In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No 106

BETWEEN:-

MR HAROLD JOSEPH DARRELL

Plaintiff

-v-

A BOARD OF INQUIRY APPOINTED UNDER THE HUMAN RIGHTS ACT 1981

First Defendant

and

THE MINISTER OF CULTURE AND SOCIAL REHABILITATION

Second Defendant

and

HSBC BANK OF BERMUDA LIMITED (formerly THE BANK OF BERMUDA) & THE DIRECTORS (including THE FORMER DIRECTORS) OF BANK OF BERMUDA LIMITED

Interested Party

RULING

(In Chambers)

Date of hearing: 8th October 2013
Date of judgment: 17th October 2013

Mr Jaymo Durham, Amicus Law Chambers, for the Plaintiff
Mr Jai Pachai, Wakefield Quin, for the First Defendant
Mr Melvin Douglas, Attorney General's Chambers, for the Second Defendant
Mr Ben Adamson, Conyers Dill & Pearman, for the Interested Party

Introduction

1. By summonses dated 6th May 2013, and undated but filed on 10th May 2013, the First Defendant ("the Board") and Second Defendant ("the Minister") respectively seek an order striking out the originating summons in this action and dismissing the action under Order 18, rule 19 of the Rules of the Supreme Court 1985 ("RSC"), or alternatively under the inherent jurisdiction of the Court, on the grounds that:

   (1) The endorsement of claim fails to disclose a reasonable cause of action against the Defendants; and/or

   (2) The endorsement is scandalous, frivolous and/or vexatious; and/or

   (3) That the action is an abuse of process.

2. The applications are supported by the Interested Party, which comprises the Bank and its present and former Directors ("the Directors").

3. By the originating summons in question, which was filed on 5th April 2013, the Plaintiff ("Mr Darrell") seeks declarations that:

   (1) The decision by the Board dated 7th April 2007 was (i) not a "determination" within the meaning of section 20(1) of the Human Rights Act 1981 ("the 1981 Act") and (ii) that it is a nullity.

   (2) Mr Darrell's complaint before the Board remains open and subject to final determination.

   (3) That section 20(5) of the 1981 Act has retroactive effect.

Background

4. The dispute giving rise to these proceedings has given rise to several previous judgments. From these I have pieced together its history.

5. Mr Darrell is a businessman. He complains that in or about February 1996 the Bank of Bermuda Limited ("the Bank") improperly disclosed his confidential business and banking information to a third party, with the result that his communications company lost a potential inward investment of $3.2 million. He complained to the Bank, but maintains that the Bank did not deal with his complaint in a satisfactory manner. This, he alleges, was because he is black and the Bank is, or was at the material time, institutionally racist.

6. On 30th October 2000, pursuant to the 1981 Act, Mr Darrell lodged a complaint of racial discrimination with the Human Rights Commission ("the Commission"). The Commission referred the complaint to the Minister of Community Affairs, who was then responsible for Human Rights. On or about 24th June 2000, the Minister in turn referred it to the Board. He drew up terms of reference which requested the Board to inquire into the:

> "*complaint of discrimination filed by Mr Darrell against the Chief Executive Officer and Board of Directors of the Bank of Bermuda Limited*".

7. The Bank filed an unsuccessful application for judicial review challenging the referral. As a result, the Board did not start its inquiry until 21st September 2005. On that date, Mr Darrell asked the Board to rule on whether the Bank was a party to the complaint and the Board ruled that it was not.

8. The hearing lasted for several weeks. At some point it was adjourned. During the adjournment, by letter dated 24th April 2006, the Board wrote to Mr Darrell and offered to adjourn the inquiry sine die with liberty to restore. This was presumably to give Mr Darrell the opportunity to challenge the Board's finding that the Bank was not a party to the complaint. The Board later resiled from this position and offered Mr Darrell an adjournment of two

months in which to challenge the Board's ruling. Mr Darrell did not avail himself of this opportunity.

