

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Civil) Appeal 36 of 2019
(Formerly Cause No G. 32 of 2014)

BETWEEN:



BILIKA HARRY SIMAMBA

APPLICANT

AND

CAYMAN ISLANDS HEALTH SERVICE AUTHORITY

RESPONDENT

CERTIFICATE OF THE ORDER OF THE COURT

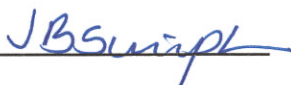
UPON THE APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

AND HAVING CONSIDERED the documents filed in this case including the Application dated 19 June 2020 for leave to Appeal out of time from the Judgment and Order of the Hon. Justice Kawaley dated 17 June 2019 and the affidavit in support; the Respondent's Response dated 22 June 2020, and the Reply to that dated 23 June 2020; and the Application filed on 9 November 2019 for leave to file a Constitutional Motion against the Attorney General and the Governor of the Cayman Islands pursuant to section 26 of the Constitution and the affidavit in support; the Response to that Application dated 22 April 2020, the Reply to that Response dated 27 April 2020; the Further Submissions as to Jurisdiction dated 8 July 2020, and the Applicant's Reply dated 11 July 2020 to those Further Submissions.

IT IS HEREBY ORDERED BY JUSTICE OF APPEAL BEATSON THAT FOR THE REASONS STATED BELOW:

The Application for Leave to Appeal out of time is refused.

Given under my hand and Seal of the Court this 5 day of August 2020


Registrar, Court of Appeal



REASONS

- 1 Whether, as the Applicant wished (see para 2.1), the Constitutional Motion dated 9 November 2019 is to be treated as an appeal against the Judgment and Order of Kawaley J, or his Notice of Appeal and Application for Leave to Appeal out of time dated 19 June 2019 are the effective documents:- (a) leave is needed because the issues decided by the judge were interlocutory: see Court of Appeal Law s. 6(f) and CA Rule 12(6)(z), and (b) the Application is out of time because CA Rule 11(5) requires notice of appeal to be filed within 14 days from the date of the Judgment or Order.
- 2 In considering whether to extend time I have taken into account the reasons given for the delay and whether the grounds of appeal have a real prospect of success.

Reasons for Delay

- 3 No reasons are given in the Constitutional Motion or the supporting affidavit for the delay of some five months in filing that application after the date of the Judgment and Order.
- 4 The Application for leave to Appeal out of time dated 19 June 2020, over a year after the Order was made, has a heading "*Reason for the delay*" which refers to financial and other difficulties of obtaining the expert medical evidence required before 31 March 2020. Those difficulties may possibly be a ground for appealing the judge's Order relating to expert evidence, but do not explain the delay in filing a Notice of Appeal and application for leave to Appeal or justify granting such a long extension of time. In particular:
 - (a) Paragraphs 9-12 give no information as to the timing of the Applicant's attempts to obtain expert medical evidence. Nor does the Applicant's Reply dated 23 June 2020 to the Respondent's submissions dated 22 June 2020. Any efforts made before the Judgment and Order (to which the Applicant may be referring - see e.g. his email dated 16 June 2019 to the Judge, exhibit "BHS-2" to his affidavit in support of the Constitutional Motion and the judgment at [37]) are irrelevant to delay since the Judgment and Order.
 - (b) Paragraphs 13 -14 address the difficulty of obtaining reports as a result of the restrictions imposed in Canada on 17 March 2020 as a result of the COVID 19 pandemic before the expiry of the extended deadline on 31 March 2020. They do not address the delay between 17 June 2019 and 17 March 2020.
 - (c) After the Judge's decision and Order, the Applicant took no steps for several months. On 16 October 2019 he complained to the Judicial and Legal Services Commission and the Governor. The Governor's response in a letter dated 23 October 2019 stated that there was nothing in the matters complained of rising to the threshold required for removal and that insofar as the crux of the complaint was Kawaley J's ruling, the proper course would be to appeal his decision. But rather than then applying for leave to Appeal, the Applicant decided to file a Constitutional Motion claiming he had been denied a fair trial. He did so on 9 November 2019. His Constitutional Motion and the Affidavit in support

maintain that there was no need for further medical evidence at that stage (see e.g. Affidavit, paragraphs 58 – 61), and do not refer to difficulties in obtaining such evidence.

