Neutral Citation Number: [2025] CA (Bda) 7 Civ

Civil Appeal No 3 of 2025

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ASSISTANT JUSTICE DIEL
CASE NUMBER 2023: No. 18

Dame Lois Browne-Evans Building
Court Street, Hamilton HM12
Bermuda

Date: 21/03/2025

Before:

JUSTICE OF APPEAL THE HON IAN KAWALEY
JUSTICE OF APPEAL THE HON NARINDER HARGUN
and
JUSTICE OF APPEAL THE RT HON SIR GARY HICKINBOTTOM

- -

Between:

REEF ISAAC MIZRACHY (A MINOR)
(through his parents and legal guardians
Amir and Jennifer Marie Mizrachy)

Appellant

- and -

MINISTRY OF EDUCATION

Respondent

Appearances:
Mr Amir Mizrachy (parent and legal guardian) Litigant in Person for the Appellant
Mr Richard Horseman, Wakefield Quin Limited, for the Respondent

Hearing date: 17 March 2025
Date of Judgment: 21 March 2025

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Extension of time for Notice of Appeal – Academic appeal – Security for costs

HICKINBOTTOM JA:

Introduction

1. On 21 February 2025, the Plaintiff/Appellant ("the Plaintiff") through his father ("Mr Mizrachy") applied for orders to dispense with security of costs and for remission of court fees in respect of an appeal he had brought against an interlocutory order of Acting Justice Diel dated 10 June 2024 striking out the Plaintiff's documents entitled "Further and Better Particulars", "Plaintiff's Notice to Admit Facts" and "Interrogatories"; refusing his application to strike out the Defence; and ordering him to pay the costs of the Respondent/Defendant ("the Defendant").

2. The application came before us on 17 March 2025, at a hearing at which Mr Mizrachy appeared on behalf of his son, and Mr Richard Horseman of Wakefield Quin Limited appeared for the Respondent. Mr Mizrachy has been an attorney in New York and Israel, but has never practiced in Bermuda. He represents his son, effectively, as a litigant in person.

3. At the end of the hearing, having concluded that the Notice of Appeal was well out of time, and the substantive appeal was academic and there were no other grounds which required or made it appropriate to proceed, we made the following Order:

   (i) recording and giving effect to the party's agreement to vary the order for costs in the Order of 10 June 2024 to an order that the costs of and occasioned by the applications before the Court on 10 June 2024 be reserved to the Supreme Court to be dealt with by the Supreme Court Justice who deals with the assessment of loss and damage at the conclusion of that assessment;

   (ii) refusing to extend time to file the Notice of Appeal on the grounds that the substance of the appeal has become academic because of the admission of liability by the Defendant and the judgment on liability in the Plaintiff's favour, and there were no other grounds which required or made it appropriate for it to proceed; and

   (iii) making no order for costs on the appeal.

4. We said that we would provide brief reasons for this Order. In this judgment, I set out my reasons.

5. The hearing before us on 17 March 2025 was in the morning. For the sake of completeness, I should say that, at 1.49pm that day, Mr Mizrachy filed a 16-page document entitled "Notice regarding Procedural Unfairness in Hearing" which seeks (amongst other things) an order declaring the hearing "procedurally unfair" and the

Notice of Appeal "procedurally valid", and for the re-hearing of the Plaintiff's applications for security for costs and remission of fees ("Mr Mizrachy's Post-hearing Submissions"). Unless convenient to consider matters raised earlier, I will deal with those submissions at the end of this judgment.

Background

6. The claim is for personal injury sustained while the Plaintiff was at school. During outdoor playtime on 5 February 2021, when the Plaintiff was 5 years old, he fell off a piece of playground equipment and injured his elbow. In respect of liability, the main issues were whether the duty of care owed by the school (and, so, by the Defendant) extended to supervising the Plaintiff during the play period; and, if so, whether that duty had been breached causing the fall and consequently the injury that he suffered.

