



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 393

BETWEEN

MR. HAROLD JOSEPH DARRELL

-v-

(1) BOARD OF ENQUIRY APPOINTED UNDER THE HUMAN RIGHTS ACT 1981

**(2) THE MINISTER OF YOUTH, FAMILY, SPORT & COMMUNITY
DEVELOPMENT**

**(3) HSBC BANK OF BERMUDA LIMITED (FORMERLY THE BANK OF
BERMUDA)**

**& THE DIRECTORS (including the former directors) OF BANK OF BERMUDA
LIMITED**

Dates of hearing: 19th and 20th December 2012

Date of Judgment: 14th February 2013

Mr. J. Durham of Amicus for the Plaintiff

Mr J. Pachai of Wakefield Quin for the 1st Defendant

Mr. M. Douglas for the 2nd Defendant

Mr. J. Elkinson for the 3rd Defendant

DECISION

1. This action begun by Originating Summons seeks an order that the judgment obtained in Supreme Court proceedings No. 400 of 2010 be set aside as a consequence of the Defendants having obtained the judgment by way of fraud on the court in the said proceedings.

HISTORY

2. In Supreme Court proceedings No. 400 of 2010 the Plaintiff challenged the legality of the decision of the First Defendant Board of Inquiry (the Board) appointed under the Human Rights Act by way of judicial review. The Board had dismissed his complaint of racial discrimination made against persons associated with the Third Defendant herein (the Bank).
3. In his claim the Plaintiff had alleged that the decision of the Board was tainted by apparent bias on the part of the Chairman of the Board. The Plaintiff had alleged that the Chairman, Paul King (Barrister and Attorney of King and Associates), had not disclosed the existence of a commercial relationship between himself and the Bank.
4. The commercial relationship had been stated by the Plaintiff to relate to a substantial amount of paid work for the Bank involving residential mortgages. The significance of the description of this work becomes of relevance in the instant case and is referred to below.
5. I heard the matter over a period of 3 days and was referred by counsel for each of the parties to evidence contained in numerous affidavits and exhibits, leading and supportive authorities on the legal principles and the test to be applied were cited by counsel in their not inconsiderable submissions. There was no challenge on the authorities as to the test to be applied by the court.
6. The Plaintiff and the Defendants relied on data contained in exhibits that had been abstracted during their research from documents available to the public, which they referred to in support of their respective case. The significance of that data became relevant then as in the instant case and is referred to below.
7. In a considered judgment I dismissed the Plaintiff's case concluding inter alia that the Chairman had made sufficient disclosure of his relationship with the Bank prior to the start of the hearing. I further concluded in paragraph 101 therein that:

“The material referred to throughout and the many facts accepted and analyses made above are a powerful demonstration that a fair-minded and informed observer reviewing this case objectively and dispassionately would be, as I am, satisfied that there is no real appearance of bias on the part of the Chairman or more inclusively on the part of the Board against the Applicant Mr. Darrell.”

THE PLAINTIFF'S CASE

8. The Plaintiff now alleges that the judgment given in case No. 400 of 2010 was obtained by fraud on the part of the Defendants. The fraud particularised is that the

Defendants concealed and/or directly deceived the court as to the nature of the First Defendant's professional relationship with the Third Defendant.

9. The Plaintiff alleges that Mr. Paul King, (of King and Associates) carried out 6 commercial mortgage transactions during the years 2003 to 2007 while he was Chairman of the Board. It is the Plaintiff's case that the 6 transactions were relevant to the issue of Mr. King's disclosure and that they were withheld from the court's consideration.
10. To illustrate the fraud, Mr. Durham for the Plaintiff relied on a number of matters referred to or expressed in the hearing or to be implied therefrom. Firstly he relies on the affidavit of the Third Defendant's witness J. D. Massa of the 17th March 2011 wherein Massa stated that Mr. King's firm "does not do commercial mortgage work for the Bank". This Mr. Durham contends implies that Mr King's firm never did commercial mortgage work for the Bank.
11. Secondly, Mr Durham relies on the categorization made by Lord Pannick in his submission during the previous hearing on behalf of the Board that firms that carry out commercial mortgages for the Bank, which are on a panel list have a "special relationship" with the Bank. It is the Plaintiff's case that Lord Pannick distinguished Mr. King's firm from the panel list of firms with a special relationship with the Bank on the basis that Mr. King's firm was never on the panel list and accordingly Mr. King's firm was no different from the firms that did residential mortgage work.
12. The Plaintiff cites these as proof of the falsehood in the submission of Lord Pannick in light of what he now argues is the withheld evidence. To make his point of the relevance of the withheld evidence and these falsehoods the Plaintiff relies on the court having accepted Lord Pannick's submission as appear from paragraphs 56 and 57 of the judgment and as expressed in my findings of fact in paragraph 91.

