In The Supreme Court of Bermuda

CIVIL JURISDICTION

Civ. 2009 No. 426

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

HAROLD JOSEPH DARRELL

Applicant

- and -

A BOARD OF INQUIRY APPOINTED UNDER THE HUMAN RIGHTS ACT 1981

Proposed First Defendant

and

THE MINISTER OF CULTURE AND SOCIAL REHABILITATION

Proposed Second Defendant

Dates of Hearing: 18th June 2010
Date of Judgment: 13th July 2010

Michael Beloff QC and Lawrence Scott for the Applicant

JUDGMENT

INTRODUCTION

1. This is an application for leave to bring proceedings for judicial review. It is a renewed application, pursuant to RSC Ord. 53, r. 3(4), leave having already been refused on the papers by Greaves J on 10th December 2009. The renewed application was lodged on 22nd December 2009. The delay since then appears to have been occasioned in part at least by the availability of leading counsel.

2. The decision which it is sought to challenge is that of a Board of Inquiry ('the Board') appointed under the Human Rights Act, dismissing the applicant's complaint of racial

discrimination against the CEO and Directors of the Bank of Bermuda ('the Bank'). The decision dismissing the claim was given orally on 23rd October 2006, although short written reasons were subsequently provided on 17th April 2007.

3. The decision of the Board was that the applicant's complaint failed because it was made against the wrong person – it was made against the CEO and the Board of Directors of the Bank, and the Tribunal held that it should have been made against the Bank itself. What the Chairman said on 23rd October 2006 was:

> "At the risk of being repetitive it is our decision that we are not able to amend the remit so as to include the Bank of Bermuda. The exclusion of the Bank of Bermuda is, in our collective view, fatal to this complaint . . . so we're going to dismiss the complaint and we'll circulate written reasons within three weeks[1]."

4. The complaint before the Board was that the Bank had failed to provide fair and proper treatment to the applicant, Mr. Harold Darrell, in relation to the resolution of a grievance about the alleged improper disclosure of his confidential business and banking information, which he says caused his communications company to lose a potential inward investment of $3.2M. In essence he says that the Bank failed to properly address his claims due to his race and the Bank's institutional racism.

5. The alleged improper disclosure of the applicant's confidential information occurred in or about February 1996. His complaint to the Bank was made verbally in April 1996, and formalized in writing on 8th May 1997. The applicant says that the Bank made two attempts at an investigation: the first took place on 16th May 1997 but was inadequate and flawed. He says that the second, in July 1997, concluded that he had been wronged by two members of the Bank's senior management team, but it was then suppressed or ignored. The applicant's original complaint to the Human Rights Commission ('the HRC') had been lodged on 30th October 2000[2].

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[1] That was not done, the written reasons not being given until nearly six months later, but they added little if anything to the oral reasons.

[2] The applicant did also sue the Bank for damages by writ of 22nd June 2000, but the evidence in support of the application does not say what the outcome of that was.

6. It is apparent from that brief overview that at the time of the initial complaint to the HRC the matter was already over three years old. There were then problems over the handling of the complaint, the net effect being that the Board was not appointed until June 2002. The Bank then launched judicial review proceedings to challenge the reference of the complaint to the Minister, which had led to the Board's appointment, and that was not resolved until 28th June 2005, when the Court of Appeal found in the applicant's favour. Only then could the Board get down to business.

7. The applicant alleges apparent and/or actual bias against the Chairman of the Board, who was a barrister and attorney, it being the applicant's case that the Chairman received a substantial amount of paid mortgage and conveyancing work from the Bank during the period he sat as Chairman. The Chairman had, in a letter of 18 July 2005, disclosed that "his firm is a customer of the Bank of Bermuda and does business with the Bank of Bermuda", but the applicant contends that that disclosure was inadequate.

8. The modern test for bias is that set out by Lord Hope in Porter v Magill [2002] 2 AC 357 at 494 H:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The test is framed in that way partly to avoid the difficult task of ascertaining whether the judge was in fact biased, and partly because appearances can matter as much as substance, and justice must not only be done but must be seen to be done.

9. At this stage the question on the merits of the application is simply whether the grounds are arguable. For a statement of the governing principles Mr. Beloff referred me to the opinion of Lords Bingham and Walker in the Privy Council in Sharma v Browne-Antoine [2001] 1 WLR 780 at 787 E:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy . . . But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application."

