In The Supreme Court of Bermuda

CIVIL JURISDICTION

1997: No. 37

BETWEEN:

THOMAS HOFER
(by his next friend Anna Hofer)

Plaintiff

- and -

THE BERMUDA HOSPITALS BOARD

Defendant

RULING

Date of Hearing: 24 June 2008
Date of Ruling: 26 June 2008

Mr. Michael Scott, Browne Scott, for the Plaintiff
Mr. Allan Doughty, Trott & Duncan, for the Defendant

Introduction

1. These proceedings arise from an accident which occurred on 12 February 1994, when the plaintiff ("Mr. Hofer") was a patient at St. Brendan's Hospital, a hospital operated by the defendant ("the Board").

2. The accident was an extremely serious one, in consequence of which Mr. Hofer was rendered quadriplegic. It is common ground that Mr. Hofer had been admitted to the hospital and thereafter treated for a paranoid psychiatric condition. The circumstances of the accident appear to be in issue, although the amended statement of claim does not descend into detail in regard to the accident, simply noting that Mr. Hofer sustained a broken neck and a cut to the chin while a patient at St. Brendan's Hospital, whereas the defence provides rather more detail as to the events of 12 February 1994.

3. Proceedings were issued on 31 January 1997, and the writ and statement of claim were amended on 20 November 1997. Appearance was entered on 16 February 1998, but the Board's defence was not filed until 28 July 1999, so that by this time more than five years had elapsed since the original accident. Notice of change of attorney was filed on 6 March 2001, and notice of intention to proceed filed on 30 July 2002. This was followed by a summons making application for an interim payment, which was issued in amended form on 3 September 2002. On the return date of that summons Mr. Scott appeared for Mr. Hofer, but the matter was simply adjourned sine die with liberty to restore. The summons was restored, and Mr. Scott again appeared before the judge in chambers on 19 November 2002. However, on that return date a further adjournment was sought and granted, and on the next hearing date neither counsel appeared. Nothing then happened for a period in excess of five years, when on 18 March 2008 attorneys for the Board filed a notice of intention to proceed. This was followed by the filing of a summons seeking to dismiss the action for want of prosecution, on 22 April 2008, and the matter came before me for argument on 24 June 2008, more than 14 years after the original accident.

The Evidence in the Application

4. The summons was supported by an affidavit sworn by Mr. Doughty, attorney for the Board. Having described the course of the proceedings, Mr. Doughty then submitted that the Board's case had been prejudiced by the delay, on the basis that

one of the witnesses (Mr. McQueen) to Mr. Hofer's accident had died, and the other (Mr. Bentham) had left Bermuda in 2004, and the Board had no knowledge as to his current whereabouts. Mr. Doughty also relied upon the effect of a delay of 14 years on the recollection of witnesses. There was also an affidavit filed by Miriam Caisey, the Board's human resources manager, indicating that Mr. Bentham's personnel file was no longer available.

5. In his affidavit, Mr. Doughty also dealt with the extent of the communication which there had been between attorneys on both sides. Although it was not exhibited, there was correspondence in September 2004, when Mr. Doughty's firm had apparently asked for a settlement proposal. This had been followed up by a letter of 3 October 2006, in which the earlier request for a relatively nominal interim payment had been denied, and the statement had been made that an application to have the claim struck for want of prosecution would be made if no settlement proposal was received by 1 November 2006. In the event, there was no reply to this letter, and on 5 July 2007 there was a further letter sent by Mr. Doughty to Mr. Scott, which referred to Mr. McQueen's death and the consequent perception of prejudice to the Board, with a further statement that application would be made to strike out the proceedings unless they were withdrawn. Again, there was no reply to this letter.

6. For Mr. Hofer, Mr. Scott filed an affidavit to which he exhibited the minutes of a meeting at which both Mr. McQueen and Mr. Bentham had been present, no doubt held shortly after the accident, although the date is not clear. It is apparent from the minutes that Mr. McQueen was not in fact a witness to the accident. Somewhat surprisingly, Mr. Scott advised that he had Mr. Bentham's last known address, although it was not indicated in the affidavit whether any efforts had been made to reach Mr. Bentham at this address.