"He contends that Mr. King's only relationship with the Bank other than as customer was consistent with all other conveyancing lawyers in Bermuda; he had clients that chose him to draw up their mortgages after having arranged for a mortgage with the Bank.

In these circumstances, he submits, far from concealing that information, Mr King specifically drew it to the attention of Mrs Dale; on the facts it did not amount to a special commercial relationship; and no real possibility of bias existed as the clients, not the Bank, chose Mr King's firm to draw up the mortgages."

And my accepting this evidence as fact:

"I accept this evidence as demonstrating that Mr. King did not attempt to hide the nature of his relationship with the Bank. I have shown that it was a relationship in common with all other conveyance lawyers."

13. From the above the Plaintiff argues that the court placed reliance on false evidence that Mr. King did not do commercial mortgage work.

14. Building on this it is the Plaintiff's contention that the reliance placed by the court on a lack of a "special relationship" between the Bank and Mr. King's firm, and the non-disclosed evidence of commercial mortgage work was relevant to the decision the court made of a lack of appearance of bias as it related to the risk that Mr. King as chairman of the Board may have been motivated to rule in the Bank's favour. He cites as proof thereof paragraphs 75-77 of the ruling:

"The evidence of J D Massa is clear; the Bank had a select few law firms that it instructed to carry out commercial mortgage work. Mr. King was aware that his firm was not included in the list of approved law firms carrying out commercial mortgage work. Indeed Mr. King was aware at the relevant time that despite his firm being able to carry out commercial mortgage work, his firm was not and had never been included in the Bank's exclusive list of firms. Accordingly Mr. King's firm was excluded by the Bank from having a special relationship with him.

The evidence that Mr. Durham relies on to sustain an appearance of bias on this point has in my view been skewed. There is no evidence capable of suggesting that Mr. King had hope of advantage in securing commercial mortgage work from the Bank by making a favourable decision for the Bank. Mr. Durham seeks to elevate to the level of risk improbabilities and conjecture.

The evidence shows Mr. King knew at the relevant time that he and most other conveyance firms were categorically excluded from commercial mortgage work by the Bank. The Bank was in control of that as Mr. Durham points out; however it does not follow that Mr. King

had reason to hope or believe that his presence on the Board could or would effect a change to the Bank's policy. In my estimation nothing other than speculation born of unwarranted suspicion could place such hope in him or pose a real risk of bias on his part."

15. It is the Plaintiff's contention that the non-disclosed evidence was relevant to the issue of the possibility of direct monetary influence from the Bank. He contends further that in the court accepting the false evidence that Mr. King's firm's relationship with the Bank was restricted to residential mortgage work, and that the Bank's panel list procedures did not allow for the potential to influence the selection of law firm, the court came to a wrong conclusion.
16. That conclusion he argues is compounded by the newly revealed fact that King and Associates in fact carried out 6 commercial mortgage transactions during the currency of the Board's existence. The Plaintiff submits that contrary to the court's finding there was therefore an extra special nature to King and Associates' relationship with the Bank during the relevant period.

THE DEFENDANTS' CASE

17. The Defendants agree that Mr King's firm carried out 6 commercial mortgages for the Bank over the period of 2003 to 2007 during which period he was Chairman of the Board.
18. Counsel for each of the Defendants dispute the Plaintiff's claim in this litigation and deny all allegations of fraud and of having relied on misleading the court factually or otherwise. In particular, their position is that what the defendant relies on as 'new evidence' was in fact available throughout the trial.
19. Counsel assert further that the so called 'new evidence' is consistent with and supports the case argued by the defendants. It is their case that not only did the evidence not mislead the court but that it was never counsel's intention that it should mislead the court. They argue that, if, which they deny, there had been fraud as alleged, such fraud would not have materially altered the judgment of the court.