10. On the material before me I would have held that there was an arguable ground for judicial review, but I consider that it is subject to a discretionary bar, being delay. The decision under challenge was taken at the latest by the date of the written reasons of 17th April 2007. These proceedings were not issued until 3rd December 2009.

11. The time for bringing judicial review proceedings in this jurisdiction is set out in Ord. 53 r. 4(1), which provides:

> **53/4 Delay in applying for relief**
> 4 (1) An application for leave to apply for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

12. The applicant explains the delay by saying that he only found out about the Chairman's mortgage work for the Bank in late February 2009, when he was told by a former employee of the HRC. Then, on or about the 3rd or 4th March of that year, he says that he discovered from a lawyer, Mr. Wakefield, that the matter could be researched further in the registers of mortgages kept by the Registrar General. As a result he began his research there on 4th March 2009. He says the collection of data was complete by 24th July 2009, and the file of information on which he relies was in its final form by about 5th August 2009.

13. As a matter of principle, I accept that ignorance of the existence of grounds for relief would constitute good reason for extending the time. It is implicit in the applicant's evidence that time should only run from when he completed his researches in July or August 2009. However, I do not accept that the applicant could not have applied on these grounds before then. This is because, on 27th March 2009 the applicant wrote a letter of

complaint to the Governor revealing that he was aware in broad terms of the current grounds, and in particular he said:

> "Mr. King, who operates and owns a one man law practice with two or three support staff, prior to accepting the Chairmanship and the commencement of the Government appointed Board of Inquiry on 27th July2005, set up to investigate my human rights complaint against HSBC Bank of Bermuda Limited, conducted mortgage work for the Bank and never disclose this very important fact to my advisors and I.
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> While it is true that Mr. King raised the conflict issue and had it relayed to us via a letter from the then Director of Human Affairs, Ms. Brenda Dale dated 18th July 2005, when copied he remained silent on the letter inaccuracy. Ms. Dale's letter did not reflect the true role of Mr. King's relationship with HSBC Bank of Bermuda Limited, in fact her letter mislead us to believe that he was a customer of HSBC Bank of Bermuda Limited, when in fact he is a vendor conducting some of the Bank's lucrative mortgage work, valued in the millions.
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> From the commencement of the Board of Inquiry he chaired in July 2005 and its ruling in April 2007, the mortgage work Mr. King conducted for HSBC Bank of Bermuda Limited jumped to approximately fifty four million ($54,000,000.00) dollars, an increase of approximately thirty seven million ($37,000,000.00) dollars compared to the same period prior to the commencement of the Board of Inquiry.
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> Mr. King, as the Chairman of the Board of Inquiry, a lawyer and an officer of the local Judiciary system knew that he had an obligation to give full and clear disclosure that he was a vendor of HSBC Bank of Bermuda Limited and that he conducted mortgage work for it and he didn't. Also, as lawyer and an officer of the Judiciary system, Mr. King is fully aware of the doctrine of bias and/or bribe and yet he remained silent on the inaccuracy in Ms. Dales letter of 18th July 2005 and continually accepted an unprecedented and enormous amount of mortgage business from HSBC Bank of Bermuda Limited during the Board of Inquiry proceedings into my human rights complaint without fear of reprisal.
>
> I ask you, why you think that is?
>
> Mr. King as Chairman of the Board of Inquiry held a *"Quasi Judicial"* position at the time HSBC Bank of Bermuda Limited gave him this one off steady stream of mortgage business. This being the case, it appears that HSBC Bank of Bermuda Limited paid off a *"Judge"* to secure a decision in its favour and they too, did it, without fear of reprisal."

14. I consider that that shows that the applicant had sufficient information by the date of that letter to mount his current challenge, and that he was aware of the implications of that

information, and was also aware of the alleged inadequacy of the Chairman's disclosure. I think, therefore, that time had begun to run against him by the date of that letter at the latest.

15. The applicant says that he has delayed since then as he had difficulty finding a lawyer, but his affidavit shows that he had access to legal advice prior to May 2009, although he says that he was not satisfied with the level of expertise of the lawyer concerned, and after May 2009 he was instructing his present firm: see paragraph 90 of the affidavit in support.