9. On 23rd October 2006 the Board dismissed the complaint. The Chairman stated:

"*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.*"

10. The Board did not in fact issue written reasons for its decision until 17th April 2007. They were as follows:

"*This matter has been much protracted and emotive. The gravamen of the complaint is that the named Directors and the then Chief Executive Officer 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 of his financial affairs. The Tribunal has noted that the preponderance of the Complainant's submissions 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.'*

The Tribunal has carefully considered this point and must conclude that it does not have jurisdiction to amend its terms of reference.

Accordingly, the complaint against the Chief Executive Officer and Board of Directors of the Bank of Bermuda is dismissed and having regard to the position taken by the Respondents, there is no order for costs."

11. Mr Darrell has issued various proceedings in relation to the complaint before the Board.

(1) Application by notice of motion filed on 16th January 2008 for leave to appeal, and an extension of time in which to do so, against the Board's decision dismissing his complaint, Civ 2008 No 2. By a

judgment dated 29th September 2008 [2008] Bda LR 54, Mrs Justice Wade-Miller dismissed the application. She found that Mr Darrell did not comply with the 28 day statutory time limit for an appeal, that the delay in the matter was substantial, and that to extend time would cause substantial prejudice to the Respondents. In the premises the Court could find no good or acceptable reason to extend the time.

(2) Application for judicial review of the Board's decision dismissing his complaint on the ground that the Chairman was apparently and/or actually biased against him. The relief sought included a declaration that the decision was unlawful and an order of certiorari quashing the decision.

(a) On 10th December 2009 Mr Justice Greaves refused leave to seek judicial review on the papers. On 13th July 2010 Mr Justice Ground, CJ, refused a renewed application for leave [2010] SC (Bda) 38 Civ, Civ 2009 No 426. Both the application for leave and the renewed application for leave were filed in December 2009. Both judges refused leave on the basis that the application was out of time and that there was not sufficient reason to extend time for the application to be brought.

(b) On 5th November 2010 the Court of Appeal allowed Mr Darrell's appeal against the Chief Justice's decision, extended the time for making the application to the date when it was made, and granted leave to claim judicial review, Civil Appeal No 7 of 2010. The Court accepted that Mr Darrell had not become aware of the matters giving rise to his complaint until March 2009. It relied on the public interest in having the allegation of bias fully investigated by the Supreme Court. Although there was a statutory right of appeal under section 21 of the 1981 Act, this could not provide the remedy which Mr

Darrell sought, namely an order disqualifying the same Board from making any further decision.

(c) In due course, Mr Darrell's application for judicial review came on for hearing before Mrs Justice Simmons, Civ 2010 No 400. She dismissed it in a judgment dated 21st August 2012. This was on the basis that a fair-minded and informed observer reviewing the case objectively would be satisfied that there was no real appearance of bias on the part of the Chairman or the Board.

(3) Application by originating summons to set aside the judgment of 21st August 2012 in the said judicial review proceedings on the ground that it was obtained by fraud, Civ 2012 No 393. By a judgment dated 14th February 2013, Mrs Justice Simmons dismissed the application. She found that, contrary to Mr Darrell's allegations, the Defendants' counsel had not been dishonest and that the Court had not been misled.

(4) Specially endorsed writ of summons filed on 5th April 2013, claiming damages against the Board and the Minister for breach of statutory duty as the Board had allegedly failed to make a determination as to whether any party had contravened the 1981 Act, Civ 2013 No 110. The Board and the Minister both filed summonses to strike out the writ and the statement of claim and to dismiss the action. By a consent order dated 13th June 2013, that action was consolidated with the present action. However, on 27th September 2013 Mr Darrell's attorneys filed a notice of discontinuance. The Court is therefore not required to consider the claims made in the writ.

Statutory framework

12. Mr Darrell relies on sections 20 and 21 of the 1981 Act. The version of section 20 which was in force at the date of the hearing, ie as amended by

section 5 of the Human Rights Amendment Act 1995 ("the 1995 Act") and section 2 and Schedule 1 of the Director of Public Prosecutions (Consequential Amendments) Act 1999 ("the 1999 Act"), read:

"*(1) A Board of Inquiry after hearing a complaint shall decide whether or not any party has contravened this Act, and may do any one or more of the following—*

(a) order any party who has contravened this Act to do any act or thing that, in the opinion of the Board, constitutes a full compliance with such provision and to rectify any injury caused to the complainant by the contravention and to make financial restitution therefor:

Provided that financial restitution shall not be ordered for any loss which might have been avoided if the complainant had taken reasonable steps to avoid it;

(b) if it is satisfied that an offence has been committed and that any order that it may make under paragraph (a) will not be complied with, refer the complaint to the Director of Public Prosecutions with a view to a prosecution; and, additionally or alternatively;

(c) order any party to the dispute to pay any other party or the Commission costs of the proceedings before the Board, not exceeding in the aggregate one thousand dollars.