7. The Defendant initially lodged a Defence, accepting that the Plaintiff had fallen as claimed, but denying breach of duty.

8. The Plaintiff served three lengthy documents, entitled "Further and Better Particulars" (58 pages), "Plaintiff's Notice to Admit Facts" (82 requests) and "Interrogatories" (67 questions). The first document set out particulars of loss and damage, but also included a substantial amount of both evidence and submissions in relation to loss. The second and third documents focused on issues of liability.

9. On 10 June 2024, following a hearing on 25 March 2024, Acting Justice Diel struck out those three documents, dismissed the Plaintiff's application to strike out the Defence, and ordered the Plaintiff to pay the Defendant's costs.

10. On 12 June 2024, the Plaintiff filed a Notice of Motion seeking leave to appeal the Order of 10 June 2024.

11. On 3 October 2024, at the hearing of an ex parte application made by Mr Mizrachy, the Chief Justice granted leave to appeal.

12. On 31 October 2024, the Plaintiff advised the Court that he was no longer seeking to advance the appeal in relation to disclosure issues, and the Chief Justice gave directions for the matter to be stayed pending the determination of the Plaintiff's other grounds of appeal to this Court.

13. On 25 November 2024, following receipt of an Amended Statement of Claim, the Defendant filed a Notice of Admission of Liability on the basis that the playground equipment was not safe. On 5 December 2024, there was an application by Mr Mizrachy for judgment on liability at an inter partes hearing before the Chief Justice, which was granted.

14. On 23 December 2024, the Chief Justice discharged the Order of 31 October 2024 staying the claim, and gave directions in respect of the assessment of damages which I understand require the Plaintiff to lodge a document setting out a schedule of his loss together with the evidence and submissions upon which he relies in support by 31 March 2025.

15. On 12 February 2025, the Appellant filed a Notice of Appeal under the leave granted on 3 October 2024.

16. On 21 February 2025, the Plaintiff applied for an order dispensing with any requirement of security for costs and remission of court fees in relation to this appeal. It was this application which was set down for hearing before this Court on 17 March 2025.

Discussion

17. Rule 2(2)(a) of the Rules of the Court of Appeal for Bermuda ("the Court of Appeal Rules") provides that, in respect of an appeal against an interlocutory order, a Notice of Appeal must be filed within seven days from the date on which leave to appeal is granted.

18. As I have described, leave to appeal the Order of 10 June 2024 was granted by the Chief Justice on 3 October 2024. On the face of it, the seven days given by Rule 2(2)(a) to file the Notice of Appeal began to run from that day.

19. Before us, Mr Mizrachy said that he did not collect the Order granting leave to appeal until 5 February 2025, and so the Notice of Appeal (filed on 12 February 2025) was in time. However, that is not so.

    (i) Time runs from the date the Order is uttered, i.e. in this case, 3 October 2024.

    (ii) Mr Mizrachy attended the hearing on 3 October 2024 (which, being an ex parte application by Mr Mizrachy, the Defendant did not), and heard the Order giving leave to appeal being made.

    (iii) It was an ex parte application, and so the burden of drafting the appropriate Order fell on Mr Mizrachy.

    (iv) From the hearing before this Court, I had understood that the Chief Justice signed the Order giving leave on 3 October 2024. The document is dated "3 October 2024". In paragraph 16 of Mr Mizrachy's Post-hearing Submissions, he says (and, for the purposes of this judgment, I accept) that the Chief Justice did not sign the Order that day. However, he says that, at the hearing of 31 October 2024 or 5 December 2024 (it is unclear which), "[Mr Mizrachy] explicitly informed the Chief Justice that the order granting leave to appeal had not yet been formally signed by him to which. He replied 'I normally sign orders immediately, submit your draft order so I can sign it'". In these circumstances, it is not clear why Mr Mizrachy did not obtain the Order until February 2025; but, in any event, leaving aside the fact that it was his responsibility for ensuring that the draft order was filed and his fault that it was not filed in a timely manner, a sealed Order is not required to file a Notice of Appeal.

