In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No 162

BETWEEN:-

HAROLD JOSEPH DARRELL

Plaintiff

-v-

(1) BRENDA DALE
(2) MYRA VIRGIL
(3) THE DEPARTMENT OF HUMAN AFFAIRS
(4) THE MINISTER OF CULTURE AND SOCIAL REHABILITATION

Defendants

RULING

(In Chambers)

Date of hearing: 25th July 2014
Date of ruling: 3rd September 2014

Mr Jaymo Durham, Amicus Law Chambers, for the Plaintiff
Mr Saul Froomkin QC, ISIS Law Limited, for the First and Second Defendants
Mr Melvin Douglas, Solicitor General, for the Third and Fourth Defendants

Background

1. The Human Rights Act 1981 ("the 1981 Act") established a mechanism to address people's complaints that their human rights had been breached and resolve them in a relatively quick and informal manner. That, at any rate, was the theory. In the case of Harold Darrell, the Plaintiff, the reality has proven somewhat different.

2. The 1981 Act has been amended on several occasions, but at the material time the procedure was as follows. The complainant would make a complaint to the Human Rights Commission ("the Commission"), which would attempt to resolve it by consent. If a consensual resolution proved impracticable, the Commission would refer the complaint to the responsible Minister, who might at his discretion refer it to a Board of Inquiry appointed under the 1981 Act. Once the Commission referred the complaint to the Minister its role was at an end and it became *functus*.

3. The terms of the complaint were settled by the Commission. In practice, they would be drawn up by the Commission's Executive Officer and agreed with the complainant. The Minister had no jurisdiction to amend them. Thus his role was described by Simmons J in Bank of Bermuda Ltd v The Minister of Community Affairs and Sport (Civil Jurisdiction 2002 No 236) as "*a purely administrative one*". The Board had no jurisdiction to amend the complaint either.

4. Happily, the 1981 Act has been amended by the Human Rights Amendment Act 2012 ("the 2012 Act") to permit the amendment of terms of reference. Section 20(5) of the 1981 Act now provides that in any proceedings before the tribunal (the successor to the Board) an interested party may, with leave of the tribunal, amend its terms of reference or add parties to an application on any conditions that the tribunal considers appropriate. Unhappily for Mr Darrell, this amendment did not come into force until 26th October 2012 and does not apply to any proceedings before Board commencing prior to that date. See the transitional arrangements at section 18 of the 2012 Act.

5. The Commission was supplied with staff by the Third Defendant, the Department of Human Affairs ("the Department"), which also provided administrative support to the Tribunal. Thus the Executive Officer was answerable to the Director of the Department, who was at the material time the First Defendant, or, in her absence, to the Acting Director of the Department, who was at the material time the Second Defendant.

6. Mr Darrell lodged a complaint of racial discrimination with the Commission. He alleged 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 maintained that the Bank did not deal with his complaint in a satisfactory manner. This, he alleged, was because he is black and the Bank is, or was at the material time, institutionally racist.

7. A written complaint was drawn up by the Commission's Executive Officer, Neville Darrell, and signed by the Plaintiff. It was dated 30th October 2000. Having set out the alleged facts, the complaint then analysed the motivation of those involved:

> 20. … It is almost impossible to believe that the events that have devastated me personally and what the Bank of Bermuda has allowed to happen to me are not driven by insidious racial behaviour by the Bank of Bermuda and its Board of Directors who are also currently well aware of my complaint and [the findings of an internal Bank investigation] in my favour.
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> 21. The Bank of Bermuda is refusing to address my complaint in their normal manner because my witnesses and I are black. Instead the Bank has opted to use the full resources of the Bank to take this complaint to the courts in an effort to exhaust my own financial ability to fully pursue the successful and fair resolution of my complaint.

8. It is clear from these passages that Mr Darrell intended to make a complaint against the Bank. It is therefore surprising that the Bank was not named as a respondent. That was to prove fatal to the complaint. Instead, the

respondents were named as the Chief Executive Officer ("CEO") and Board of Directors of the Bank ("the Directors").