(2) In any case where a Board of Inquiry exercises its powers under paragraph (a) of subsection (1) but the party against whom the order was made refuses or neglects to comply with the whole or any part of it, then upon application by the Commission or by any party aggrieved by the non-compliance, the Board of Inquiry may proceed as provided by paragraph (b) of subsection (1).

(3) In any case, where a Board of Inquiry, after hearing a complaint, considers that the complaint is frivolous or vexatious and unjustified, the Board may order the complainant to pay compensation to the person against whom the complaint was made, not exceeding the reasonable costs of that person incurred in defending himself against the complaint.

(4) For the avoidance of doubt it is hereby declared that restitution in relation to a contravention of any provision of this Act includes financial restitution for injury to feelings."

13. Under section 13 of the Human Rights Amendment Act 2012 ("the 2012 Act"), section 20 was repealed with effect from 26th October 2012 and

replaced with a new section 20. Although subsections (1) – (4) remained substantially similar, the amendments included two new provisions:

"*(5) In any proceedings before the tribunal under this Act or otherwise, an interested party may, with leave of the tribunal, amend its terms of reference or add parties to an application on any terms and conditions that the tribunal considers appropriate.*

(6) The Tribunal may dismiss a complaint at any stage of the proceedings."

14. Section 18 of the 2012 Act dealt with transitional provisions. It provided:

"*(1) This section applies in a case where, before the commencement date, a board of inquiry was appointed by the Minister under section 18(2) of the Human Rights Act 1981 to deal with a complaint.*

(2) If the board of inquiry has not finally determined the complaint before the commencement date, the board of inquiry shall continue in being to consider the complaint and exercise its powers after that date as if this Act had not been passed.

(3) 'Commencement date' means the date on which this Act comes into operation."

15. Section 20A is also pertinent. It provides:

"*A claim by any person ('the claimant') that another person ('the respondent') has committed an act of discrimination against the claimant which is made unlawful by virtue of Part II may be made the subject of civil proceedings in like manner as any other claim in tort.*"

16. The version of section 21 which was in force at the date of the hearing, ie as amended by section 2 and Schedule 1 of the 1999 Act, read as follows:

"*(1) Any party against whom an order has been made by a Board of Inquiry may, subject to the provisions of this section, appeal to the Supreme Court.*

(2) 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) 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) A reference by a Board to the Director of Public Prosecutions shall not be deemed to be an order subject to appeal.

(5) The Chief Justice shall have the same power to make rules in respect of appeals under this section as he has under section 62 of the Supreme Court Act 1905.

(6) Section 6 of the Statutory Instruments Act 1977 shall not apply to rules made under subsection (5) unless they impose fees, in which case the rules imposing fees shall be subject to affirmative resolution procedure."

17. Section 21 was amended by section 12 of the 2012 Act, but those amendments need not concern us.

Discussion

18. The Defendants, supported by the Interested Party (collectively, "the Other Parties") apply to strike out the originating summons on the basis (i) that Mr Darrell has a hopeless case on the merits; (ii) that he has waited too long and it is now too late for him to make his application; and (iii) the Board would have no power to apply section 20A of the 1981 Act as the section does not have retrospective effect. The strike out application is brought under RSC Order 18, rule 19(1). Although rule 19(1) is stated to apply to writs, rule 19(3) provides that rule 19 shall also, so far as applicable, apply to an originating summons.

Hopeless case?