16. It was also said in argument that the applicant lost time because his attorney undertook the very proper course of sending a letter before action. I accept the desirability of such a course, but the letter itself was not sent until 16th September 2009, and it elicited a prompt response of 25th September 2009 from the Chairman's lawyer. There is no explanation for the delay after that time.

17. The obligation imposed by RSC Ord. 53, r. 4(1) on would-be applicants is to make their application promptly, and in any event within 6 months. In this case, even giving the most generous interpretation to the six month limitation period provided by the Rules, the application was not commenced promptly and was outside the time limit.

18. Mr. Beloff asks me to extend that limit. He prays in aid the strength of the applicant's case on the merits and the public interest. Dealing with the merits first, I accept that a strong case on the merits may be a reason for overriding the time limits. Thus, in R (Cukurova Finance Limited) v HM Treasury [2008] EWHC 2567 at [52] Moses LJ said:

> ". . . it is often the case that the court will grant an extension despite undue delay where the merits are so strong that the court senses that a grave injustice will result were permission refused on the grounds of delay. Of course sometimes, however strong a case, the delay will be so serious or the impact of a late challenge so severe that, however dripping with merit a case may be, an extension will be refused, as Lord Goff recognised; but it would, in my view, be wrong to refuse an extension without some consideration of the true merits of the challenge."

19. However, the applicant's case is not necessarily as strong as he contends, and, as with most things, there are two sides to it. The Bank, in its response to the letter before action, argued against the applicant's case on the basis that it was not the Bank who assigned work to attorneys. They say:

> ". . . throughout the period in question, a Borrower from a financial institution and a prospective Purchaser of a property (being one and the same person) instructed a law firm of his or her choice and the lender had no involvement in the selection of the law firm."

20. The Chairman's attorneys, Wakefield Quin, advanced a similar argument in their letter of 25th September 2009:

> ". . . the work which was done by Mr. King's law firm was very much client driven in that it was his own firm's clients who were obtaining financing of one sort or another from the Bank of Bermuda in respect of which legal services were provided by his law firm."

21. They say, therefore, that a fair-minded and *informed* observer, who knew the true facts, would not come to the conclusion that there was a real possibility that the tribunal was biased. That argument is potentially a powerful response. It is supported by some of the evidence filed by the applicant, being the affidavit of Mr. Wakefield, which confirms that it is indeed the standard practice for the attorney who represents the purchaser to draft the mortgage. There are some qualifications to that, which Mr. Wakefield makes – the Bank will require the attorney to have indemnity insurance up to $3M; that for some (unspecified) commercial projects the lending bank has dictated to the developer what law office to use; that if the purchaser does not have an attorney the bank may recommend one; that he knows of one instance where an unspecified bank barred an attorney for poor performance; and that another, completely different bank, had once barred an attorney from mortgage work because the attorney acted against it in litigation. Mr. Wakefield also says that the Bank withdrew its mortgage business from his former firm, Wakefield Quin, and the resultant downturn led to him losing his job (although he also says there were other reasons for that). While he does not himself say it in terms, Mr. Wakefield gives a general

confirmation of the statements in the applicant's affidavit, which would include the assertion that the Bank put pressure on his former firm to drop the applicant as a client.

22. Of course, none of that can be resolved on this application. I merely recite the issues to show that the merits of this application are not a foregone conclusion. There are arguments both ways, but the result is that I am not persuaded that the merits are so strong in the applicant's favour that they should override the time limits.

23. As to public policy, Mr. Beloff argues that it is in favour of ensuring that allegations of racism against such a prominent institution are fully investigated and aired. Normally I would agree. But the allegations relate back to events which happened at the latest thirteen years ago in 1997. *Tempora mutantur nos et mutamur in illis*[3]: The Bank has changed ownership since then, having been acquired by HSBC in 2004. It has a different CEO. The Board of Inquiry dismissed the complaint nearly four years ago. In those circumstances I do not think that the public interest in having the applicant's complaints against the Bank investigated is now so strong as to override his non-compliance with the time-limits.

24. Like Greaves J, I too refuse this application on the basis that it is out of time, and, given the age of the matters under review, I can see no sufficient reason to extend time to permit it to be brought.

Dated this 13th day of July 2010

Richard Ground
Chief Justice

[3] Times change, and we change with them