    (v) In his Post-Hearing Submissions, Mr Mizrachy complains that, whereas the Chief Justice did not raise any issues about the timeliness of the Notice of Appeal at the hearings of 3 and 31 October, and 5 December 2024, this

Court did take the point that the Notice of Appeal was out of time and an extension was required. However:

(a) This Court (and not the Supreme Court) was seized of the appeal from 3 October 2024.

(b) The requirement for the Notice of Appeal to be filed within seven days of the grant of leave to appeal is found in the Rules of this Court (and not the Supreme Court) and is a requirement of this Court (and not the Supreme Court).

(c) The silence on the part of the Chief Justice on 3 and 31 October, and 5 December 2024 (relied on by Mr Mizrachy as some form of acceptance of, or acquiescence in, or even "legitimate expectation" in respect of the late filing of the Notice of Appeal) was far more likely to have been an acceptance by him that the matter was now in the hands of this Court which had the power to give any necessary and appropriate extension. I certainly do not consider that it was, or could reasonably have been considered to be, the intention of the Chief Justice to require this Court to accept as in-time a Notice of Appeal that was out-of-time if the grounds of appeal had become entirely academic.

(d) Mr Mizrachy knew that the Plaintiff needed an enlargement of time in respect of filing his Notice of Appeal, because it was raised in paragraph 6 of the Defendant's Submissions in Reply to the Plaintiff's Application to Dispense with Security for Costs and Fee Remission dated 10 March 2015; and he knew that Defendant submitted that, following the judgment on liability in the Plaintiff's favour, the appeal was academic because Mr Mizrachy referred to that point in paragraph 19 of his Reply to those submissions. Therefore, he was not – or should not have been – taken by surprise when this Court asked him to justify the extension of time the Plaintiff required to make his Notice of Appeal in time.

20. Nothing submitted by Mr Mizrachy affects the fact that time to file the Notice of Appeal started to run from 3 October 2024 and expired on 10 October 2024. The Plaintiff consequently required from this Court an extension of time of about four months in respect of this Notice of Appeal.

21. In determining whether to grant such an extension, this Court will take into account all relevant factors. Where an appeal has become entirely academic then, particularly in a damages claim, it is unlikely that it will be in the interests of justice to grant an extension to allow such an appeal to proceed. It is the Court's function to determine the relevant issues between parties, which enable a claim to be determined. It is not the Court's function to consider and determine academic issues, i.e. issues which are not live between the parties and which do not go to the disposition of a claim.

22. Consequently, whether an appeal is academic is a matter which is not dependent

on what the merits of the appeal would be if the appeal were not academic. Therefore, the fact that Mr Mizrachy considered the merits of the appeal to be overwhelmingly strong (as he submitted they were), or that Mr Horseman considered the merits of the appeal were hopelessly weak (as he submitted they were), is not to the point. The Courts are not designed to hear academic points even where the parties take different lines on them, if they do not and cannot affect the outcome of the ultimate claim.

23. In this case, it is my firm view that, with one caveat, by the time of the hearing before this court, the appeal for which leave had been granted was academic.

24. Leaving aside the costs order for a moment, the orders challenged (striking out the Further and Better Particulars, the Notice to Admit Facts and the Interrogatories; and the refusal of the Judge to strike out the Defence) have been entirely overtaken by events. They relate either to issues of liability (which have been overtaken by the admission and then judgment on liability) or the assessment of quantum (such as the Further and Better Particulars document, in respect of which they have been overtaken by the directions given by the Chief Justice for the efficient and expeditious assessment of loss and damage). The dismissal of Mr Mizrachy's application to strike out the Defence has, of course, been overtaken by the Defendant's admission of liability and the subsequent judgment on liability. Subject to the issue of costs, the appeal has unarguably become entirely academic.