19. The application to strike out on the basis that Mr Darrell has a hopeless case on the merits could be brought under (i) RSC Order 18 rule 19(1)(a), on the ground that the originating summons discloses no reasonable cause of action; (ii) rule 19(1)(b), on the ground that the action is vexatious as it is bound to fail – see the decision of the Court of Appeal of England and Wales in Chatterton v Secretary of State [1895] 2 QB 189 at 191, 194, and 195 – 196; or (iii) rule 19(1)(d), on the ground that the action is otherwise an abuse of process as it is bound to fail – see the decision of the High Court in Domer v Gulf Oil (Great Britain) (1975) 119 SJ.

20. The Defendants rely on RSC Order 18 rules 19(1)(a) and 19(1)(b). As stated by Mrs Justice Wade-Miller in this Court in Martin v Minister of Labour [2011] Bda LR 3 at para 17:

> "*a reasonable cause of action is a cause of action with [a] chance of success if only the allegations in the claim are considered.*"

Thus rule 19(2) provides that no evidence is admissible on an application under rule 19(1)(a). However in my judgment this restriction does not prevent me from taking into account the Board's written reasons or the various judgments given in the course of this long-running dispute. Evidence is not prohibited on an application under rule 19(1)(b) or 19(1)(d). See the judgment in this Court of Mr Justice Meerabux in The Performing Rights Society v Bermuda Cablevision Limited [1997] Bda LR 33.

21. What, then, of the merits of the originating summons? It is based on the contention that although the Board has dismissed the complaint it has failed to comply with its statutory duty to decide whether the Directors have contravened the 1981 Act. In the absence of such a decision, it is submitted, the proceedings before the Board remain live, albeit dormant. Mr Durham, who spiritedly represented Mr Darrell, therefore invites me to direct that the Board should reconvene and reconsider its decision that it had no jurisdiction to join the Bank as a party to the complaint. Getting the Board to consider the allegations of institutional racism against the Bank is the purpose of the originating summons.

22. Mr Durham focuses on the written reasons for the Board's decision to dismiss the complaint. He submits that they contain no express finding that the Directors did not contravene the 1981 Act. This omission, he submits, was intentional. The Board made no findings as to the merits of the complaint because a finding against the Directors would by necessary implication have involved a finding against the Bank. This would have been inappropriate, or so the Board must have thought, as the Bank was not a party to the proceedings and therefore would not have had the opportunity to defend itself.

23. The Other Parties contend that this position is not properly arguable. They submit that on a plain reading of both the Board's decision and the written reasons the Board found that the complaint lay not against the Directors but the Bank. Indeed, they submit, the Chairman's statement that: "*The exclusion of the Bank of Bermuda is, in our collective view, fatal to this complaint … so we're going to dismiss the complaint*" could hardly be clearer. The Board, it is submitted, dismissed the complaint against the Directors because it was satisfied that they had not contravened the 1981 Act. Had the position been otherwise, Mr Darrell's then counsel would not have conceded before the Board that, unless the Bank was made a party, the Board could go no further.

24. The Other Parties rely on the fact that the Board dismissed the complaint only after a full evidential hearing that lasted for several weeks. They submit that this context supports their contention that it was a decision on the merits.

25. The Other Parties also rely on the said judgment of Mrs Justice Wade-Miller. It appears from her judgment that she had the benefit of a record of the proceedings before the Board, including transcript notes, written submissions, and correspondence between the Executive Officer of the Commission and Mr Darrell. Having reviewed this material, she stated at para 7 that "*the crucial issue is what the Board of Enquiry's decision was…*" and at para 30 that it was a decision "*dismissing the Appellant's substantive application in its entirety*".

26. It is submitted that it is implicit from these and other references to the Board's decision in the judgment that the learned Judge was satisfied that the Board had found that the Directors did not contravene the 1981 Act. If she were not satisfied, she would no doubt have said so. For the Board to have dismissed the complaint after a full, contested hearing but without making a decision as to its merits would have been a surprising step and one calling for judicial comment. Had Mr Darrell understood the Board to have done that, he would doubtless have raised the point himself.

27. The Board's written reasons were accurately described by Mr Adamson, counsel for the Bank, as "laconic". But I am satisfied, both from the language of the written reasons and their context, in that they came after a contested hearing lasting several weeks, that the Board had decided that the Directors had not contravened the 1981 Act. I find support for this position in the judgment of Mrs Justice Wade-Miller. Mr Durham's submission to the contrary, while ingenious, depends on a perverse misreading of the written reasons that is not supported by any contextual material.