Do the grounds of appeal raise a real prospect of success?

The references below are to the grounds in the most recent document, the Notice of Appeal, not to such of the 17 grounds set out in the earlier Application for leave to file a Constitutional Motion that might be addressed in an appeal.

- 5 The grounds relating to expert evidence (grounds 5, 7 & 8):** There is no real prospect of successfully maintaining that the Judge erred in stating at [43] ff that the Applicant’s case is bound to fail if he is unable to adduce expert evidence from an urologist and a dental surgeon and proceeds on the basis of the existing reports from forensic pathologists.
- (a) In a medical negligence claim where the critical issues are as to the standards expected, whether the injuries were caused by the alleged negligence, and as to the risks of which the patient should have been warned, the expert evidence would be expected to come from a clinician in the same profession: as well as the passage from *Bolam v Friern Hospital* [1957] 1 WLR 582, 586 cited by the Judge at [47], see *Sansom v Metcalfe Hambleton* [1998] PNLR 542, 549 (CA).
 - (b) The forensic pathologists stated that it was outside their expertise to offer an opinion on (i) the duty of a urologist prescribing Terazosin, the drug prescribed to the Applicant, (ii) whether the majority of urologists would mention the side effects, or (iii) UK practice concerning prescribing physicians warning of side effects: Judgment [30]
 - (c) It is utterly unarguable that the way the Judge dealt with the immunity issue (as to which see 7 below) meant that he had no jurisdiction to require the production of additional evidence (ground 7) or that, if he had jurisdiction, it was lost after the decision of the Court of Appeal in *Deputy Registrar of the Cayman Islands v Day & Bush* on 7 November 2019 (ground 8).
- 6 Failure to apply the right criteria under Order 14 of the Grand Court Rules (ground 6):** It is utterly unarguable that the Judge failed to apply the correct criteria in the 19 paragraphs of his judgment dealing with the general principles governing applications to strike out and for summary judgment, and their application in this case.
- (a) The Judge asked whether the claim had a realistic as opposed to a fanciful prospect of success and, at [27] stated that the prospect of success was to be assessed on the basis of the Applicant being able to adduce the evidence required before trial.
 - (b) The decision in *Omni Securities* on which the Applicant relies (see Judgment [40] – [42]) does not assist him for the reasons given by the Judge at [42].
 - (c) The decision in *Grupo Torras SA v Bank of Butterfield* [2000] CILR 441 does not assist the Applicant because that case concerned sustainable inferences of fact from the pleaded facts and not the expert evidence needed in a professional negligence case.

- (d) The Judge did not strike the case out or order summary judgment but made an immediate case management order requiring the Applicant to file the specified expert evidence without which he was entitled to conclude his case was (see 5 above) bound to fail. In view of his doubts, he applied the approach in *Swaine v Hillman* [1999] EWCA Civ. 3053 so that, in the words of Judge LJ at [29], “the case could proceed but subject to appropriate conditions imposed by the court”.
- (e) Notwithstanding the background of the Applicant consistently maintaining that there was no need for him to adduce further medical evidence, he was then given a further 4 months to adduce such evidence before 31 October 2019, extended by the Amended Case Management Order dated 13 November 2019 until 31 March 2020. It is utterly unarguable that providing the Applicant with a total of 9 months to adduce the evidence did not afford him with a reasonable opportunity to do so.

7 The Immunity issue under section 12 of the Health Services Authority Law (2010 Revision) (grounds 1, 2 & 4): The Judge did not make a decision on this issue. He adjourned it with liberty to apply for it to be determined if the medical evidence required was adduced: Judgment [82] and [85(d)]. In view of that there is no determination on this issue which can be appealed.

