



In The Supreme Court of Bermuda

**CIVIL JURISDICTION
2016 No. 313**

B E T W E E N:

HAROLD DARRELL

Plaintiff

- And -

RICHARD HORSEMAN

First Defendant

**(RELEVANT) PARTNERS OF WAKEFIELD QUIN
THE FIRM**

Second Defendant

Professional negligence – extension of the limitation period - section 33 of the Statute of Limitations Act 1984 – Rule 13 of the Barristers Code of Conduct

Date of hearing: February 13, 2018

Date of Judgment: March 8, 2018

Mr G. R. Woolridge for the Plaintiff

Mr P Sanderson for the First Defendant

RULING

1. This matter comes before me on the hearing of the First Defendant's Application to strike out the Plaintiff's Statement of Claim upon the grounds that his claim is out of time by reason of the Limitations Act 1984.
2. The Plaintiff's Statement of Claim seeks damages against the Defendants for breach of duty in providing negligent advice leading to a missed deadline for the filing of an appeal against a decision of a Board of Enquiry. The Plaintiff's Statement of Claim acknowledges that his claim is *prima facie* statute barred. The Plaintiff, however, contends that the limitation period should be enlarged under section 33 of the Limitation Act because the Defendants engaged in deliberate concealment of facts relevant to his cause of action. The Plaintiff's Statement of Claim, also, alleges that the Defendants breached Rule 13 of the Barristers' Code of Conduct 1981 ("the Code of Conduct").

The Parties

3. The Plaintiff, Mr Harold Darrell, was a businessman and President and Chief Executive Officer of the Hardell Group.
4. The First Defendant, Mr Richard Horseman, was an attorney with Wakefield Quin ("WQ"). The Second Defendant, WQ, is described in the title to these proceedings as "(Relevant) Partners of Wakefield Quin The Firm." It is not apparent from the Court file whether Mr Horseman was a partner of WQ at the time the matters in dispute took place.

Background

5. In October 2000 Mr Darrell made a complaint to the Human Rights Commission (“the HRC”) claiming racial discrimination arising from matters that were alleged to have occurred at the Bank of Bermuda Limited (“the Bank”) in the mid-1990s (“Mr Darrell’s Complaint”).
6. The HRC heard Mr Darrell’s Complaint but was unable to reach a determination. As a result, the HRC referred Mr Darrell’s Complaint to the Minister of Community Affairs. The Minister of Community Affairs established a Board of Enquiry to consider Mr Darrell’s Complaint under the Chairmanship of Mr Paul King (“the BOE”). The BOE commenced its proceedings in September 2005.
7. The BOE’s terms of reference were to consider Mr Darrell’s Complaint of discrimination by the Chief Executive Officer and Board of Directors of the Bank. The fact that the Bank was not named as a respondent in the BOE’s terms of reference lead to a great deal of controversy. Mr Darrell contended that the Bank should have been a party to the BOE enquiry. On 21 September 2005 the BOE ruled that its terms of reference were limited to Mr Darrell’s Complaint against the Bank’s Chief Executive Officer and Board of Directors and that the Bank was not a respondent.
8. Mr Darrell made repeated efforts to have the BOE reverse its decision in respect of the Bank not being a party to its enquiry. It is not necessary, for present purposes, for me to recount a detailed history Mr Darrell’s battle before the BOE. It suffices that the BOE maintained its position that the Bank was not a party to its enquiry and that it did not have jurisdiction to amend its terms of reference so as to add the Bank as a respondent. The BOE did, however, invite Mr Darrell on several occasions to appeal its decision not to join the Bank as a party. Mr Darrell chose not to do so.

9. On 23 October 2006 the BOE gave Mr Darrell notice that it dismissed his Complaint with reasons for its decision to be provided within 21 days (“the BOE’s dismissal”). The BOE did not in fact deliver its reasons until 17 April 2007.