28. I therefore find, without reference to any contextual material, that the originating summons discloses no reasonable cause of action. Taking contextual material into account I find that it is vexatious and an abuse of process in that it has no realistic prospect of success on the merits. In short, I find that Mr Darrell has a hopeless case.

Waited too long?

29. The application to strike out on the basis that that Mr Darrell has waited too long, and that it is now too late for him to make his application, is brought under RSC Order 18 rule 19(1)(d), on the ground that the action is otherwise an abuse of process.

30. The Other Parties rely on the principle that a party to litigation must put forward his entire case, submitting that it is an abuse of process to raise in subsequent proceedings matters which could have been litigated in earlier ones. That is how the principle was expressed by Lord Kilbrandon in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581 in the Privy Council at 590A.

31. It found its classic expression in the judgment of Wigram VC in Henderson v Henderson (1843) 3 Hare 100 in the Vice Chancellor's Court at 115:

> "*... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the*

same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

32. This passage was approved by the Privy Council in Yat Tung at 590B. But nowadays it must be be read subject to the gloss given by Lord Bingham in Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1 in the House of Lords at 31 A – E.

"*But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.*"

33. The Other Parties submit that Mr Darrell should have challenged the finality of the decision of the Board in his appeal or alternatively when he brought proceedings for judicial review.

34. I find that Mr Darrell cannot fairly be criticised for not raising his challenge on appeal. The appropriate respondent on the appeal was the Bank and not the Defendants. I agree with Lord Millett in Johnson v Gore Wood & Co (a firm) at 60 that:

> "*The rule in Henderson v Henderson … cannot sensibly be extended to the case where the defendants are different.*"

35. I also agree with Mr Darrell's submission that an appeal only lies against a final decision of the Board. Ie that section 21 of the 1981 Act only provides for an appeal against a decision or order of the Board under section 20 of the 1981 Act. As Mr Darrell complains that the Board has failed to make a decision under section 20, he is precluded by the terms of that complaint from raising it on appeal.

36. However I accept the Other Parties' submissions that Mr Darrell should have challenged the Board's alleged failure to make a final decision by way of judicial review. It is a public law issue par excellence. He should have brought a challenge promptly, and in any event within the 6 month time-limit permitted for judicial review applications. It is abusive for him to try to circumvent the requirement of a prompt challenge by bringing some 6 years later what is – presumably – intended to be a private law claim in tort for breach of statutory duty.

37. The point was well made by Lord Woolf MR in Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988 in the Court of Appeal of England and Wales at para 17:

> "*Since it was published the CPR* [Civil Procedure Rules] *1998 have given substance to its suggestion that the mode of commencement of proceedings should not matter, and that what should matter is whether the choice of procedure (which will now be represented by the identification of the issues) is critical to the outcome. This focuses attention on what*

in my view is the single important difference between judicial review and civil suit, the differing time limits. To permit what is in substance a public law challenge to be brought as of right up to six years later if the relationship happens also to be contractual [or, by parity of reasoning, tortious] *will in many cases circumvent the valuable provision of R.S.C., Ord. 53, r. 4(1)—which, though currently due to be replaced by a new Civil Procedure Rule, is unlikely to be significantly modified—that applications for leave must be made promptly and in any event within three months of when the grounds arose, unless time is enlarged by agreement or by the court.*"

38. There is a further difficulty with a claim for breach of statutory duty. As Lord Browne-Wilkinson said in X (Minors) v Bedfordshire CC [1995] 2 AC 633 in the House of Lords at 731 D – E:

"*The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.*"

39. Section 20A of the 1981 Act does provide for a private right of action for breach of statutory duty where it is alleged that the respondent has committed an act of discrimination against the claimant which is unlawful under Part II of the 1981 Act. The alleged failure of the Board to determine the merits of Mr Darrell's claim would not satisfy this definition and hence would not give rise to a right of action under section 20A. The 1981 Act does not provide for any other claim for breach of statutory duty.