7. Mr. Scott sought to explain the delay, and having referred to matters relating to the proceedings, then made reference to his own position and particularly his

political involvement, which included a spell as Minister of Health. Although Mr. Scott referred to the conflict of interest occasioned by that appointment, it is to be noted that such appointment came relatively late in the day, in June 2007. Mr. Scott also suggested that the correspondence from Mr. Doughty's firm effectively amounted to a representation consistent with an admission of liability. I would pause to say that I reject such a characterisation.

8. Mr. Doughty swore an affidavit in reply in which he accepted that Mr. McQueen had not been a witness to the accident, but nevertheless asserted that Mr. McQueen would have been a critical witness. He made no reference to the question of Mr. Bentham's address or the possibility of tracing him.

The Delay

9. Mr. Doughty helpfully produced a chronology, and it is no doubt appropriate to consider the different periods of delay which there have been in this matter. First, there was a delay of approximately three years before proceedings were issued. There then appears to have been a delay of almost a year before the proceedings were served, and appearance entered. This was followed by a delay of approximately 18 months before the defence was filed. It was then some three years later that a notice of intention to proceed was filed, and during this period the limitation period expired. Although a summons seeking application for an interim payment was then filed, this was not pursued, so that the last signs of any activity on the court file were appearances before a judge in chambers in September and November 2002, before the matter finally went to sleep when counsel failed to attend a scheduled hearing before the judge in chambers on 5 December 2002.

10. At that point, very nearly nine years had passed since Mr. Hofer's accident, and there then followed a delay of more than five further years (during which there was the correspondence from the Board's attorney without reply from Mr. Hofer's

attorney, as referred to in paragraph 5 above) before attorneys for the Board issued the present application to strike out for want of prosecution.

The Law

11. Mr. Doughty relied upon what he referred to as the trilogy of Bermuda cases dealing with applications to strike out for want of prosecution, all of which had been decided by Kawaley J. The first was *Mermaid Beach and Racquet Club Ltd -v- Donald Morris* [2004] Bda L.R. 49; the second was *Re Burrows* [2005] Bda L.R. 77, and the last was *Roberts and Hayward -v- Minister of Home Affairs and Public Safety* [2007] Bda L.R. 31. Although Mr. Scott's written submissions had referred to a number of criminal cases, Mr. Scott agreed that the criminal cases were not as helpful as the local cases to which Mr. Doughty had referred, and I would propose to review the current state of the law on the basis of the three cases on which Mr. Doughty relied.

12. In each of those three cases, Kawaley J. set out a summary of the applicable principles, taken from *Halsbury's Laws*[1], in the following terms:

> "The power to dismiss an action for want of prosecution, without giving the plaintiff the opportunity to remedy his default, will not be exercised unless the court is satisfied: (1) that the default has been intentional and contumelious; or (2) that there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as themselves and the plaintiff or between each other or between them and a third party.
>
> The power to dismiss an action for want of prosecution, other than in a case of contumelious conduct by the plaintiff, should not usually be

[1] Fourth edition, volume 37, paragraph 448

> exercised within the currency of any relevant limitation period…on an application to dismiss for want of prosecution the court will take into account all the circumstances of the case, including the nature of the delay and the extent to which it has prejudiced the defendant, as well as the conduct of the parties and their lawyers…"

13. In this case, there is no question of failure to comply with any order of the Court, so that the first of the two alternative bases for dismissal of the action does not arise. And although the limitation period had not expired in the *Mermaid Beach* case, Kawaley J. nevertheless went on to consider the issue of inexcusable delay, and indicated that, had it been necessary for him to consider that issue, he would have accepted the complaint that a delay of almost three years by the plaintiff for which no explanation was proffered was both inordinate and inexcusable.

14. The *Burrows* case was concerned with delay in the context of a complaint to the Human Rights Commission and the subsequent appointment of a board of inquiry, and consequently gave rise to different issues than typically arise in applications to strike out for want of prosecution in civil proceedings. I therefore turn to the third case in the trilogy, *Roberts and Hayward -v- The Minister of Home Affairs*, which is the first case where the question of the Court's jurisdiction to strike out for want of prosecution has been considered since the amendment to the Rules of the Supreme Court 1985 so as to incorporate in Order 1A the overriding objective of enabling the Court to deal with cases justly. Pursuant to Order 1A rule 1(2)(d), dealing with a case justly includes, so far as practicable, ensuring that it is dealt with expeditiously and fairly, and pursuant to Order 1A rule 3, the parties are required to help the Court to further the overriding objective.