Attempt To Appeal the BOE’s Decision¹

10. Mr Llewelyn Peniston of Peniston and Associates represented Mr Darrell in respect of the BOE proceedings. Mr Darrell promptly contacted Mr Peniston upon receiving notice of the BOE’s dismissal. Mr Darrell instructed Mr Peniston to appeal the BOE’s dismissal. Mr Peniston advised Mr Darrell that he could not appeal the BOE’s dismissal until he had received the BOE’s reasons for its decision.
11. Mr Darrell had doubts about Mr Peniston’s advice on the timing of the appeal so he met with Mr Joseph Wakefield, a friend of long standing, at the Red Carpet Bar and Restaurant (“the Red Carpet”) to obtain his opinion. At the time, Mr Wakefield was a consultant and property lawyer with WQ. It appears from the affidavits that, from time to time, Mr Wakefield informally assisted Mr Darrell by providing strategic advice rather than detailed litigation advice. Mr Wakefield told Mr Darrell that he could not assist him with his query regarding the time for appealing the BOE’s dismissal because it was not his area of law. Mr Wakefield recommended that Mr Darrell consult with Mr Horseman.
12. Mr Darrell arranged to meet with Mr Horseman at WQ’s offices the following afternoon. Prior to the scheduled meeting, Mr Darrell encountered Mr Horseman in the Red Carpet at lunch time. Mr Darrell questioned Mr Horseman about Mr Peniston’s advice and Mr Horseman agreed that it was

¹ The narrative in this section of my Ruling is taken primarily from paragraphs 44 – 116 of Mr Darrell’s First Affidavit, dated 18 August 2016.

premature to appeal the BOE's dismissal until it had delivered its reasons. On that basis the meeting between Mr Darrell and Mr Horseman for that afternoon was postponed.

13. On 17 April 2007 the BOE delivered its Ruling setting out the reasons for the dismissal of Mr Darrell's Complaint.
14. The following day Mr Darrell consulted Mr Peniston and asked how long did he have to appeal the BOE's Ruling. Mr Peniston advised that there was no time limit for appealing the BOE's Ruling. At that meeting Mr Darrell informed Mr Peniston that he was going to instruct Mr Horseman to conduct his appeal.
15. Mr Darrell had previously been advised by the HRC's then Executive Officer, David Wilson, that the time limit for appealing a decision of the HRC was 6 months from the date of reasons being delivered.
16. On 24 April 2007 Mr Darrell wrote to the HRC seeking clarification of the BOE's Ruling and querying whether a new HRC Commission would be established to consider his complaint.
17. On 25 August 2007 Mr Darrell met with Mr Horseman at WQ concerning his appeal of the BOE's Ruling. Mr Darrell asked Mr Horseman to consider Mr Peniston's advice that there was no time limit for appeal and Mr Wilson's advice that there was a 6 month appeal period. Mr Horseman agreed to research the point. Later that day Mr Horseman telephoned Mr Darrell and advised that he agreed with Mr Peniston's advice that there was no deadline for appealing the BOE's Ruling.
18. Mr Darrell decided that he would wait for the HRC's response to his letter of 24 April 2007 before appealing the BOE's Ruling. Mr Darrell instructed Mr Horseman that if he had not received a satisfactory response from the HRC

within 3 months, he should commence an appeal of the BOE's Decision. Mr Darrell considered that this plan would put his appeal safely within the 6 months deadline advised by Mr Wilson.

19. On 24 August 2007, Marshall Diel & Myers ("MDM"), on behalf of the HRC, responded to Mr Darrell's letter of 24 April 2007. MDM informed Mr Darrell that the HRC would not revisit the BOE's Decision and that the HRC considered Mr Darrell's complaint to be at an end.
20. Following receipt of MDM's letter, Mr Darrell met with Mr Horseman to discuss next steps. Mr Darrell was keen to bring proceedings against the HRC. Mr Horseman disagreed and advised that Mr Darrell's that his best option was to appeal the BOE's Ruling. Mr Darrell accepted Mr Horseman's advice. On 2 October 2007 Mr Horseman filed Mr Darrell's Notice of Appeal seeking to reverse the BOE's Ruling.
21. Within about two weeks of filing Mr Darrell's Notice of Appeal Mr Jeffery Elkinson of Conyers Dill & Pearman ("CDP") contacted Mr Horseman on behalf of the Respondents to the BOE. Mr Elkinson informed Mr Horseman that he considered that WQ had a conflict of interest. Mr Jai Pachai who had recently joined WQ had been advising Mr King in his capacity as Chairman of the BOE. Mr Horseman advised Mr Darrell of CDP's conflict contention which came as a surprise to Mr Darrell. Mr Darrell contacted a couple of law firms with a view to obtaining alternate representation but those firms had conflicts and could not assist. Mr Darrell again sought advice from Mr Wakefield as to what he should do in light of the conflict situation. Mr Wakefield urged Mr Darrell to stick with Mr Horseman or at least meet with him before making a decision on change of representation.
22. Pursuant to Mr Wakefield's advice Mr Darrell met with Mr Horseman. Mr Horseman advised that he could continue to act for Mr Darrell until such time

as CDP formally requested WQ stand down because of the conflict. At such time WQ would recuse itself and assist Mr Darrell in finding alternate representation.