40. Mr Darrell faces yet another hurdle. The Other Parties submit that the members of the Tribunal were carrying out a judicial function. In Heath v Commissioner of Police of the Metropolis [2005] ICR 329 the Court of Appeal of England and Wales reviewed the relevant case law. Lord Justice Auld, who is now a Justice of Appeal in this jurisdiction, summarised it thus at paragraphs 20 – 24:

"*21. The nature of the exercise in determining whether a body is to be regarded as 'judicial' for the purpose of giving absolute immunity to those involved in its proceedings*

is not a technical or precise one. It is one of determining its similarity in function and procedures to those of a court of law. It is a matter of fact and degree, one, as Lord Atkin said in O'Connor v Waldron [1935] AC 76 , 81, 'not capable of very precise limitation'. Thus, in Royal Aquarium [1892] 1 QB 431 , Lord Esher MR spoke, at p 442, of:

'an authorised inquiry which, though not before a court of justice, is before a tribunal which has similar attributes ... [namely] acting ... in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it.'

And Lord Atkin in O'Connor v Waldron [1935] AC 76 , 81, referred in the same context, and in confirmation of Lord Esher's proposition, to a tribunal that 'has similar attributes to a court of justice or acts in a manner similar to that in which such courts act'.

22. In Trapp v Mackie [1979] 1 WLR 377 Lord Diplock, after consideration of all or most of the relevant reported authorities over the near century since Lord Esher formulated the test of similarity, identified four aspects for consideration: (1) whether the tribunal is 'recognised by law', (2) whether the issue is 'akin to' that of a civil or criminal issue in the courts; (3) whether its procedures are akin to those in civil or criminal courts; and (4) whether the result of its procedures leads to a binding determination of the civil rights of a party or parties. However, at pp 383-384, he made plain after a detailed analysis of the evidence in the case going to the similarities under those four categories, that satisfaction of one of them would not on its own suffice to attract absolute immunity, and also that failure to satisfy one would not necessarily be fatal to it. The need for such flexibility is to be found in the public policy lying behind the rule with which he introduced his analysis, at p 379:

> *'No single touchstone emerges from the cases; but this is not surprising for the rule of law is one which involves the balancing of conflicting public policies, one general: that the law should provide a remedy to the citizen whose good name and reputation is traduced by malicious falsehoods uttered by another; the other particular: that witnesses before tribunals recognised by law should, in the words of the answer of the judges in Dawkins v Lord Rokeby (1875) LR 7 HL 744 , 753 "give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice".'*

23. Similar considerations, including, in particular, flexibility of application of the various components of similarity to individual circumstances, are also to be found in the following words of Dickson J, giving the judgment of the Supreme Court of Canada in Minister of National Revenue v Coopers & Lybrand [1979] 1 SCR 495 , 504, in which he sought to define the distinctive characteristics of a quasi-judicial act:

'(1) Is there anything in the language in which the function is conferred or in the general

context in which it is exercised which suggests that a hearing is contemplated before a decision is reached? (2) Does the decision or order directly or indirectly affect the rights and obligations persons? (3) Is the adversary process involved? (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense? These are all factors to be weighed and evaluated, no one of which is necessarily determinative ... In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those ... affected thereby ... The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process. The existence of something in the nature of a lis inter partes and the presence of procedures, functions and happenings approximating [to] those of a court add weight to (3). But, again, the absence of procedural rules analogous to those of courts will not be fatal to the presence of a duty to act judicially.'

24. Lord Diplock, in Trapp v Mackie [1979] 1 WLR 377, 383, returned, when considering the fourth category of similarity in the case, to the important theme of the competing public policies:

'In deciding whether a particular tribunal is of such a kind as to attract absolute privilege for witnesses when they give testimony before it, your Lordships are engaged in the task of balancing against one another public interests which conflict. In such a task legal technicalities have at most a minor part to play.'"

41. Applying these considerations to the Board, I am satisfied that it was exercising a judicial function. It was recognised by law, having been established by the 1981 Act; the complaint of which it was seised was akin to a civil issue in the courts; its procedures were akin to those in civil courts; and the result of its procedures led to a binding determination of the civil rights of the parties.

42. Consequently, the acts and omissions of the members of the Board in the course of the hearing attract immunity from suit. This is so irrespective of whether Mr Darrell's intention is to sue the Crown or alternatively the individual members of the Board.