9. In a letter dated 21st November 2005 to the new Executive Officer, David Wilson ("Mr Wilson"), Neville Darrell explained that the CEO and the Directors were made respondents on the theory that as the people in charge of the Bank they should be held accountable for any discriminatory acts which it committed. In other words, they were joined in a representative capacity. That is not a theory which appears to have found favour with the Board. As I have not heard argument on the point, which does not arise on the instant application, I express no view as to the correctness of the Board's approach.

10. A further reason for naming the Directors as a respondent may have been that the complaint expressly alleged that they racially discriminated against Mr Darrell by not taking his complaint seriously. Perhaps because I have not had the benefit of hearing the evidence that was before the Board, it is not clear to me why, as appears below, the Board concluded that it was unable to deal with this aspect of his complaint.

11. The Commission referred the complaint to the Minister, who referred it to the Board. As noted above, the Minister had no jurisdiction to amend the complaint. Thus the terms of reference to the Board, which were signed by the Minister, named the same respondents as those named in the complaint, namely the CEO and the Directors.

12. The Board did not start its inquiry until 21st September 2005. The reason for the delay was that the Bank filed an unsuccessful application for judicial review challenging the referral. The hearing lasted several weeks and was adjourned. The Board did not give its decision until 23rd October 2006. Written reasons followed on 17th April 2007.

13. The complaint was dismissed because the Board found that: (i) the preponderance of Mr Darrell's allegations related to institutional racism against the Bank; (ii) the Bank was not a party to the proceedings; and (iii)

the Board had no jurisdiction to amend its terms of reference so as to join the Bank as a party.

Current proceedings

14. This is the latest of a number of actions from Mr Darrell arising from the Board's decision. The others have all been unsuccessful. A specially endorsed writ of summons was served on 28th April 2014. As against the First and Second Defendants, he claims damages for the tort of misfeasance in public office. The gist of the allegations is that both these Defendants: (i) maliciously influenced the Commission so as to prevent it from acting to have the Bank joined as a party to the complaint before the Board; and (ii) met the Board and improperly advised it on legal matters that were within the sole remit of the Board, namely

> … whether the Bank was originally an intended party to the Plaintiff's complaint and whether it was necessary for the Board to allow the proceedings to be stayed, pending referral of the matter of amending the terms of reference to the Minister.

15. Further, Mr Darrell claims that his right to a fair hearing before an adjudicating authority, namely the Board, as guaranteed by section 6(8) of The Constitution of Bermuda ("the Constitution"), has been breached by the First, Second and Third Defendants:

> … by abusing their power and unlawfully influencing the Board of Inquiry that the Plaintiff never intended the Bank of Bermuda Ltd. to be a respondent to his complaint, thereby preventing the referral of the matter of amending the Board of Inquiry's terms of reference to the Minister as the Board Chairman had invited the Commission to do in his 23rd December 2005 letter to Mr. David Wilson.

16. As Mr Douglas, counsel for the Third and Fourth Defendants, rightly points out, the Third Defendant is not a legal person and therefore cannot be sued.

17. There is no cause of action pleaded against the Fourth Defendant, the Minister of Culture and Social Rehabilitation (now the Minister of

Community, Culture and Sports). I assume that the Minister has been joined as an interested party because, through the Commission, he is responsible for the administration of the 1981 Act, and referred the complaint to the Board.

Strike out applications

18. All four Defendants apply to strike out the specially endorsed writ of summons on the grounds that it: (i) discloses no reasonable cause of action; (ii) is scandalous, frivolous and vexatious; and (iii) is otherwise an abuse of process of the Court. The application is brought under Order 18, rule 19 of the Rules of the Supreme Court 1985 ("the RSC").

19. By consent, I heard argument on just one element of the Defendants' application to strike out the Plaintiff's claim in tort, namely that the claim is time barred under the Limitation Act 1984 ("the 1984 Act"). This was on the basis that if the Defendants do not succeed on this point I shall hear argument on the remaining elements of their application at a later date. I heard argument on all aspects of the application to strike out the Plaintiff's constitutional claim.

