

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **SVGHCV2016/0054**

BETWEEN

NATIONAL INSURANCE BOARD

CLAIMANT

AND

AUSTIN FRASER

DEFENDANT

Appearances:

Mr. Duane Daniel with Ms. Jenell Gibson of Counsel for the Claimant

Mr. Roderick Jones of Counsel for the Defendant

2020: February, 21st

MASTER Ermin Moise

REASONS FOR DECISION

[1] **Moise, M.:** On 23rd July, 2019 I made an order declaring that the claim against the defendant is not statute barred. I gave an undertaking to provide written reasons for that decision. I apologise to the parties for the delay in providing the reasons as promised.

THE FACTS

[2] The claimant is the National Insurance Board of the Saint Vincent and the Grenadines. In accordance with the provisions of the National Insurance Act, the claimant is established as a statutory body seized with the authority to enforce the requirements of the Act. The defendant, on the other hand, is a registered employer who is liable to pay insurance contributions for persons employed with his business. His registration as an employer dates back to 2002. The parties are agreed that the defendant has not made contributions for the period May, 2005 to February, 2016.

[3] On 3rd April, 2016 the claimant commenced an action for the collection of the outstanding contributions owed by the defendant. It is conceded that some contributions are owed. However, the defendant denied that he owed the amount claimed by the claimant. The court had granted some time for the parties to discuss the outstanding issues between them with a view to a possible settlement. There was an agreement, for the most part, save and except that the defendant claims that the provisions of the Limitation Act apply to the outstanding contributions owed between 2005 and 2010. The defendant therefore filed an application in which he sought a ruling by the court on this issue. The claimant agreed to this approach and both parties were ordered to file submissions on the matter. The sole issue for consideration therefore was whether a claim for outstanding insurance contributions for the period 2005 to 2010 is statute barred. I ruled that the claim was not statute barred. These are my reasons.

THE LIMITATION ACT

[4] The relevant provision of the Limitation Act is contained in sections 11(1) which states that “[a]n ***action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.***” In accordance with that section a limitation period is established for the collection of any sum recoverable by way of statute. The National Insurance contributions are therefore sums recoverable by virtue of an enactment. However, section 37 of the Limitation Act seeks to place limits on the applicability of that section as it relates to the crown. The section states that:

- (1) Except as otherwise provided in this ACT, and without prejudice to section 38, this Act shall apply to proceedings by or against the crown in like manner as it applies to proceedings between subjects.***
- (2) Notwithstanding subsection (1), this Act shall not apply to –***
 - (a) Any proceedings by the crown for the recovery of any tax or duty ...***
- (3) For the purpose of this section, proceedings by or against the crown include proceedings by or against any government department or any officer of the crown as such or any person acting on behalf of the crown.***

- [5] The dispute between the parties therefore hinges on the question of whether the national insurance contributions are in fact taxes which fall within the exception of section 37 of the Act, for which no limitation applies. In order for that to be the case the question of whether the NIB is a representative of the crown is also an issue for consideration. Counsel for the defendant relies on two authorities for his argument that the limitation applies to the National Insurance Board. Firstly, he refers to the case of ***The Barbuda Council v. Antigua Aggregate Limited et al***¹. In that case Rawlins JA states as follows:

“unlike Ministers of the Crown (who are often corporations sole and are part of ‘the crown’ when that term is used in the sense of ‘the government’), a corporation aggregate created by Parliament such as the Civil Aviation Authority, will not be entitled to crown immunities, as being a servant or agent of the crown, unless the statute creating the corporation expressly enacts that it acts on behalf of the crown, or unless the corporation is otherwise rightly regarded as such a servant or agent, or the title to immunity is the logical and necessary consequence of the character of the corporation’s powers and responsibilities. ... A corporation not subject to control by the crown is not entitled to crown immunities on the ground that it is performing a public duty or providing a public service.”

- [6] Counsel therefore argues that the National Insurance Board is not a representative of the crown for the purposes of section 37 of the Limitation Act. Reference is also made to the judgment of Rawlins JA in the case of ***Winmark Limited v. National Insurance Corporation***² where he stated the following:

“In any event, section 6(6)(a)(i) of the constitution would not apply because the outstanding social security contributions are not taxes, rates or dues. Moreover, they are not contributions due to the state, but to a statutory corporation. Neither does section 6(6)(a)(iii) of the constitution does not apply to the present case.”

- [7] I note that the decision of the court of appeal in ***Winmark Limited v. National Insurance Corporation*** was overturned by the Privy Council on 16th May, 2009. Although that specific portion of Rawlins JA’s decision was not referenced in the Privy Council decision, I am not at all

¹ Civil Appeal No. 11 of 2005

² Civil Appeal No. 7 of 2006

sure that it would be safe to rely on it as an authority for the proposition put forward by the defendant.