23. During this meeting between Mr Darrell and Mr Horseman, Mr Horseman informed Mr Darrell that he needed to file an application for leave to appeal the BOE's Ruling. Mr Horseman explained that he had missed the deadline for filing the appeal. Mr Darrell became very angry with Mr Horseman and reminded him that he had advised that there was no time limit for appealing the BOE's Ruling. Mr Horseman admitted that he had made a mistake. Mr Horseman explained that he had found no deadline for filing leave to appeal in the HRC legislation and wrongly concluded that there was no time limit. CDP had informed Mr Horseman that RSC Order 55 provides that deadline for appealing decisions of government tribunals is 28 days from the date of on which the decision was given.
24. Mr Horseman told Mr Darrell that applications for leave to appeal were not uncommon. Mr Horseman expressed some confidence that leave to appeal would be granted and if it were not Mr Darrell could appeal the rejection to the Court of Appeal. Matters were left at the conclusion of this meeting on the basis that Mr Horseman would pursue an application for leave to appeal the BOE's Ruling. WQ would continue to act for Mr Darrell until such time as CDP formally requested that they stand down.
25. WQ filed Mr Darrell's application for leave to appeal on 16 January 2008.
26. On 12 February 2008 CDP formally objected to WQ's representation of Mr Darrell. Mr Horseman assisted in instructing Mr Paul Harshaw of Lynda-Milligan Whyte & Associates to take over the conduct Mr Darrell's application for leave to appeal out of time. Mr Horseman is said to have

assisted Mr Harshaw in the preparation of Mr Darrell second affidavit in the leave to appeal application.

27. On 29 September 2008 Wade-Miller J delivered her judgment dismissing Mr Darrell's application for leave to appeal. I return to Wade-Miller J's judgment below.

The Defendant's Strike Out Application

28. In *Broadsino Finance Company Limited v Brilliance China Automotive Holdings Limited* [2005] Bda LR 12 Stuart-Smith LJ stated that "*the power to strike out a claim ... should only be exercised in plain and obvious cases.*"
29. Wade-Miller J ruled in her judgment on Mr Darrell's application for leave to appeal out of time that the time limit for appealing the BOE's decision not to join the Bank commenced on the date the decision was given, 17 April 2005, rather than the later date on which reasons for the decision were given. Under RSC Order 55 an appeal of the BOE's decision not to join the Bank should have been commenced on or before 15 May 2005. Mr Horseman filed Mr Darrell's Notice of Appeal on 2 October 2007. This was replaced by Mr Darrell's application for leave to appeal out of time which was filed on 16 January 2008. This action was commenced on 19 August 2016. Some 2 years and 4 months later.
30. It is not entirely clear to me why Wade-Miller J chose 21 April 2005, the BOE's decision not to join the Bank, as the starting point for the appeal period to run. It seems that Mr Darrell would, also, have the right to appeal the BOE's Decision to dismiss his complaint which was given 23 October 2006. This would mean the time limited for Mr Darrell to appeal the BOE dismissal expired on 13 November 2006. This issue may have been thrashed out in argument before Wade-Miller J and I do not think I can go behind her

Judgment. Clearly the Learned Judge referred to all relevant dates in her Judgment and chose the earlier one.

31. Mr Horseman gave Mr Darrell negligent advice on 25 August 2007 that there was no time limit for filing an appeal against the BOE's dismissal. WQ filed Mr Darrell's Notice of Appeal on 2 October 2007 and its application for leave to appeal out of time on 16 January 2008. At the time Mr Horseman gave Mr Darrell his advice the time to appeal either the BOE's Decision not to join the Bank or its Decision to dismiss his complaint had passed. Consequently, it could not be said that Mr Horseman's negligent advice caused him to miss the deadline for appeal.
32. Mr Darrell accepts that his claim against the Defendants for negligence is *prima facie* statute barred. The limitation period being 6 years. He seeks to overcome this obstacle by contending that Mr Horseman engaged in deliberate concealment of facts relevant to his claim against the Defendants. Mr Darrell relies upon section 33 of the Limitation Act which so far as is material provides:

“where in any action for which a period of limitation is prescribed by this Act ...

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from the Defendant, ...

The period of limitation shall not begin to run until the plaintiff has discovered ... the concealment ... or could with reasonable diligence have discovered it.”