43. If Mr Darrell's intention is to sue the Crown, the appropriate defendant is the Second Defendant as the Minister responsible for the Board. See section

14(1) of the Crown Proceedings Act 1966 ("the 1966 Act") read in conjunction with section 3 of the Interpretation Act 1951 ("the 1951 Act"). However his claim must fail as section 3(5) of the 1966 Act provides:

"*No proceedings shall lie against the Crown by virtue of this section in respect of any act by any person while discharging or purporting to discharge any responsibilities of a judicial nature which may be vested in him …*"

44. If Mr Darrell's intention is to sue the members of the Board personally – in which case they should have been joined as parties individually – his claim must also fail as at common law they have immunity for judicial acts. See the judgment of Lord Denning MR, with whom Lord Justice Ormrod agreed at 149 G, in Sirros v Moore [1975] 1 QB 118 in the Court of Appeal of England and Wales at 136 B – D:

"*Every judge of the courts of this land—from the highest to the lowest— should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure " that they may be free in thought and independent in judgment," it applies to every judge, what- Q ever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action.*"

45. This passage was approved by Lord Hope when giving the judgment of the Privy Council in Durity v AG of Trinidad and Tobago [2008] UKPC 59 at para 24.

"*As Lord Denning MR pointed out in Sirros v Moore [1975] QB 118 , 136-137, every judge from the highest to the lowest should be protected to the same degree from liability so that they may be free in thought and independent in judgment when acting judicially*."

46. Mr Pachai, counsel for the Board, submitted that the common law position had been superseded by section 10A(4) of the Magistrates' Act 1948 ("the 1948 Act"), which provides:

"*For the purposes of this section 'magistrate' includes a justice of the peace and any person appointed to sit as a member of a Special Court or required by law to carry out any other judicial function.*"

47. I am inclined to think that "*any other judicial function*" should be construed as referring only to functions carried out by Magistrates rather than by members of any inferior tribunal including Boards of Inquiry. But I did not hear argument on the point and, in view of my findings on the position at common law, I need not decide it.

48. These various obstacles to Mr Darrell's claim are insurmountable.

Retrospective effect?

49. Mr Durham concedes that, in light of the transitional provisions in section 18 of the 2012 Act, section 20(5) of the 1981 Act would not apply to those proceedings. There is therefore no reason to suppose that, even if the Court did have jurisdiction to remit the matter to the Board for further consideration, the Board's decision that it had no jurisdiction to join the Bank as a party to the complaint would be any different. Mr Darrell had the opportunity to challenge the Board's decision on that point on appeal, but his appeal was brought out of time and the Court refused to grant him an extension. Once the section 20A point was conceded, the originating summons became a collateral attack on that refusal. That is a further reason why it is abusive. See the judgment of Lord Justice Auld in the Court of Appeal of England and Wales in Bradford and Bingley Building Society v Seddon [1999] 1 WLR 1482 at 1493 B.

Conclusion

50. I am satisfied, for the reasons given above, that the endorsement of claim fails to disclose a reasonable cause of action against the Defendants; that it is vexatious; and that the action is an abuse of process. I therefore order that

the endorsement on the originating summons is struck out and that the action is dismissed.

51. I see no good reason to depart from the principal that costs follow the event. I am therefore minded that Mr Darrell should pay the Defendants their costs. However it is not clear to me that he should be liable for the costs of the Interested Party. If, in light of these indications, any of the parties wish to address me as to costs, they are at liberty to apply within 7 days of the date of this judgment to have the matter relisted for that purpose.

52. Although I have dismissed the action, I have every sympathy with the impetus behind it. The 1981 Act was intended to provide a relatively informal mechanism for resolving complaints by members of the public that their human rights have been breached. Mr Darrell made a complaint under the 1981 Act. He alleged that he had been indirectly discriminated against by the Bank. But the Board never got to decide whether that allegation was true. This was because of the terms on which the complaint was referred to the Board. Whether or not the allegation was true, Mr Darrell might justifiably feel that the statutory mechanism has let him down.

DATED this 17th day of October, 2013

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Hellman J