20. I remind myself of the principles applicable to a strike out application, which were helpfully summarized by Kawaley J (as he then was) in Global Construction Ltd v Hamiltonian Hotel & Island Club Ltd [2005] Bda LR 81 at para 14:

> The jurisdiction to strike-out under order 18 rule 19 and/or under the Court's inherent jurisdiction must be "*sparingly exercised*". It is also well settled that:
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> > "The jurisdiction must be sparingly exercised, as its exercise deprives a party of the normal procedure by way of trial with discovery and oral evidence tested by cross-examination. It should only be used in plain and obvious cases. I have only to decide whether the case is so plainly unarguable that there is no point in having a trial at all." [Re a Company [1991] BCLC 154 at 155.]

21. As Kawaley J stated at paras 16 – 17, "*in a very clear case*" the Court can also strike out a claim which is time-barred. This is on the ground that it is frivolous and vexatious and an abuse of process. This reasoning derives from a line of authority in the Court of Appeal of England and Wales which culminated in Ronex Properties v John Lang [1983] 1 QB 398. See the judgments of Donaldson LJ at 405 A – B and Stephenson LJ at 408 B – D.

The limitation point

Statutory provisions

22. The Defendants rely on section 4 of the 1984 Act, which provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

23. However, section 33 of the 1984 Act modifies the time limit in the case of fraud, concealment and mistake. In particular, and subject to certain exceptions which are not material, section 33(1) provides that where any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant, the relevant limitation period under the 1984 Act shall not begin to run until the plaintiff has discovered the concealment or could with reasonable diligence have discovered it.

24. Section 33(2) of the 1984 Act provides that, for these purposes, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

25. The phrase "*deliberate commission of a breach of duty*" means that the defendant knew that he was committing a breach of duty or intended to commit one, not that he deliberately carried out an act which happened to be a breach of duty without knowing or intending any such breach. See the decision of the House of Lords in Cave v Robinson, Jarvis & Rolf [2003] 1 AC 384 *per* Lord Millett at para 25 and Lord Scott at para 60. The House

was there construing the wording of section 32(2) of the Limitation Act 1980, a statute in England and Wales, which is identical to the wording of section 33(2) of the 1984 Act.

26. The expression "*breach of duty*" in this context was defined by Arden LJ, giving the judgment of the Court of Appeal of England and Wales in Giles v Rhind (No 2) [2009] Ch 191 at para 38, as meaning: "*a legal wrongdoing of a kind that can properly be raised in an action to which section 32 [or, in Bermuda, section 33] applies*". Thus Arden LJ stated that it would not cover legal wrongs which are not justiciable and may not cover all breaches of duty by public authorities in judicial review proceedings.

Allegations of malicious influence

27. Turning to the circumstances of the instant case, the Plaintiff's allegations that the First and Second Defendants maliciously influenced the Commission concern events which allegedly took place in or around October 2005 through December 2005. The six year limitation period has long since expired. There is no evidence from which I can properly find that by reason of fraud, concealment or mistake the limitation period should have started to run at a later date.

28. Moreover, the substance of these allegations was contained in an affidavit sworn by Mr Wilson on 10th January 2008 in support of Mr Darrell's application for leave to appeal against the Board's decision that the Bank was not a party to the proceedings before the Board. Thus Mr Darrell or his legal advisors had actual knowledge of the allegations of malicious influence by that date.

29. Indeed, on 9th August 2006 Mr Darrell had written to the Chairman of the Board alleging: "*underhanded behaviour by Mrs Brenda Dale; specifically that she broke policy, was biased, and attempted to influence the Commission to rule against my interest.*"

30. In the premises I find that the allegations of malicious influence against the First and Second Defendants are time barred and order that they be struck out on the grounds that they are frivolous, vexatious, or otherwise an abuse of process.

Allegation of meeting and improperly advising the Board

31. The Plaintiff's allegations that the First and Second Defendants met the Board and improperly advised it on legal matters that were within its sole remit relate to a meeting which allegedly took place sometime between 23rd December 2005 and 23rd October 2006.

32. Mr Darrell's case is that he did not become aware of the meeting until receipt of a letter from the Ombudsman dated 16th November 2011. The letter was written pursuant to a complaint to the Ombudsman from Mr Darrell that the Commission unreasonably delayed in responding to a letter from the Board dated 23rd December 2005. In her letter, the Ombudsman stated that the Department met with the Board to follow up on the 23rd December 2005 letter.