THE LAW

20. The relevant legal principles are not in dispute between the parties. The well-established doctrine of *res judicata*, which reflects the value placed on the finality by courts in the common law system, is intended by the courts to prevent the re-litigation of decided matters. It also operates to have the whole of a case litigated at once and not piecemeal.
21. This rule is not absolute; exceptionally, a party may be able to start a new action to contest the judgment in an earlier case. A claim that a party practiced fraud on the court is one such exception. The conditions to be met are those stated in *Jacobs-v-Beaver* (1908) 17 O.L.R. (C.A.) at P.506:

“The fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counterstatements by the other side, and the whole adjudicated upon by the court and so passed on into the limbo of estoppel by the court. This estoppel cannot be disturbed except upon the allegation and proof of new and material facts, and from which are to be deduced the proposition that the former judgment was obtained by fraud.”
22. To fall into this exception, where fraud is alleged there must be evidence capable of demonstrating a strong *prima facie* case of wilful deception. (see *Boodoosing-v-Ramnarace* [2005] UKPC 9).

THE ISSUES TO BE DETERMINED

- (a) Was the evidence ‘new’?
 23. The ‘new evidence’ that the Plaintiff relies on is the fact that Mr. King’s firm carried out 6 commercial transactions during the period in which he was Chairman of the Board. Mr. Massa furnished data in an exhibit to his affidavit filed in the judicial review case which he obtained from public records. Contained in that data, was reference to the 6 commercial transactions; these the Plaintiff now refers to as new evidence. The commercial transactions were not distinguished from the residential mortgages when reference was made to the number and value of transactions and comparisons were made with other firms’ transactions.
 24. It appears to me quite clear that what is ‘new’ is the emphasis that the Plaintiff now seeks to put on the 6 transactions, having now segregated them from the residential transactions. The plaintiff could have segregated the commercial transactions in the judicial review matter if he thought it relevant to the issues then being tried; he had access to those very same public records and relied on them in support of his case. In my view this evidence was not concealed from the court by the defendants and accordingly is not new evidence.
- (b) Is there a *prima facie* case of fraud?

25. The Plaintiff complains that by not referring specifically to the 6 commercial transactions, the Defendants directly deceived the court as to the nature of the First Defendant's professional relationship with the Third Defendant. However, when one considers that the main thrust of the Plaintiff's case in the judicial review matter concerned non-disclosure of residential mortgages, it is difficult to understand how the court could have been deceived by the fact that no emphasis was put on 6 commercial transactions.
26. The court dealt decisively with the matter of no-disclosure and determined that Mr. King had made an appropriate disclosure. If the Plaintiff had pointed out the 6 transactions in that case it could and would not have affected the court's view that an appropriate disclosure had been made by Mr. King.
27. Much of the Plaintiff's argument arises from reference he said were made in the affidavit of J.D. Massa and in the submissions of Lord Pannick about Mr. King's firm not being on the Bank's panel list of firms carrying out commercial mortgage transactions. Mr. Massa was clearly speaking of a period after 2008 when there was a change in Bank policy, when he stated that Mr. King's firm does not do commercial mortgage work for the bank.
28. It does not now lie in the Plaintiff's mouth to suggest in this action that, Mr. Massa must have known of the commercial work done by Mr. King, therefore that statement implies that Mr. King's firm never did commercial mortgage work so therefore the 3rd Defendant's case was dishonestly presented. The statement was accurate for its purposes, and in the circumstances was not misleading. No evidence has been presented to the court to sustain an allegation of fraud on this point.
29. In his oral submissions Mr. Durham for the Plaintiff went further to make a wholly new submission. He asserted that the 'new evidence' made abundantly clear that a panel of lawyers existed that carried out work exclusively for the Bank prior to the new policy that resulted in the list that Mr. Massa's affidavit referred to. This assertion is contrary to the evidence submitted in the judicial review matter. It is wholly new and unsubstantiated. As such it is without merit.
30. Lord Pannick asserted that Mr. King's firm's relationship with the Bank was no different from other law firms, and did not amount to a special commercial relationship. In the court's view this was not a mis-statement nor a mis-representation of the facts. At the relevant time there was no panel list of lawyers carrying out commercial mortgage work for the Bank.
31. King and Associated carried out 6 transactions of a commercial nature over a 5 year period in the same manner that the firm carried out residential mortgage work; the firm was instructed by individual clients who sought King and Associates' services. Any other conclusion would be contrary to the evidence, because the panel list of lawyers had not yet been established.