15. Kawaley J. took the view that the obligation of the parties to assist the Court to achieve the overriding objective significantly undermined the traditional view that one party could "simply fold their arms, not enforce a time order, and then complain of the resultant delay." In expressing that view, Kawaley J. noted that

the overriding objective had not had application during most of the period of delay complained of.

16. However, Kawaley J. was dealing with a delay of a much shorter period than has occurred in the case before me. In the case before Kawaley J., the writ had not been issued until July 2003. In this case, almost twelve years had passed between Mr. Hofer's accident and the amendment to the Rules of the Supreme Court providing for the implementation of the overriding objective. In these circumstances it does seem to me that I am concerned with a very different factual scenario than existed in the case before Kawaley J. Further, after the amendment to the Rules of the Supreme Court, Mr. Doughty's firm had twice written to Mr. Scott's firm putting them on notice that failure to act on their part would lead to an application to strike out for want of prosecution, and the correspondence had failed to provoke any action on the part of Mr. Scott's firm. So if the provisions of the overriding objective were to be applied in this case, I would find that the Board had discharged its obligation under the Rules.

Finding in Relation to Delay

17. In these circumstances, I find firstly that the delay is unquestionably both inordinate and excessive. Indeed, Mr. Scott accepted, as no doubt he was bound to, that the delay was "considerable".

18. The next question to be considered is whether the delay can be said to be "inexcusable". In his affidavit, Mr. Scott went into some detail as to the difficulties which he said had contributed to the delay. Unfortunately, he did not give what would have been very helpful detail in terms of the timing of the various steps to which he referred.

19. It appears that Mr. Hofer returned to his native Germany within a relatively short time after the accident. Mr. Scott referred to the difficulty in securing instructions, but also sought to blame the Board for having invited settlement

proposals, which he said cast a burden on those advising Mr. Hofer. In a case such as this, where quantification of damages was always likely to be a time consuming and hence expensive exercise, one might have expected that an admission of liability would be sought, and that if not forthcoming, those advising Mr. Hofer would have sought to separate the issues of liability and quantum. Be that as it may, it cannot be right to blame the Board's attorneys for an invitation to present settlement proposals.

20. Mr. Scott carried on to say that the last relevant and significant step in terms of the pleadings was the filing of a summons seeking an interim payment. This of course occurred in mid 2002, some three years after the filing of the defence. One would have expected that by this time discovery would have taken place following the close of pleadings, and that a summons for directions would have been issued on Mr. Hofer's behalf. Mr. Scott carried on to say that the Board challenged the application for an interim payment on technical grounds, without identifying such technical grounds, and took matters as far as 5 December 2002, when counsel had failed to appear before the judge in chambers. He then referred to the period following 2002, with reference to his own increased political involvement. He had been appointed to the Senate in 1998 and had been a minister since 2003. As indicated above, he had been appointed Minister of Health in June 2007. Mr. Scott indicated that he had resumed his law practice in 2008, when he had not been appointed a minister following the 2007 general election.

21. Thus it appears that the last five years of delay were occasioned only by reason of Mr. Scott's political involvement, and with all respect I have to say that such a reason for a substantial delay when the limitation period had already passed is, regrettably, inexcusable, and I so find. Mr. Scott's appointment as Minister of Health came, as I have said, late in the day, but the conflict that that appointment created should have caused Mr. Scott to pass conduct of the matter on to some other attorney, something which should have happened some considerable time

earlier in any event, when it became clear that there was a conflict between Mr. Scott's political activities and his duties to his client.

Finding in Relation to Prejudice

22. As can be seen from the principles set out in paragraph 12 above, even after it has been determined that the delay has been both inordinate and inexcusable, the applicant is nevertheless required to establish that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action. Typically, the effect of the lapse of time on the memory of witnesses may be relied upon, and the death or disappearance of witnesses are often factors. The importance of the loss of availability of witnesses will depend upon the matters in issue in the particular case. In a well documented commercial action, such matters are less likely to carry weight than in the circumstances of an accident case such as this. To appreciate the full extent of the prejudice which the Board claims to have suffered by reason of the delay, it is necessary to consider the circumstances of the accident in more detail.