[8] In addition to these authorities counsel also refers to **Black's Law Dictionary** in which it is stated that a tax is ***"a pecuniary burden laid upon individuals or property to support the government, and is a payment exacted by legislative authority."*** The argument therefore is that the National Insurance Board is a statutory corporation created by the National Insurance Act for the purpose of administering the national insurance fund. It is therefore not a government department and not an agent of the crown. It does not enjoy crown immunities and contributions made to the national insurance fund are not taxes and therefore attract a limitation period as contained in section 11(1) of the Limitation Act.

[9] Counsel for the claimant, on the other hand, argues that national insurance contributions are in fact taxes and that no limitation should be applied to an action for recovery for non-payment. The claimant relied on the authority of ***Minister of Housing and National Insurance et al v. Smith***³ which emanates from the Privy Council. In that case their lordships noted that:

"Leaving aside the payment of voluntary contributions ... their lordships are of the opinion that the contributions of employed persons, employers and self-employed persons are properly to be regarded as taxes.

Their contributions are the means by which the government raises part of the money necessary to bestow a wide range of benefits on the people of the Bahamas. The essential features of a tax are that it is imposed by or on the authority of the state, that its payment is compellable and that it is raised for a public purpose. The contributions fulfill all these requirements."

[10] The Board went on to note that although the Act is couched in the language of insurance, it in fact operates in a way which is entirely divorced from the commercial concept of insurance. The benefits to which an individual is entitled does not correlate to the contributions he makes. It is not therefore a tax on the earnings of the employer but a tax on employment. Whether the employer earns money or not, he is obligated to pay. I would also add here that the lack of contributions paid over by the employer may have very long lasting effects on the employee for many years down the road; making the payment of the contributions, or the lack thereof, a very serious issue. Counsel

³ (1990) 40 WIR 1

for the claimant therefore argues that the monies payable by the defendant, as an employer, is a tax and may be so regarded for the purpose of section 37 of the Limitation Act. I agree with that submission.

- [11] Counsel for the claimant also goes on to argue that there is a strong nexus between the claimant and the government, sufficient to establish that it is in fact clothed with the immunity of the crown in keeping with the provisions of section 37 of the Limitation Act. In direct response to the submissions of counsel for the defendant, it is argued that ***The Barbuda Council v. Antigua Aggregate Limited et al*** outlined the difficulties in determining whether a particular entity is to be regarded as an agent of the crown. In that case the court noted that there are three separate enquiries to undertake in determining whether the entity may be a “crown body” for the purpose of the Act. Rawlins JA goes on to state that:

***“The enquiry does not cease if the court finds that a body is not one around which the crown’s shield is to be thrown by express statutory provision. The court should then enquire whether the shield is to be thrown around the body because the body acted on behalf of the crown or was an agent of the crown. If the answer on that inquiry is no, the enquiry should then be whether it is to have that shield because it is the logical and necessary consequence of the character of the corporation’s powers and responsibilities.*”**

- [12] It was argued that the case of ***The Barbuda Council v. Antigua Aggregate Limited et al*** was ultimately decided on the last of these considerations. The court concluded that the powers of the council in that case were a ***“sufficiently intimate emanation from the crown to attract a contagion of the crown’s immunity.”*** Counsel for the claimant then referred to the case of ***Territorial and Auxiliary Forces Association of the County of London v. Nichols***⁴. In that case the court sought to distinguish between an entity whose functions are ***“semi-commercial and discharged previously by private commercial bodies”*** and one whose functions are of ***“nationwide scope and import”***.

- [13] I agree with the submissions put forward by the claimant. Despite the fact that the National Insurance Act does not expressly clothe the NIB with crown immunity, it is to the scope and import of its functions the court must turn in determining this issue. Not only are the contributions a tax, as

⁴ [1949] 1 K.B. 35

has been decided by the Privy Council, but the functions of the NIB are designed to fulfill a direct public purpose entirely distinct from any quasi commercial enterprise. This is not the same as commercial insurance but a charge against the employer and the employee which is then used to provide benefits to the employee and the wider society. It is the fulfillment of a comprehensive social policy of the government for which the NIB is accountable to the cabinet of ministers by virtue of a number of the provisions of the Act itself. As counsel for the claimant pointed out, section 4(5) and (6) of the Act allows the Minister to refer matters to the board for consideration. The Board is required by virtue of section 16(3) and (4) to submit audited accounts to the minister. Reports on the financial condition of the fund to the minister and remuneration and appointment of certain officers and financial investments of the fund must all be approved by the cabinet of ministers.

- [14] Adding all of these together I am fully satisfied that not only are the contributions made to the insurance fund taxes for the purpose of the Limitation Act, but the Board is clothed with crown immunities by virtue of its scope and import, sufficient to place its powers of enforcement within the provisions of section 37 of the Act for which no limitation would apply.
- [15] It is for these reasons that I have found that the claim for contributions owing prior to 2010 is not statute barred.

Ermin Moise
Master

By the Court

Registrar