Neutral Citation Number: [2021] CA (Bda) Civ 14

Case No: Civ/2020/01

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. ACTING JUSTICE WHEATLEY
CASE NUMBER 2018: No. 245

Sessions House
Hamilton, Bermuda HM 12

Date: 02/09/2021

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

WANDA ANN PEDRO

Applicant

- v -

THE ATTRONEY-GENERAL & MINISTER FOR LEGAL AFFAIRS

Respondent

The Appellant appearing as litigant-in-person

Mr Brian Moodie, of the Attorney-General's Chambers for the Respondent

Hearing dates: 22 June 2021

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JUDGMENT

CLARKE P:

1. On 22 June 2021 we declined to grant Ms Pedro leave to appeal to the Privy Council from our decision of 19 March 2021 rejecting her appeal. We did so on the grounds that, even if, *prima facie*, she had a right of appeal under section 2(a) of the Appeals Act 1911, we were not satisfied that the proposed appeal raised a genuinely disputable issue. We set out our reasons below.

2. Ms Pedro's claim is against the Department of Child and Family Services ("DCFS") of Bermuda in respect of the circumstances in which her son, Michael Jnr, came to be removed from her care and, by an order made on 8 January 2010, she and Michael Jones (Michael Snr) were awarded joint custody of Michael Jnr but Michael Snr was to have care and control of him.

3. Ms Pedro's claim against the DCFS was begun by writ on 10 July 2018. It was struck out by Acting Justice Wheatley, following a hearing on 24 September 2019, by a Ruling of 28 November 2019, on the ground that it was frivolous, vexatious and an abuse of the process of the court, because Ms Pedro had consented to the Orders against which she complained and her complaint was brought after the expiry of the applicable limitation period.

4. An appeal was brought to this court, in which one of the principal grounds relied on was that the Ruling of Acting Justice Wheatley was a nullity because, although she had been appointed as an Acting Puisne Judge by an instrument signed by His Excellency the Governor, she had not taken the oath prescribed by section 76 of the Constitution in order to fulfil that position, but had only sworn the oath prescribed by the *Bermuda Promissory Oaths Act 1969* for her office as Registrar.

5. At the first hearing before this Court on 6 June 2020, at which Ms Pedro was represented by Mr Cameron Hill of Counsel, the Respondent accepted that the Ruling was invalid because the Registrar had not sworn the requisite oath. In subsequent submissions the Respondent argued that the Ruling was valid, relying, among other points, on the maxim *Omnia praesumuntur rite et solemniter esse acta*. On considering the matter after the first hearing it appeared to us that the concession and subsequent submissions were both misplaced. We drew the attention of the parties to a number of authorities and listed the matter for a further hearing which took place on 3 November 2020, at which Ms Pedro was represented, but by a different Counsel, Ms Smith-Bean.

6. The point that the Ruling was invalid was fully argued before us on 3 November 2020, as were the other points in the appeal which arose for consideration if the Ruling was not invalid on the ground alleged.

7. The pleadings, or what must be taken as the pleadings, in the case, which Ms Pedro had drafted were, as at 3 November 2020, prolix and discursive. It was not clear exactly what causes of action were being relied on and what exactly was being said in relation to the limitation point. It seemed to us that, in the interests of fairness, and in order for us to be able to reach a decision on the requisite material, that we should give Ms Pedro the opportunity to set out in a professionally drafted pleading exactly what her case was, and that that pleading should also address any defence that she sought to raise to the limitation point taken against her. (Limitation had not been pleaded at the hearing below, but reliance was placed on the line of authority which establishes that a pleading may be struck out if it is clear that the defendant intends to rely on limitation as a defence

and that there is no answer to it: e.g. *Ronex Properties Ltd v John Laing Construction Ltd et al* [1983] QB 398). Accordingly, at the conclusion of the hearing on 3 November 2020, we required the production of a full and clearly particularised pleading of Ms Pedro's case, including her response to the limitation point.

8. On 15 December 2020 the draft pleading was produced. It is lengthy and substantial. It made plain that the cause of action relied on was misfeasance in a public office and that the response to the limitation point was one of reliance on section 12 of the *Limitation Act 1984.* Reliance was not placed on the fraudulent concealment provisions of section 33 of that Act, which Ms Smith-Bean had indicated to us at the November hearing were not relied upon, nor on section 34.

9. In our judgment of 19 March 2021 we rejected the contention that the Ruling of Acting Judge Wheatley was a nullity. We also determined that the matters pleaded did not amount to misfeasance in a public office; and that Ms Pedro's answer to the limitation point was clearly untenable.

10. Ms Pedro has produced voluminous submissions as to why we were wrong, which we have carefully considered. Under section 2(a) of the *Appeals Act 2011* a would-be appellant to the Privy Council has an appeal as of right from any final judgment of this court where the claim involves some civil right amounting to or of the value of $ 12,000 or upward. Ms Pedro's original claim was for $ 250,000 and, whilst that is not determinative, we have little difficulty in concluding that, if she had a valid claim, it would be for more than $ 12,000. Further we would regard our judgment as final for the purposes of section 2(a) since, by dismissing the appeal, it finally determined that Ms Pedro had no claim.

11. A litigant who under section 2(a) has an appeal as of right still requires leave from this Court (or, that failing, special leave from the Privy Council). Privy Council authority confirms that leave is still needed where, if there is a tenable appeal, the appeal is as of right; and that in determining whether leave should be granted we must consider whether the proposed appeal raises a genuinely disputable issue in the prescribed category of case: *A v R (Guernsey*) [2018] UKPC 4, at [8], following *Alleyne-Forte v Attorney General of Trinidad and Tobago* [1998] 1 WLR 68, at p 73 and *Ross v Bank of Commerce (Saint Kitts and Nevis) Trust and Savings Association Ltd (in liquidation)* [2011] 1 WLR 125.

12. We take the view that, although the proposed appeal *prima facie* falls within the prescribed category of case, it does not raise a genuinely disputable issue. Our decision that the Ruling was not a nullity and that the essentials of a claim for Misfeasance in a Public Office were not pleaded was based on well-established authority at the highest level, and in the case of the former, of some antiquity. Our view on the limitation point was based on the relevant statutory provisions; and this point does not in any event arise unless our view on the second point is erroneous.

13. We are also clearly of the view that the proposed appeal does not raise a question of general or public importance or is otherwise such that it ought to be submitted to Her Majesty-in-Council.

14. It is for those reasons that we refused leave.

15. We fully appreciate the impact on Ms Pedro of the fact that her son was removed from her care; that she has suffered much in consequence, and that she has bent, and continues to bend, every sinew to secure what she would regard as redress against those whom she regards as responsible for all of this. However, it is the function of the Court to determine whether she has a viable cause of action, assuming the accuracy of the matters pleaded. In our view, for the reasons that we have expressed in our judgment she does not.

16. We would observe that, although Ms Pedro denies that she ever consented to any order, the orders of the Magistrate, made at the hearings on 20 October and 3 November 2009, and 8 January 2010, at each of which she was represented by counsel, are all expressed to be made with her consent.

17. We wish to draw attention to the fact that these proceedings have been conducted, in their entirety, remotely, and that there are a number of relevant documents which were before us "on the cloud" and of which we do not currently have hard copies. These include but are not limited to the orders made by the Magistrate. If this matter is to be addressed by the Privy Council, it may be necessary to ensure that all the relevant documents are before them. This may require some consultation with the Clerk of the Court of Appeal.