In The Supreme Court of Bermuda

CIVIL JURISDICTION

2008: No. 2

BETWEEN:

NAME

Harold Joseph Darrell

Appellant

-and-

NAME

Chief Executive Officers,
Board of Directors, Bank of Bermuda Limited

Respondents

Date of Hearing: 06 August 2008

Date of Judgment: 29 September 2008

Mr. Paul Harshaw of Lynda Milligan-whyte for the Appellant;
Mr. Saul Froomkin of Mello, Jones and Martine for the CEO (Respondent)
Mr. Jeffrey Elkinson assisted by Mr. Ben Adamson of Conyers, Dill and Pearman for the Respondent

JUDGMENT

1. This is an application by notice of motion brought by Harold Joseph Darrell filed on January 16, 2008, against Chief Executive Officer, Board of Directors, Bank of Bermuda Limited, seeking leave to appeal and an extension of time in which to

appeal against the decision of the Board of Inquiry dated January 17, 2007, in which it was found that the Bank of Bermuda Limited ('the Bank') was not a party or respondent to the complaint and/or proceedings before it.

2. Counsel for the Appellant in his submission indicated that whilst the Notice of Motion seeks leave to appeal, leave is not necessary or to be sought, as section 21 of the Human Rights Act 1981 ('the Act') provides for an appeal as of right.

The Court disagrees with Counsel for the Appellant that leave to appeal is not necessary.

Section 21 of the Act provides that "Any party against whom an order has been made by a board of inquiry may" appeal to the Supreme Court.

"Any party to the proceedings before a board of inquiry shall be entitled to be heard on the appeal and the Commission shall likewise, if it so wishes, be entitled to be heard".

3. Section 21 (3) provides that an appeal under this section "may be made on questions of law or fact or both and the Court may affirm or reverse the decision or order of the board or the Court may substitute its own order for that of the board".

4. The Supreme Court Rules 1985 order 55 governs any such appeal.
Rule 1(1) says that "*Subject to paragraphs (2) and (3), this Order shall apply to every appeal which by or under any enactment lies to the Supreme Court from any court, tribunal or person"*.
"The notice must be served, and the appeal entered, **within twenty-eight days** after the date of the judgment, order, determination or other decision against which the appeal is brought (rule 4 [2]).

"*In the case of an appeal against an order, determination, award or other decision of a tribunal, Minister, or government board of other person, the period specified in paragraph (2) shall be calculated from the date on which notice of the decision was given to the appellant by the person who made the decision or by a person authorized in that behalf to do so.* [Emphasis added]

5. The combined effect of Section 21 of the Act, and Order 55 of the rules of the Supreme Court, is that the right to appeal only existed for 28 days after the tribunal's decision against which the appeal is sought. If an appeal is not entered within 28 days, the leave of the court to bring the appeal is necessary and must be sought.

6. Order 55 is complimentary to section 21 of the Act and order 55 (4) directs that the 28 days shall be calculated from the date on which notice of the decision was given to the Appellant. The combined effect of the two sections is that the right to appeal only existed for 28 days after the tribunal has made its determination. The right given can only be revived or extended by the court, pursuant to Order 3 rule 5 which authorises the court to "… *extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings."* Whether or not the court will grant an extension is a matter of discretion to be exercised, after considering the length and reason for the delay and whether there is an acceptable explanation for the delay. If the delay is substantial or if to grant an extension will cause considerable prejudice to the respondent, the court may refuse to exercise its discretion.

7. This Court believes that the crucial issue is what the Board of Enquiry's decision was and, most importantly, the date of that decision.

Historical Background

8. On the 30th October 2000, Mr. Darrell, a businessman, and the President and Chief Executive Officer of the Hardell Group, made a complaint to the Human Rights Commission ('the Commission') under the Human Rights Act 1981 ('the Act) in respect of issues dating back to the mid 1990's.

9. The complaint was heard by (the Commission) and being unable to resolve the complaint the Commission referred it to the Minister of Community Affairs ('the Minister'). The Minister in turn referred the complaint to a Board of Enquiry ('the Board'), which was established under the provision of Section 18 of the Act. The terms of reference requested the Board to enquire into the "complaint of discrimination filed by Mr. Darrell against the Chief Executive Officers and the Board of Directors of the Bank of Bermuda Limited". The Board began its enquiry on September 21, 2005.