33. Mr Darrell, also, relies on Rule 13 of the Barristers' Code of Conduct:

“As soon as a barrister becomes aware that he has made a mistake that will or may damage his client's interest, he must immediately inform the client of the mistake and advise him promptly to seek advice of an independent barrister.

Where the client chooses not to seek such advice, the barrister must do his best to rectify the mistake at no additional expense or risk to the client.”

34. The thrust of Mr Darrell’s case as put by Mr Woolridge was that Rule 13 imposed upon a barrister who has made a mistake a duty to draw Rule 13 to the client’s attention and to advise the client that he has a cause of action against the barrister in respect of the mistake. Mr Darrell claims that deliberate concealment in this case was constituted by Mr Horseman’s failure to advise him of the existence of Rule 13 and that he had a cause of action against WQ. Mr Woolridge, also, added that there was deliberate concealment in Mr Horseman’s failure to advise Mr Darrell of the provisions of the Limitation Act in respect of his cause of action against WQ.
35. I do not see Rule 13 as an adjunct to section 33 of the Limitation Act. Section 33 relates to deliberate concealment of “*any fact relevant to the plaintiff’s right of action*”. In *McCaroll v Stathan Gill Davies* [2003] EWCA civ 428 Pill LJ quotes Sir John Donaldson MR in *Frisby v Theodore Goddard & Co* as follows:
- “A right of action arises out of a basic set of essential facts. In the context of the present case these essential facts were (a) a solicitor and client relationship between the plaintiff and the defendants, (b) the giving of advice by the defendants which a skilled and careful should not have given and, possibly consequential damage. A right of action may be concealed by hiding one or more of these essential facts from the potential plaintiff.”*
36. By the time Mr Darrell went to Mr Harshaw in about February 2008 it appears that he had sufficient information about his right of action against WQ in respect of the negligent advice regarding the deadline for appealing the BOE’s Decision. Mr Horseman openly admitted to Mr Darrell that he had made a

mistake in advising on the appeal period. Mr Darrell, also, knew at that time WQ had a conflict by reason of Mr Pachai advising the BOE's Chairman.

37. I do not consider that a breach of Rule 13 is a free standing cause of action. Breach of Rule 13 could found a disciplinary complaint to the Bar Council. In this regard, I note that in August 2015 Mr Darrell made a complaint to Bar Council contending that Mr Horseman had breached Rule 13 in respect of his missing the deadline for appealing the BOE Decision. I understand that this Complaint was dismissed.

38. Mr Darrell's affidavits repeatedly assert that Mr Horseman failed to advise him that he had a cause of action against WQ. I find that WQ did not have duty to advise Mr Darrell that he had a cause of action against Mr Horseman or the firm. If Mr Darrell had any misapprehension about his right to bring a claim against Mr Horseman or WQ that misapprehension must surely have been dispelled when Wade-Miller J gave her Judgment on 29 September 2008 dismissing his application for leave to appeal the BOE's decision not to join the Bank.

39. At the hearing of the Leave to appeal out of time application on, Mr Harshaw sought to explain the delay in appealing on bad legal advice. Wade-Miller J ruled:

“Blaming the excessive delay upon erroneous legal advice is not an acceptable excuse in law”.

40. Wade-Miller J then went on to consider *Regalbourne Ltd v East Lindsey District Council* [1994] RA 1 where the English Court of Appeal said:

“If failure to appeal within the time allowed is due to neglect on the part of the potential appellant's lawyers, such a litigant may have some redress against

his own lawyers, but that again is not something with which the court is likely to be concerned when it is asked to extend”.

41. Following Wade-Miller J’s Judgment, Mr Darrell ought to have known that he had a potential claim against Mr Horseman and WQ arising out of the advice he received in respect of an appeal (if he had not known before). Based upon Mr Horseman giving negligent advice on 25 August 2007, Mr Darrell would have had up to at least 25 August 2013 to bring a claim. Instead he waited until 19 September 2016 to file his Writ and Statement of Claim.
42. In the circumstances I find that Mr Darrell’s claim is hopelessly out of time and that section 33 of the Limitation Act and Rule 13 of the Barristers’ Code of Conduct do not apply so as to enlarge the time for the bringing of these proceedings. Accordingly, I rule that Mr Darrell’s Writ and Statement of Claim be struck out as showing no realistic possibility of success.
43. Unless either party applies for a different order as to costs within 14 days, I order the Plaintiff do pay the First Defendant’s costs of this application.

Dated this 8th day of March, 2018

JOHN E. RIIHILUOMA
Assistant Justice