IN THE SUPREME COURT OF BERMUDA

Civil Jurisdiction

1997: No. 37

BETWEEN:

THOMAS MANFRED HOFER
(by his next friend Anna Hofer)

Plaintiff

and

THE BERMUDA HOSPITALS BOARD

Defendant

RULING

Date of Hearing: Thursday, 9 October 2008
Date of Ruling: Thursday, 9 October 2008

Mr. Michael Scott for the Plaintiff
Mr. Alan Doughty for the Defendant

1. This ruling arises from an application to enlarge time and for leave to appeal the ruling which I circulated on 26 June, following a hearing on 24 June. I should start by recounting various procedural matters. First, the ruling did not come to Mr. Scott's attention until 9 July, because the arrangement that his firm has with the Registry is that mail is retained until collected by him. Mr. Doughty takes no

point on the delay between 26 June and 9 July.

2. However, Mr. Scott then filed a Notice of Appeal on 21 July, in the mistaken belief that leave was not required. The correct position in regard to leave was drawn to his attention by the Registrar on 8 September and these applications made on 26 September.

3. There are two factual matters dealt with in the ruling which need to be addressed. First, I stated in paragraph 27 that Mr. Scott's affidavit had exhibited an affidavit from one nurse, Mr. McQueen, but not the other (who had actually been in the room at the time of the accident), Mr. Bentham. I carried on in paragraphs 28 and 29 to refer to the lack of a witness statement, inferring, incorrectly as it turns out, that the Board had not taken a statement from Mr. Bentham. Mr. Doughty's affidavit had referred (paragraph 16) to witness statements taken from employees without any reference to Mr. Bentham, and this, coupled with the contents of Mr. Scott's affidavit led me to the wrong conclusion. Mr. Doughty wrote to the Registrar on 14 July to correct the Court's error.

4. The second (and more significant) matter is that at the time of the hearing on 24 June, the Board had no knowledge of Mr. Bentham's whereabouts – see Mr. Doughty's affidavit of 17 April, paragraph 16, and Ms. Caisey's affidavit of 17 March, paragraphs 4 and 7.

5. In reply to those affidavits, Mr. Scott had sworn an affidavit on 8 May, saying (paragraph 6) that Mr. Bentham's last known address was known to him, and (paragraph 24) that he would undertake to write to him.

6. In the event, Mr. Scott did endeavour to track down Mr. Bentham, but without success. At the hearing this morning he confirmed what he had told me on 24 June, namely that he had telephoned a number that he had been given without securing an answer, and had not received any response to a letter he had written –

see paragraph 26 of the ruling.

7. On 25 June Mr. Scott wrote a letter to the Registrar, date stamped in the Registry on 27 June, after my ruling had been sent out. I left the Island on 28 June without that letter having come to my attention, but all it did was to give an address where Mr. Bentham was said to be working. On 26 September, Mr. Scott exhibited to his affidavit an email from Mr. Bentham dated 13 September, confirming his availability to give evidence.

8. The reason for going into such detail is that these two matters are relied on by Mr. Scott in his grounds of appeal. Indeed these two matters are the only grounds of appeal relied on.

9. I would propose to address the application to enlarge time first, and to do so with reference to the four matters to be taken into account referred to by counsel in *Vaucrosson –v- Bank of Bermuda* [1997] Bermuda LR 5, though I also have regard to what was said by Meerabux, J. in *Minister of Finance –v- Braswell et al* [2001] Bermuda LR 80. That said, the Court of Appeal in *Phillips* (see below) said that the requirements of 0.2 r.4 had been subsumed in the dicta relied upon by Mr. Doughty.

10. First is the length of the delay – between two and three months, not short, and perhaps of moderate length. No doubt it would have been longer if the position had not been pointed out by the Registrar.

11. Next is the reason for the delay, which was a failure to appreciate that the ruling was interlocutory, so that leave was needed. As the Court of Appeal commented in *Braswell*, whether or not the order was final or interlocutory should not have been a confusing matter, since the point had long been decided by the Court, (a quotation from *Phillips –v- Phillips*, judgment of 21 June 2001). I might add that *Phillips* was an appeal (or application for enlargement of time and leave) from an

order striking out the action. The Court held in *Braswell* that the intended appellant's mistake did not constitute a good and substantial reason. I would take the same view in this case.

12. Next is the chance of the appeal succeeding – the settled practice of the Court being to consider the merits of the appeal.

13. I should start with Mr. Bentham's whereabouts. Though it is perhaps strange that it was the Board who claimed to be prejudiced by their inability to locate him, the fact is that Mr. Scott was aware as early as 17 March that the Board was saying it was unable to locate Mr. Bentham, and certainly by 17 April. Yet, Mr. Scott did nothing until his affidavit of 8 May, and between that date and the hearing, more than six week laters, it remained the case that Mr. Bentham had not been located. It is not clear to me what led to his being found – no doubt through Mrs. Bentham who knew of his place of employment, but Mr. Scott knew at all times that Mrs. Bentham would be reached through her former employer in Bermuda, and I am bound to say that the exercise of reasonable diligence at an earlier stage would no doubt have led to the information produced in September being available before the hearing of 24 June.

14. If leave were to be granted so that the appeal could be argued, it would obviously be necessary for the appellant to secure the leave of the Court to put in the material which was not before me on 24 June. It necessarily follows from my comments above that I believe the Court would take the view that reasonable diligence would have led to Mr. Bentham's whereabouts being established before the 24 June hearing. As Ground J. held in *Muhl –v- Ardra* [1997] Bda LR 35, a finding in that regard is the end of the matter; the Court does not go on to consider the other criteria. I therefore hold to the view that the Court of Appeal would not allow evidence that Mr. Bentham would be available at trial to be admitted on the hearing of the appeal.

15. It seems to me that the question of Mr. Bentham's whereabouts is very much more significant than whether the Board had or had not obtained a statement from him at an earlier date. In one sense the supposed lack of a statement tied in with the issue of Mr. Bentham's availability. Certainly I looked at the three matters mentioned in paragraph 29 of the ruling together, referring to a combination of the Board's inability to locate Mr. Bentham, the lack of a detailed witness statement, and the effect of a lapse of time of more than fourteen years on the witness's memory. If only the first and last of those three matters were to have been relied on, I would have come to the same conclusion in relation to the risk that a fair trial of the issues would not now be possible, and would thereby prejudice the Board. I would expect that the Court of Appeal would take a similar view, and it follows from that and my view expressed above in relation to the admission of new evidence that I do not believe that this appeal has any real prospect of success.

16. In relation to prejudice to the potential respondent to the appeal if the application is granted, the fact of the matter being outstanding obviously causes prejudice to the Board, and if I granted an enlargement of time and leave to appeal, it would be some months before the Court of Appeal would dismiss the appeal, as I have indicated I believe they would.

17. I do, therefore, dismiss the application for an enlargement of time, and that is an end to the matter. If I were wrong in that regard, I would not grant leave to appeal on the basis of my view of the merits, quite apart from any difficulty arising on an appeal from an exercise of judicial discretion.

18. Finally, in relation to costs, I would expect these to follow the event, but will hear counsel should they wish.

Read: Court indicates copy will be made available. No submission by Mr. Scott on costs.

Court: The Board is to have its costs of these applications, to be taxed in default of agreement.

Dated this day of October 2008.

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Hon. Geoffrey R. Bell
Puisne Judge