33. Mr Darrell alleges that the meeting was a deliberate commission of a breach of duty by the First and Second Defendants in circumstances in which the breach was unlikely to be discovered for some time. It follows, on his case, that the meeting amounts to a concealment of the facts involved in that breach of duty. Therefore, Mr Darrell submits, the limitation period did not begin to run until he became aware of the meeting.

34. The background to the meeting was as follows. On 19th December 2005, Mr Wilson, in his capacity as Executive Officer of the Commission, wrote to the Chairman of the Board stating that, in the Commission's view, Mr Darrell had at all material times intended to include the Bank as a respondent to his complaint.

35. A file note from the Second Defendant dated 22nd December 2005 records that upon receipt of the letter, the Board's Chairman, Paul King, drafted a response and asked for the Department's advice as to the letter's "*content and process*". The Second Defendant and two other members of the Department, Jane Brett and Michelle St Jane, called the Chairman to discuss the situation. Ms St Jane advised that the Chairman should acknowledge receipt of the letter but consult the other members of the Board before sending a substantive response.

36. The Chairman should not have sought advice from the Department and the Department should not have provided it. However the course proposed by the Department was sound and the Department did not seek to influence the Chairman's substantive response to the Commission's 19th December 2005 letter.

37. By letter to Mr Wilson dated 23rd December 2005 the Chairman acknowledged receipt of the 19th December 2005 letter. He requested authority that the Board could amend its own terms of reference and stated that, absent such authority, the Board was firmly of the view that only the Minister could amend the terms of reference. In fact neither the Board nor the Minister had jurisdiction to amend them.

38. In her letter of 16th November 2011 the Ombudsman records that the Commission, having double-checked its files, confirmed that it had never replied to the Chairman's letter of 23rd December 2005. Instead, as noted above, the Department met with the Board to follow up on the 23rd December 2005 letter.

39. I have not seen a file note or minutes of that meeting. However the Ombudsman wrote in her 16th November 2011 letter:

> For your additional information, it appears that, while various views were exchanged generally regarding the authority to amend Terms of Reference, it was determined unnecessary to do so in this case as your own counsel had identified the parties to your complaint in (a) a previous

judicial review and (b) representations to the Board itself (see attached excerpt).

40. It therefore appears that at the meeting a discussion took place regarding the authority to amend the terms of reference. It should not have done. The Department's role was to provide administrative support to the Board. A discussion with the Board about amending the terms of reference lay beyond its remit. The discussion having taken place, the Board should have informed the parties to the hearing of the fact of the discussion and of what was said. This does not appear to have happened.

41. There is no evidence before me from which I can properly infer whether the First or Second Defendants were present at the meeting, and, if they were, what they said. I am therefore unable at present to make any finding as to whether either or both of them deliberately committed a breach of duty. The resolution of that question must await the trial of the action. However they will *ex hypothesi* have deliberately committed such a breach if, in due course, they are found to have committed misfeasance in public office.

42. I am satisfied that any deliberate breach of duty was unlikely to be discovered for some time, as the participants in the meeting evidently felt under no obligation to report what was said there to Mr Darrell.

43. As it is not clear whether the allegation of meeting and improperly advising the Board is time-barred, I decline to strike it out at this stage.

Allegation of breach of constitutional right to a fair hearing

44. The Plaintiff's right to apply to the Supreme Court for redress on the grounds that a right guaranteed by the Constitution has been breached is conferred by section 15(1) of the Constitution.

45. RSC Order 114, rule 1 provides that proceedings instituted pursuant to section 15(1) shall be commenced by originating summons. In the present case, the constitutional claim has been made by writ. However this is not

fatal to the claim as RSC Order 2, rule 1 provides that a failure to comply with the requirements of the Rules shall be treated as an irregularity and shall not nullify the proceedings.

46. It would have been needlessly cumbersome for the Plaintiff to issue both a writ for his claim in tort and an originating summons for his claim under the Constitution when both claims arise from the same factual matrix and can conveniently be included in one document.