25. At the hearing before us, Mr Mizrachy nevertheless tried to persuade us that the substantive appeal should be allowed to proceed, so that this Court, on a future occasion, can hear and determine those grounds. However, he was unable to identify any way in which pursuing such an appeal could assist in resolving any remaining issues between the parties and/or benefit the Plaintiff who now has the benefit of a judgment on liability and directions for the assessment of his damages.

26. Mr Mizrachy also made some broad submissions that "justice" requires this otherwise academic appeal to proceed. However, there is nothing here that makes it necessary or appropriate for the Court to entertain, or the parties to contest, an appeal which will have no bearing upon the issues currently remaining between the parties. There is simply no public interest in using public resources to determine such issues.

27. In his Post-hearing Submissions, Mr Mizrachy submits that the Interrogatories and Notice to Admit Facts go, not only to liability (not in issue since the judgment in liability in the Plaintiff's favour), but to the assessment of "the level of negligence" and thus "the potential for punitive damages". By "punitive damages", he appears to mean non-compensatory damages in the form of exemplary damages. He refers to five (of a total of 67) interrogatories as going to this issue, and nine (of 82) requests to admit facts as falling within this category. However:

    (i) It is difficult to see how all of even these few requests could bear upon any form of recognised non-compensatory damages (e.g. Interrogatory 67: "How do you deny that the school breached its duty of care?").

(ii) In any event, unless and until Mr Mizrachy properly sets out the Plaintiff's claim for exemplary damages – for example, identifying under which of the three well-recognised categories of exemplary damages a claim is being made – it would be premature to allow such requests. The Further and Better Particulars document does not do so. As I understand it, the directions given in the assessment of damages require the Plaintiff to do so by 31 March 2025.

(iii) In any event, it would clearly be grossly disproportionate to require the Defendant to respond to 149 requests, most of which are now otiose and none of which has been identified as going to any current issue between the parties.

28. This does not, of course, mean that, at the appropriate stage of the assessment of damages procedure, the Plaintiff cannot raise proper requests for disclosure and/or the admission of facts and then apply to the Supreme Court for appropriate orders if no response (or no proper response) is received. It is important to note that, in the pursuit of damages, the Plaintiff is not prejudiced in any way by the inability to pursue this appeal.

29. I can therefore see no purpose in allowing such academic grounds of appeal to be pursued at the expense of Court time, and the time and cost of the parties particularly in circumstances in which Mr and Mrs Mizrachy say that they are impecunious and do not have sufficient income or assets to bear the Court fees yet alone any costs order that might be made against them in relation to an entirely academic appeal. In my view, far from it being in the interests of justice for the appeal to proceed, justice cries out for this now purposeless appeal not to proceed so that the parties can focus on the assessment of damages which will ensure that the Plaintiff obtains the damages to which he is entitled as soon as possible without unnecessary distraction. The pursuit of this academic appeal would (in my view, quite clearly) not be in the interests of the Plaintiff.

30. The caveat to which I referred relates to the costs of the applications below. The Order of 10 June 2024 directed the Plaintiff to pay the Defendant's costs. However, sensibly, the parties before us agreed that, if this Court were to conclude that the substantive appeal is academic and an extension of time ought not to be granted in respect of the substantive grounds of appeal, then the Order of 10 June 2024 should be varied to an order that the costs of and occasioned by the applications below be reserved to be dealt with by the Supreme Court at the conclusion of the assessment of damages before that Court.

31. I understand that the parties also agreed (again, if I might respectfully say so, wisely) that in these circumstances, there should be no order for the costs of this appeal. In any event, it is my firm view that, in all the circumstances, that is the appropriate and fair order.