10. The Board commenced its hearings on September 21, 2005, and as the hearing progressed Counsel for the Appellant asked the Board to make a ruling on whether the Bank was a party or respondent to the complaint. An extract from the transcript notes of the proceedings [see page 3 of the transcript dated September 21, 2005] shows that the Board confined itself to what it believed to be the case. This extract from the proceedings read:-

> *"The Chairman: You are going to have an issue with the board. We are confining ourselves to what we believe the case, which is the board of Directors and the.*
> *Mr. Elkinson: Chief Executive Officer*
> *The Chairman: The Chief Executive. Sorry"*

11. When the Court looks at the plethora of correspondence that followed the Board's decision the Court is satisfied that the Appellant knew and understood the Board's

rulings but he sought to have the Board reverse its decision. For example, on October 18, 2005, subsequent to the decision, the Appellant wrote a letter to David Wilson Executive Officer of the Human Rights Commission in which he said:

"The tribunal has ruled that my complaint is not against the Bank but instead against the individuals holding the above respective positions. Notwithstanding that this may impact the effectiveness of the Tribunal's final determination; this ruling has become important…The ruling places me in the position to show that the CEO and members of the Board personally discriminated against because I am a black Bermudian…I have no personal involvement with them.

…it is the Tribunal's position that while they recognised that the Bank should be connected to my complaint, they could only contain their investigation to the Terms of Reference specified by the Minister."

12. The record shows that the Board gave the Appellant the opportunity to appeal its finding that the bank was not a party to the proceedings.

13. In his letter to the Acting Executive Officer, Human Rights Commision, dated August 21, 2006 the Appellant acknowledged that he was given the opportunity to apply to the Supreme Court to appeal the Board's ruling to try and have it set aside. In that letter he wrote:-

"During the adjournment, on the 24th April 2006, the Tribunal wrote and offered me two options to proceed when the Tribunal reconvened. The first option was to proceed as if the Bank of Bermuda Limited ('the Bank') was not a party to the tribunal, which was totally unacceptable. The second option was for me to: "Adjourn the inquiry sine die with liberty to restore" On Wednesday, after being advised of, and accepting my position that I was going to exercise the second option, Mr. Paul King, the Chairman of the Tribunal pronounced that it was still

the Tribunal's position that the Bank was not included in the Minister's terms of reference and therefore not a party to the proceedings.
…reneged on his offer to adjourn sine die as communicated in his letter dated 24 April 2006, and gave me two months to either go to the Supreme Court and have the Tribunal's ruling overturned, or use any other options I have available to me to overturn it."

14. The Board dismissed the complaint on October 23, 2006.

In its written reasons for the decisions dated April 17, 2007, the Board stated:-

"… this matter has been much protracted and emotive. The gravamen of the complaint is that the named Directors and then Chief Executive Officers of the Bank of Bermuda racially discriminated against the Complainant in failing to adequately investigate a complaint of breach of confidence owed to the Complainant in respect to his financial affairs. The tribunal has noted that the preponderance of the complainant's submission relate to institutional racism which – if accepted- would result in a finding against an entity that is not a party to these proceedings. The tribunal then next had to consider whether it has the inherent ability to amend its terms of reference so as to include the Bank of Bermuda as a party. Further, as counsel for the Complainant commented "it must be that this Board of Inquiry can really go no further, if in fact they are unable to include the Bank in these proceedings."

15. The history of the delay is an unfortunate one.

16. Mr. Paul Harshaw, Counsel for the Appellant, explained why he seeks to appeal the decision of the Board of Inquiry out of time, he submitted that the Appellant has properly and adequately explained the reason for that delay; the length of the delay is directly referable to actions on the part of the Commission and the Bank,

the prospects for success on appeal are good and there is no real prejudice to the Bank.

17. Mr. Harshaw's discourse dealing with the explanation for the delay was taken substantially from his written submission. He maintained that the "the crux of the matter is that the Board of Inquiry ruled that the Bank was not a party to the 30 October 2000 complaint by the Appellant in circumstances where the Bank by its own action had no less than 3 different rulings that it was, in fact, a party to the 30 October 2000 complaint by the Appellant."