47. The Court's jurisdiction to hear and determine the application is conferred by section 15(2) of the Constitution. However section 15(2) contains a proviso:

> … the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

48. As to adequate means of redress, Lord Nicholls, giving the judgment of the Privy Council in AG of Trinidad and Tobago v Ramanoop [2006] 1 AC 328 stated at para 25:

> … where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

49. In the present case, the way in which the constitutional claim has been framed merely recasts the malicious influence limb of his claim in tort. That tortious claim therefore provides Mr Darrell with an adequate alternative remedy.

50. Alternatively, Mr Darrell could have brought a claim in judicial review, challenging the lawfulness of the Board's decision to dismiss his claim, on the ground that the Board had taken into account irrelevant matters, namely the representations allegedly made at the meeting by the First or Second Defendants or other members of the Department.

51. RSC Order 53, rule 4(1) provides that 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 this period.

52. Had Mr Darrell, upon learning of the meeting between members of the Department and the Board, promptly sought leave to apply for judicial review of the Board's decision not to amend the terms of reference then the Court would likely have granted him an extension of time in which to do so.

53. Alternatively, Mr Darrell could have applied to amend his then extant application for judicial review challenging the lawfulness of the Board's decision to dismiss his claim, which was heard on 16th – 18th January 2012.

54. I am therefore satisfied that judicial review also provided Mr Darrell with an adequate alternative means of redress.

55. That is not the only problem with the constitutional claim. It is based upon a misconception, namely that the Minister had jurisdiction to amend the terms of reference to the Board. As I have explained above, he did not.

56. In the premises I am satisfied that Mr Darrell's constitutional claim as presently drafted is frivolous, vexatious, or otherwise an abuse of process, and order that it be struck out.

Summary

57. The claim against the First and Second Defendants for malfeasance in public office is time-barred insofar as it alleges that they maliciously influenced the

Commission so as to prevent it from acting to have the Bank joined as a party to the complaint before the Board. I therefore order that this limb of the claim should be struck out on the grounds that it is frivolous, vexatious, or otherwise an abuse of process.

58. I am at present unable to determine whether the claim against the First and Second Defendants for malfeasance in public office is time-barred insofar as it alleges that they met the Board and improperly advised it on legal matters that were within the sole remit of the Board. I therefore decline to strike it out at this stage. I understand that those Defendants wish to argue that it should be struck out on other grounds, in which case they should re-list their strike out applications for further argument.

59. As to the claim against the First, Second and Third Defendants for breach of the Plaintiff's right of access to the Board under section 6(8) of the Constitution, the Plaintiff has an adequate alternative means of redress, namely his existing claim for misfeasance in public office. He formerly had a further means, namely a claim for judicial review. Moreover, the claim is based upon a false premise, namely that the Minister had jurisdiction to amend the terms of reference, when in fact he did not. Further, the Third Defendant is not a legal person and is therefore not capable of being sued. I therefore order that the claim should be struck out as frivolous, vexatious, or otherwise an abuse of process.

60. I shall reserve the question of costs until the conclusion of the strike out applications. That will also be the appropriate time to address, if need be, the nitty-gritty of precisely which passages in the statement of claim, in light of this ruling, need to be struck out.

Afterword

61. I have stated above that Mr Darrell's constitutional claim *as presently drafted* is frivolous, vexatious, or otherwise an abuse of process. I say "*as presently drafted*" because it appears to me that if he has a claim under the

Constitution the real ground would be this: that he had an arguable claim of racial discrimination against the Bank; that, as appears from the body of the written complaint, he always intended that the complaint which he made to the Commission should be construed as being against the Bank; but that the mechanism under the 1981 Act for the resolution of complaints failed to provide him with a fair hearing of his complaint against the Bank.

62. The appropriate respondent to such a complaint would be the Fourth Defendant as the Minister responsible for the administration of the mechanism under the 1981 Act. The Bank should be notified of any such claim as it might wish to be joined as an interested party.

63. I express no views as to the merits of such a claim. Indeed I can anticipate various objections to it. However it appears to me to capture the essence of Mr Darrell's grievance concerning his complaint to the Commission and the subsequent hearing before the Board.

DATED this day of 3rd day of September, 2014

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Hellman J