32. Those are my reasons for concluding that, with the agreed variation to the costs order made on 19 June 2024, this appeal would be academic and there is no good reason for it otherwise to proceed; and there is therefore no purpose in extending time for the Notice of Appeal to be filed, which extension should consequently

be refused. With that refusal, issues concerning security for costs and remission of fees become academic.

Conclusion

33. It is for those reasons that I would make the Order which we briefly set out at the end of the hearing.

34. For the avoidance of doubt, I would make the following Order:

> "UPON READING the Record of Appeal, the Appellant's application for dispensation from security for costs and fee remission, the Appellant's supporting written submissions, the Respondent's Response, the Appellant's Reply and the Appellant's post-hearing written submissions
>
> AND UPON HEARING Mr Amir Mizrachy, the father and legal guardian of the Plaintiff, and Mr Richard Horseman of Wakefield Quin for the Respondent
>
> AND UPON finding that the appeal is academic and there is no other ground upon which the appeal should proceed out-of-time
>
> AND UPON RECORDING:
>
> (1) that this Order is made without this Court making any findings in respect of, and the parties making no concessions with regard to, the merits of the grounds of appeal;
>
> (2) the parties' agreement to vary the Order of 10 June 2024 by replacing paragraph 4 with the following: 'Costs of an occasioned by the applications and the hearing of 10 June 2024 be reserved to the Supreme Court Judge dealing with the assessment of damages"; and
>
> (3) the Notice of Appeal was not filed in the time required by the Rules of the Court of Appeal
>
> IT IS ORDERED BY CONSENT THAT
>
> 1. The Order of 10 June 2024 be varied by replacing paragraph 4 with the following: 'Costs of an occasioned by the applications and the hearing of 10 June 2024 be reserved to the Supreme Court Judge dealing with the assessment of damages'.
>
> AND IT IS FURTHER ORDERED THAT
>
> 2. Time for the filing of the Notice of Appeal shall not be extended, so that there is no valid Notice of Appeal.
>
> 3. There shall be no order as to costs in relation to this appeal or applications in respect of this appeal."

Coda: Mr Mizrachy's Post-hearing Submissions

35. Although Mr Mizrachy is or has been legally qualified in other jurisdictions, he has never been qualified in Bermuda, and therefore appears as the Plaintiff's father and, effectively, as a litigant in person. However, he should be made aware that, unless the circumstances are exceptional (e.g. where a party seeks to correct misinformation given to the Court during the hearing) of which there is none here, further submissions after the Court has made a ruling are inappropriate and are deprecated.

36. Nevertheless, given that he is a litigant in person, I shall respond, briefly, to Mr Mizrachy's extensive post-hearing submissions.

37. I have already covered the submission that the approach of this Court's approach to the timing of the Notice of Appeal was unfairly inconsistent with that taken by the Supreme Court (paragraph 19(v) above), and that the Interrogatories and Notice to Admit Facts remain relevant (paragraphs 24 and 27 above). The main remaining strands of his complaint appear to be as follows.

    (i) His overarching complaint is that "the Court raised questions and sought submissions regarding the merits of [his] notice of appeal, which were not part of the stated scope of the hearing"; and, he "was not given prior notice that the merits of the appeal would be discussed, nor was he provided with an opportunity to prepare submissions or arguments on this issue", so that the hearing was procedurally unfair (paragraphs 1-4). However, as made clear at the hearing (and described above), the merits of the appeal were irrelevant to the issue of whether the appeal had become academic. As to that issue, he was on notice that the Defendant took the point that the Notice of Appeal was well out of time (see paragraph 19(v)(d) above), and the Plaintiff could not avoid the issue by failing to issue the required application for an enlargement/extension of time. The Plaintiff could not rely on his own procedural default.

    (ii) Mr Mizrachy submits that this procedural unfairness prejudiced the Plaintiff's case. However, in addition to there being no such unfairness, as described above, the Plaintiff's inability to pursue this academic appeal does not in any way adversely affect his ability to pursue his claim for damages. Indeed, it benefits him by enabling him now to focus on the assessment of those damages.