23. Mr. Hofer was admitted to St. Brendan's Hospital on 10 February 1994, after he had been brought by two police officers to the hospital as a place of safety pursuant to section 72 of the Mental Health Act 1968. He had been examined by a psychiatric resident who had admitted him for observation and assessment under section 13 of the Mental Health Act. There followed a further psychiatric assessment and treatment, and Mr. Hofer was admitted to a general ward. The following day, while visited by friends, he expressed a wish to leave. When told that he could not, he became disturbed, and was placed in a more secure seclusion room. He was treated further and kept under constant observation. The accident occurred at about one o'clock in the afternoon of 12 February 1994, when he was being prepared for a visit from friends. At this point, one nurse, Mr. Bentham, was present, when Mr. Hofer had raised his arms behind his head, swayed forward and hit the floor in what appeared to be a deliberate act. The second nurse, Mr. McQueen, was not in the same room at this point, since he was

speaking with Mr. Hofer's visitors, but he was alerted to what had happened by Mr. Bentham, and the circumstances of the accident explained to him.

24. So Mr. Bentham was the only witness to the accident, although Mr. McQueen had seen Mr. Hofer both shortly before and immediately after the accident.

25. At the time that this application was made, the Board's knowledge according to Mr. Doughty was that Mr. McQueen had died in 2005, and that Mr. Bentham had emigrated to Canada after he had left the Board's employment in 2004. The Board then had no knowledge as to his current whereabouts.

26. I have referred to the fact that Mr. Scott had indicated in his affidavit that he had an address for Mr. Bentham, which by the time of the hearing Mr. Doughty had not sought. The address was given to Mr. Doughty at the hearing, as was a telephone number which Mr. Scott had, but which he said he had called without securing an answer. Although one might have expected that following Mr. Scott's evidence that he had an address for Mr. Bentham, the Board's attorneys would have sought that and endeavoured to trace him, as I understood the position from Mr. Scott during the hearing, he had himself tried to trace Mr. Bentham, without success to this point. He had not received a response to the letter he had written, and I have already referred to the failure to establish telephone contact.

27. In the material exhibited by Mr. Scott to his affidavit, there are the minutes of the meeting referred to in paragraph 6 above, as well as an unsigned statement from Mr. McQueen, but no such statement from Mr. Bentham. According to the material exhibited to the affidavit of Ms. Caisey, Mr. Bentham had left the Board's employment in October 1994, rather than the date of 2004 which had been given by Mr. Doughty. The material exhibited by Ms. Caisey also indicates that Mr. Bentham would now be fifty years of age.

28. I have referred to the lack of any statement from Mr. Bentham, and whilst there is an account of the accident in the minutes to which I have referred, this is relatively brief, and does not, for instance, spell out clearly the respective positions of Mr. Bentham and Mr. Hofer, the distance between them, and whether Mr. Bentham had tried or been able to do anything to prevent or minimise the severity of the accident by breaking Mr. Hofer's fall. I would have expected a statement prepared by attorneys to have gone into very much more detail in regard to the circumstances of the accident.

29. While I would have preferred the position in relation to Mr. Bentham's whereabouts and availability to have been clearer, I am nevertheless satisfied that, in relation to him, the combination of the Board's present inability to locate him, the lack of a detailed witness statement from him and the effect that a lapse of more than 14 years will inevitability have on his memory, do give rise to a substantial risk that it will not now be possible to have a fair trial of the issues in the action, and cause prejudice to the Board thereby. I do not attach any great weight to the fact that Mr. McQueen has died since the accident, since he was not a witness to it. However, it does have to be recognised that Mr. McQueen's statement in relation to the accident is both unsigned and relatively brief. It is not the sort of detailed statement which one would have expected had Mr. McQueen been interviewed by an attorney. It is to be noted that there appears to be more detail in the report of the accident in the minutes than that appearing in Mr. McQueen's statement and while I would hold that a sufficient level of prejudice exists on the basis that Mr. Bentham is not available to the Board, in my view the level of prejudice to the Board is increased by reason of Mr. McQueen's death.

30. I do, therefore, hold that the action should be dismissed for want of prosecution, and I so order.

Costs

31. Costs should follow the event in my view, and I therefore order that the Board should have its costs of these proceedings.

Dated the 26th of June 2008.

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Hon. Geoffrey R. Bell