BVIHSA denies that BVIHSA had any relationship with the deceased at the time he was allegedly exposed to asbestos which eventually led to his death. As already stated, it is alleged that the deceased's exposure to asbestos occurred between December 2000 and June 2001 and he first became ill in 2004.<sup>10</sup> Essentially, it is a claim founded on employer's liability arising out of the defendants' negligence to provide a safe place of work and causing and/or permitting the deceased to be exposed to asbestos.

[19] Therefore, the question to be determined is whether all the rights, powers, duties and liabilities which accrued under or in connection with the deceased's contract of employment with the BVI Government were transferred to BVIHSA when his contract of employment was transferred.

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<sup>10</sup> See paragraphs 6, 8 and 11 of the Amended Statement of Claim filed on 4 December 2007.

[20] BVIHSA is a statutory body which came into existence under the auspices of the Act. It was established by section 5 of the said Act. Its functions are set out in section 6 and includes, among other things, to manage the operations of Peebles Hospital and community health services and to manage and administer public healthcare services and programmes. Prior to its establishment, these functions were carried out by the Ministry of Health, BVI Government. The Act came into force on 11 November 2004.

[21] Mrs. Frett concedes that by virtue of section 28 and Schedule 3 of the Act, the deceased's employment was transferred from the BVI Government to BVIHSA<sup>11</sup>. Section 28 (1) states:

"Subject to subsection (2), **every officer or employee of the Government** who, immediately before the coming into force of this Act, is **holding a post specified in Schedule 3 shall**, upon the coming into force of this Act, **be deemed to be transferred from the service of the Government to the service of the Authority** upon terms and conditions (including any tax benefits) not less favourable in aggregate than those which were attached to the appointments held by such officers and employees under the Government."  
[emphasis added]

[22] Then, subsection (2) provides that "every officer and employee who is deemed to have been transferred under subsection (1) shall, within six months of the coming into force of this Act, have the option of electing, (a) to continue in the service of the Authority, in which case **such service shall be retrospective from the date of his transfer** and he shall be entitled to such pension, gratuity and other allowances and rights, if any, as he would have received had he been retired from the service of the Government on the abolition of his office on the date of his transfer to the Authority..." [emphasis added]. Subsection (3) continues: "where any officer or employee referred to in this section fails to elect as provided under subsection (2), he shall be deemed to have elected under subsection (2) (a) and he shall be treated accordingly."

[23] So, a failure to elect any of the options stipulated in subsection (2) will result in the officer or employee being deemed to have elected option (a) namely: to continue in the service of the Authority [BVIHSA]. It is not in dispute that the deceased did not elect any of the

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<sup>11</sup> See paragraph 4 of the Amended Statement of Claim filed on 4 December 2007.

options provided for in subsection (2) within the specified time and consequently, he was deemed to have continued in the service of BVIHSA.

[24] An important consideration arises here. Subsection 28(2)(a) expressly provides that every officer or employee who continues in the service of BVIHSA, his employment shall be retrospective from the date of his transfer and he shall be entitled to pensions, gratuities and other allowances and rights, if any, on the date of his transfer to BVIHSA. Thus, section 28 clearly limits the relevant date of employment of the deceased to the date of coming into force of the Act (i.e. 11 November 2004) and not to a date prior to that (i.e. 2001, when the deceased is alleged to have been exposed to asbestos). It is also plain that the section does not fix BVIHSA with or transfer any liabilities of the Government which arose prior to the coming into force of the Act.

[25] Although not pleaded, Dr. Archibald QC contends that Section 29 of the Act also applies to the present case. Should the court consider this issue since it was not pleaded? To borrow the words of Lord Collins in **Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited**<sup>12</sup>, "it has often been said that, in the pursuit of justice, procedure is a servant and not a master." In my opinion, in a situation such as the present, strict adherence to rules of procedure must be conformed with. Indeed, it is a master as a claimant **must** set out in the claim form or in the statement of claim a statement of **all** the facts on which he relies<sup>13</sup>. Not having done so, Mrs. Frett puts BVIHSA in the unenviable position of having to answer to allegations at short notice. This flies in the face of CPR 2000 to do justice to the case and such practice should not be countenanced.

[26] That said, and in the event that I am wrong to say so, I shall address the issue which presents itself under section 29 of the Act. Dr. Archibald QC argues that the deceased is dealt with in section 29(b) which includes "**any person** a contract for the provision of a service at the Hospital or in relation to community health services, which has not been discharged". He submits that, unlike section 28 of the Act, section 29 extends the liability of

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<sup>12</sup> [2009] Privy Council Appeal No. 0018 of 2009, from the Eastern Caribbean Court of Appeal (British Virgin Islands)- judgment delivered on 26 November 2009.

<sup>13</sup> See Part 8.7(1) of CPR 2000.

BVIHSA to when the employment contract of the deceased was originally made with the BVI Government and that this was continued with BVIHSA upon transfer.

- [27] Section 29 is clear and unambiguous. It deals with the Transfer of Government contracts of employment and service to BVIHSA. From my reading, it appears that sections 28 and 29 have an important distinguishing factor which is, if section 29 is applied, the relationship between the deceased and BVIHSA will extend beyond the date of the transfer. Section 29 in effect provides that where the Government had a contract of employment with a person, **other than an officer or employee referred to in section 28**, which the Government had immediately prior to the coming into force of the Act, that contract of employment shall continue to have effect in accordance with its terms as if it was originally made between the employee and BVIHSA.
- [28] As BVIHSA rightly contends, section 29 of the Act is not applicable to the present case. Indeed, section 29 is clearly distinguishable from section 28 and operates to the express exclusion of the classes of persons referred to in section 28. In addition, since Mrs. Frett admits in the Amended Statement of Claim that section 28 was applicable to the present case, by extension, she admits to the exclusion of section 29.
- [29] Applying section 28, I find that the contractual relationship between BVIHSA and the deceased is retrospective from 11 November 2004 (the date of the transfer). Therefore at the time when the deceased was allegedly exposed to asbestos in 2001, there was no relationship between him and BVIHSA.
- [30] As a matter of fact, this case is apposite to be disposed of summarily. BVIHSA has shown that Mrs. Frett's claim against it has no reasonable prospects of success and I so find. I will therefore order that summary judgment be entered for BVIHSA and the claim against it be dismissed with costs to be taxed if not agreed. As costs were not ventilated at the hearing, I will invite written submissions from both parties.
- [31] In accordance with CPR 15.6(2), I will now give case management directions so that the trial of the substantive claim against the Attorney General can be expedited.

**Claim being statute-barred**

[32] At the outset of this hearing, Mr. Farara QC informed the court that BVIHSA does not intend to rely on the issue of whether Mrs. Frett's claim should be struck out for being statute-barred by the Public Authorities Protection Act. Consequently, this issue was abandoned.

[33] Last but not least, the court expresses its gratitude to Dr. Archibald QC and Mr. Farara QC for their kind assistance in re-constituting the transcript of proceedings which went astray by the Court Reporting Unit. The court is also grateful to Mr. Aziz for his forbearance.

**Indra Hariprashad-Charles  
High Court Judge**