32. The distinction being made by Lord Pannick and adopted throughout that case was that it was the panel list of lawyers which gave rise to a special relationship with the Bank. The fact that the 6 transactions involved property of a commercial nature does not elevate the nature of King and Associates' relationship to that of a special commercial relationship with the Bank in the sense that the term was used in the judicial review decision.
33. The plaintiff's other concern had been non-disclosure and the risk of financial influence by or from the Bank. The court is now, as it was then, satisfied that the circumstances in which the work came to King and Associates did not disclose a risk of bias on Mr. King's part or an appearance of influence over him in his decision making role.
 - (a) Any likelihood of a different result?
34. Mr. Durham hinges his allegation of fraud on certain submissions made by Lord Pannick and adopted by the court in the judicial review decision referred to above as contained in paragraphs 75-77 of the decision. It is true that Lord Pannick referred to Mr. King as being excluded from the panel list of lawyers for commercial mortgages and that he did not act in relation to commercial properties. This he did in supporting his position that there was no special relationship between Mr. King and the Bank.
35. On a proper analysis of his submission it is clear to the court that Lord Pannick was not attempting deliberately to mislead or deceive the court. Mr. King in paragraph 23 of his affidavit in the first sentence used the past tense in referring to his view of the Bank (ie his view at the time he was Chairman of the Board). In the next sentence he refers to the present policy of the Bank regarding the panel list of lawyers (ie the post 2008 policy) and indicates that he is not on the panel list.
36. Lord Pannick in his written (and oral) submissions at paragraph 19(4) accurately quotes Mr. King's second sentence referred to above. He goes on in paragraph 23 to illustrate with the evidence of JD Massa that Mr. King did not and have a special commercial relationship with the Bank. It is conceivable that one could interpret Lord Pannick's submission to be a denial that Mr. King ever carried out a commercial transaction involving the Bank. It is clear to the court that that is not what he intended to submit. His submission was in relation to a special relationship with the Bank. The special relationship arose for the panel list of firms out of the 2008 policy of the Bank.
37. Where Lord Pannick said, "Like all other law firms, they [King and Associates] acted for clients seeking mortgages from the Bank for residential clients. Unlike some law firms, they did not act in relation to commercial properties. No doubt if Mr. King did have such a commercial relationship, he would have declared it."
38. In my estimation Lord Pannick was making the distinction between the nature of King and Associates mortgage transactions emanating from their clients and the nature of

the relationship between panel law firms and the Bank in order to illustrate that Mr. King had no special relationship with the Bank. In the circumstances Mr. Durham has wrongly castigated Lord Pannick by overzealously attributing an intention to fraudulently mislead the court.

39. It would appear from the part of the judicial review decision quoted above, referred to as paragraphs 75-77, that the court was making a distinction as to how a special relationship with the Bank arose. The court's purpose was to illustrate that without evidence of a special relationship in the 2008 policy sense of the term, Mr. King had no reason to hope or believe that his presence on the Board would garner more mortgage work for his firm (including commercial transactions). The court could have been more pellucid.

CONCLUSION

40. What is of critical importance is that bearing in mind all of the submissions made by Mr Durham the court would not have come to a different decision than it did in the judicial review case. This so termed 'new evidence' is not new evidence. It is not capable of changing the findings that the court made in the judicial review matter. There was sufficient disclosure made by Mr. King.
41. The fact that out of the entire mortgage transactions 6 were of a commercial nature is not capable of elevating Mr. King's status to that of a special relationship or an extra special relationship with the Bank as submitted. The court found and is confirmed in that finding that there was no appearance of bias on Mr. King's part.
42. There was no new evidence. Counsel for the defendants did not deliberately or otherwise mislead the court. The court was not misled. The Defendants' Counsel were not dishonest nor did they in any way perpetrate a fraud on the court in the judicial review matter. Finally, none of the submissions made by the Plaintiff disclose anything capable of materially affecting the judgment of the court in the judicial review matter.

Dated this day of 2013

Charles-Etta Simmons

Puisne Judge