18. As regards to the length of the delay, Mr. Harshaw said, "the length of delay in this application can be calculated in a number of different ways. The decision complained of is dated 17 April, 2007. On a straightforward reading of Order 55, the appeal should have been launched on or before 15 May, 2007, if 17 April, 2007, is the effective date of the decision. But that ignores the fact that upon receipt of the decision, HJD promptly wrote to the Commission seeking clarification of the status of the Bank. No substantive response to that letter was received by HJD for 4 months, when Marshall Diel & Myers responded to HJD substantively by letter dated 24 August, 2007, indicating that the Commission's inquiry was at an end. Upon receipt of that letter from Marshall Diel & Myers, HJD instructed Wakefield Quin to appeal.

19. "If we take the 24 August, 2007, letter as the starting point (considering that the Commission might have come to a different view and so advised the Board of Inquiry), then the time limited for appeal would be 28 days from 24 August 2007, or 21 September, 2007."

"…Contrary to what the Bank would have the court believe, this appeal is *not* about a decision made more than 2 years ago. It is about a decision published on 17 April 2007, some 4 ½ months before the Notice of Appeal in the abandoned

appeal was filed, which decision was confirmed on 24 August 2007, 37 days before the Notice of Appeal in the abandoned appeal was filed."

20. "The reasons for the delay are two-fold. First, HJD had sought clarification from the Commission as to the decision of the Board of Inquiry and HJD had been told that the period in which he had to appeal was 6- months, that is until 17 October 2007, if the 17 April 2007 date is the effective date, or until 24 February 2008, if 24 August 2007 is the effective date. Either way, HJD was within the 6 - month time limit he had been told applied to his appeal."
"HJD was told of the 6 - month window in which to appeal by David Wilson, the former Executive Director of the Commission. This is admitted by David Wilson, and the reason for that misconception explained."

21. "HJD believes that his appeal has a good chance of succeeding. This is not a fanciful belief. The Bank has consistently asserted that it is the true respondent to HJD's complaint to the Commission. The Bank has even commenced an action against the Minister for Community Affairs and Sport in this regard, a step which could not have been taken unless the Bank, as opposed to only the Directors and the CEO of the Bank, had sufficient interest in HJD's complaint to the Commission."

22. "It is clear that the Court has the power to halt proceedings before a Board of Inquiry if there is substantial injustice to one of the parties to those proceedings by reason of substantial prejudice caused by delay, even where that delay is not attributable to the opposite party…"

23. "…The only prejudice that the Bank asserts is the death of a Mr. Trimingham, Chairman of the Board (presumably of the Bank) at the relevant time. The Bank does not assert or even suggest that Mr. Trimingham had or might be presumed to have had any personal knowledge or records of the events complained of. In such circumstances, any complaint of prejudice is merely a bald assertion, completely

bereft of any particulars of actual prejudice to the Bank, the Directors of the Bank or the former CEO of the Bank."

24. Mr. Elkinson's submission on behalf of the Second Respondent is as follows: "The Appellant was given notice of the Board's decision on this point on 21st September, 2005. He complained about it in writing in October 2005. A letter dated 23rd December 2005, addressed to the Commission and copied to the Appellant, confirmed the Board's decision. A later letter, dated 24th April, 2006, written to the Appellant, expressly invited the Appellant to appeal this decision to the Supreme Court. The Appellant accordingly issued this Application (dated 16th January, 2008) over two years after he was given notice of the Board's decision. Further, the Appellant did not even file an appeal within 28 days of receiving the Reasons for Decision document on 23rd April, 2007, in which the Board explained why it had decided to dismiss the Complaint in its entirety."

25. "…The Appellant has no acceptable explanation for the delay. The hearing was repeatedly adjourned to allow him to appeal. He did not do so. He was at all times represented by attorneys and he has provided evidence that approximately 3 years ago he had legal advice that the Tribunal's ruling "…would not stand up in court." The excuses to the gleaned from the filed Affidavits of [the] Appellant in this Application, in addition to his letter writing to third parties, are:-
1). David Wilson of HRC told him on the 17th October, 2005, that he had 6 months to appeal – but he still failed to do so
2). Mr. Horseman was engaged in early July 2006, and told him that his only recourse was to appeal – but he chose to wait until receipt of a letter from the HRC on 24th August, 2007 - and even then he continued to wait
3). Mr. Horseman advised him, like my previous counsel, Mr. Peniston, whom he first consulted after receiving the Board's ruling, that there was no limitation period specified in the act and that there was no set time period for an appeal."

26. "…In the circumstances, on the authority of *Regalbourne,* the application should be dismissed on the basis that no proper explanation has been given and, from the evidence, none exists."