Additional observations:

- (a) The adjournment of the fact that the matters before the judge had been dealt with principally on the basis of the written submissions with only very short oral submissions (see Judgment [5] – [9]) meant that it was probably inappropriate for the Judge to deal with the status of *Thompson v HSA* 2016 (1) CILR 93 and the interests of judicial comity at such length at [58] – [82], but:
- (b) In *Thompson v HSA* at [69] and [89] Williams J clearly adopted a purposive and contextual approach, and considered the statute as a whole and in its context after an extensive survey of the authorities. The focus of [89] was the admissibility of *Pepper v Hart* statements by government ministers as to the meaning of a Bill during its legislative passage. There is no arguable error in the Judge’s conclusion at [75] that it was manifestly unsupported to maintain that Williams J applied the literal rule in an old fashioned and mechanistic manner.
- (c) Contrary to the Applicant’s submission in “BHS-2”, in *BDO Cayman v Governor Mangatal J* referred to the decision in *Thompson v HSA* at [22] but did not disavow it: see the section on the correct approach: 2018 (1) CILR 457 at [123] ff.

8 Failure to deal with the 52 cases cited and the 7 issues raised on the Immunity issue (grounds 1 & 2): This is unarguable:

- (a) Since (see 7 above) no final decision was reached on the immunity issue there was no need to deal with the cases identified in “BHS-2” and listed in “BHS-3” or the unaddressed issues referred to in “BHS-2”.
- (b) In any event, it is not necessary for a judgment to identify and explain each and every factor which weighed with the judge or to provide multiple citations for a single proposition. “It is not necessary to address every single argument let alone provide a

detailed answer to every point made ...”: Zuckerman, *Civil Procedure: Principles and Practice*, 3rd ed. § 3-202. What need to be identified are the issues the resolution of which were vital to the judge’s conclusion and the manner they were resolved: *English v Emery Richmond* [2002] EWCA Civ. 605 at [19], and see in the context of adequacy of reasons *South Bucks DC v Porter (No. 2)* [2004] UKHL 33 at [36].

9 Failure to give a fair summary of the facts and arguments (ground 3): This is utterly unarguable:

- (a) Each section of the judgment introduces the issue and identifies the positions of the parties.
- (b) I have considered the criticisms identified principally by the Applicant’s comments on a tracked copy of the draft judgment. For the reason given at 8(b) above and in view of the reasons given at 5(a) – (c) and 7 above, they are misplaced.
- (c) The Applicant’s reaction to the draft Judgment which went far beyond identifying typographical and other obvious errors of that sort was entirely inappropriate: see *R (Chorion plc) v Westminster CC* [2002] EWCA Civ. 1126 at [5] – [6]. The opportunity is not to be used for the purpose of attempting to reargue points, which is something that is for an appeal.

10 Making the decision principally on the basis of written submissions: This is not a ground raised in the Notice of Appeal but a matter the Applicant has chosen to raise in his application to file a Constitutional Motion: see grounds 1.3 and 8. For the reasons given in the Order on that Application, there would be no real prospect of success in an appeal on this ground.

11. Failure to decide case within a reasonable time: This is also not a ground raised in the Notice of Appeal but a matter the Applicant has chosen to raise in his application to file a Constitutional Motion: see ground 10. However, to the extent that it is relevant to the grounds of appeal:

- (a) it is utterly unarguable that the Judge’s Judgment and Order dated 17 June 2019 was as the Applicant submitted in grounds 10 and 14 of his application to file a Constitutional Motion “*in law no decision at all*” and “*a refusal to decide the matter according to law*”; and
- (b) In the period between March 2016 and October 2018 when Mangatal J recused herself after the Applicant’s complaint about her to the Judicial and Legal Services Commission and the Governor, the Applicant did not appeal against any of her decisions to adjourn the matter pending a decision in the appeal from Williams J’s decision in *Thompson v HSA*.