    (iii) Mr Mizrachy submits that the approach of this Court was unfair because, in the past, the Defendant has been guilty of delays and failures to comply with mandated time limits for (e.g.) discovery; and it was not sanctioned by the Court for such breaches. There has therefore been (it is said) an unlevel playing field as between the parties. However, that submission is disingenuous. There is no proper comparison between a party merely failing to comply with procedural deadlines which can, if necessary, be remedied by (e.g.) an unless order and/or an appropriate costs order, and allowing an extension of time for an appeal which, since judgment on liability has been entered, has no purpose so far as the issues between the parties are concerned. The submission fails to acknowledge that the admission of liability by the Defendant firmly and irrevocably shifted the dynamics of this claim, and shifted them in favour of the Plaintiff.

38. Mr Mizrachy's Post-hearing Submissions are very lengthy. I have dealt with the main strands of complaint, as I see them; but, for the avoidance of doubt, I have considered all the submissions with particular care. Nothing in the submissions persuades me that there was any arguable unfairness in the way in which the 17 March 2025 hearing was conducted, or that the Order made at the hearing was unfair or inappropriate. Indeed, in my view, they have reinforced the appropriateness of the Order.

39. I would urge Mr Mizrachy now to focus upon the assessment of his son's damages, which will be to his son's benefit, rather than to worry over historic, academic points which go to no current issue between the parties and which cannot benefit his son but can only adversely affect him by further delaying and disrupting the assessment and payment of his damages.

40. Finally, I have had the benefit of seeing the judgment of Kawaley JA, with which I am pleased to agree.

HARGUN JA:

41. I agree with the reasoning and conclusion in the judgment of Hickinbottom JA and the timely observations on litigants' obligation to conduct litigation on a proportionate basis in the judgment of Kawaley JA.

KAWALEY JA:

42. I too agree.

43. It is unfortunate that Mr Mizrachy, like many litigants in person, has struggled to attain the objectivity required to appreciate the boundaries between proportionate and disproportionate litigation conduct. His desire to continue a battle he has already won also reflects a lack of appreciation of the proper function of the courts.

44. The Overriding Objective sets out the principles Bermuda's courts are obliged to follow and may be viewed as a procedural underpinning for the fundamental fair hearing rights guaranteed by section 6 of the Bermuda Constitution. Section 6(8) of the Constitution provides as follows:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time." [Emphasis added]

45. This provision is generally accepted as affording a claimant a right of access to the Court and an effective remedy in respect of breaches of civil rights or obligations. A fair hearing requires fairness to both parties, so a defendant is entitled not to be vexed by stale or hopeless claims. The right to a hearing within a reasonable time confers the

imprimatur of the Constitution on the notion that litigation must be conducted in an efficient manner: justice delayed is justice denied.

46. Paragraph 1A of the Rules of the Supreme Court 1985 builds on these constitutional foundations when it provides as follows:

> "**1A/1 The Overriding Objective**
>
> 1(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate—
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> (i) to the amount of money involved;
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> (ii) to the importance of the case;
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> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases." [Emphasis added]

47. While these Rules do not directly apply in this Court, they have considerable general pertinence particularly in the context of interlocutory appeals which indirectly impact upon the course and costs of proceedings before the Supreme Court. This Court will in most cases, and the present case is no exception, be astute to:

> (i) save expense by declining to require the parties to expend time and resources on unnecessary steps;
>
> (ii) ensuring that the litigation is conducted in a financially proportionate manner by, *inter alia*, discouraging overly enthusiastic litigants from pursuing legal red herrings; and
>
> (iii) devoting finite judicial resources to individual cases in an appropriate manner, measured by the importance and merits of each application.

48. In my judgment, the Order we made on 17 March 2025 was, in addition to the reasons articulated by Hickinbottom JA above, also justified by reference to these substantive and procedural case management principles.