27 It is not required for the Court to consider the issue of prejudice, but it is clear that Directors have been severely prejudiced by the passage of time. The Chairman of the board (of directors) has died interim. One other Director has also died; others are unwell.

28. It would surely be a breach of the director's constitutional right, namely to have a hearing within a reasonable time for them to face a rehearing of a Complaint made eight years ago, concerning issues which date back to the 1990's.

29. Mr. Froomkin adopted the submissions of the Second Respondents. He added as follows:-

i. The only attempt at an explanation for the excessive delay is that set out in the Appellant's Second Affidavit, sworn on April 18th, 2008, three months after the filing of his Notice of Originating Motion;

ii. His explanation is that his various attorneys, and others who assisted him, erroneously advised him that he had 6 months in which to appeal the decision of the Board rendered on September 21st, 2005.

Blaming the excessive delay upon erroneous legal advice is not an acceptable excuse in law. As was held by Rose, J., in Ynys Mon Borough Council v. Secretary of State for Wales et al [1992] PLR1, pp. 2 – 3:

> *"In my judgment, it is the job of legal advisers either to know or to find out the law. If they do not do so, certain consequences may follow. One consequence which, in my judgment, should not follow is that their ignorance should attract judicial dispensation. I am wholly unperceived that Mrs. Williams' misappreciation of the time-limit for appeal is a reason why time should be extended. Indeed, in so far as it is material, I am wholly unpersuaded that the chronology of events which appears in the affidavits shows due diligence on her part."*

There being no reasonable excuse for the excessive delay, and there being unquestionable prejudice to the Respondents who are asked to respond to a Complaint made almost eight (8) years ago in respect of matters arising prior thereto, this Application should be dismissed with costs.

Court

30. Legal Counsel of the Appellant did not make the application to the Supreme Court to challenge the ruling of the Board of Enquiry until January 16, 2008. This was some 2 years and 4-months after the September 21 2005 ruling and 9 months after the written reasons for decision. According to Mr. Harshaw, the Appellant tried to exhaust all his avenues before coming to the court.

31. It is clear that the court will not extend time as a matter of course but there must be material before it upon which it can exercise a discretion.,
There is no acceptable explanation for the delay put before this court by the Appellant.
The Board of Enquiry made a ruling on September 21, 2005 and the record is replete with the opportunities given to the Appellant by the Board to challenge the decision. The Court does not understand the approach that was taken in this

matter. It is elementary that when a decision is given if it is being challenged the right of appeal to challenge should be preserved within the time frame given to do so. In this instance, within 28 days after the decision was given.

32. No application was made to the Supreme Court to challenge the decision until January 16, 2008. This was some two years and 4 months after the September 21, 2005, ruling and 9 months after the written reason for decision dismissing the Appellant's substantive application in its entirety.
Section 21 of the Act, giving the aggrieved party the right to appeal the tribunal's decision, is straightforward. Order 55 of the Rules of the Supreme Court is straightforward. I can find no satisfactory explanation why the Appellant did not exercise the right to appeal. Furthermore, the Board gave him two months to appeal the decision yet he failed to file an appeal.

33. The fact that Mr. David Wilson told the Appellant he has six months to appeal is being relied upon. But this was told to him after the September 21, 2005 ruling. Even if the right to appeal could by some stretch of the imagination be made applicable to the written decision which was given on April 17, 2007, the application to appeal that decision was not filed until some nine months after the written ruling.

34. In Regalbourne Ltd v East Lindsey District Council, Court of Appeal (Civil Division) [1994] RA 1 on page 6 *"Obviously, if time is not extended, there is prejudice to the potential appellant because he or she loses his right to appeal and the prejudice will be greater if the intended appeal had good prospects of success. But in most cases that is unlikely to be of great weight. If the failure to appeal within the time allowed is due to neglect on the part of the potential appellant's lawyers, such a litigant may have some redress against his own lawyers, but that again is not something with which the court is likely to be concerned when it is being asked to extend."*

35. In this case the Appellant did not comply with a clear time limit of 28 days. The delay in this matter is substantial and to extend time would cause significant prejudice to the Respondents. The Court can find no good or acceptable reason to extend the time. For those reasons the application is denied. The cost of this application shall be the Respondents'.

Dated day of 2008

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Justice Norma Wade-Miller

Puisne Judge