[2010] JMCA App 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 141/2009

APPLICATION NO. 225/2009

BETWEEN	**HUMPHREY LEE MCPHERSON**	**APPLICANT**
AND	**DAMION CHAMBERS**	**1ST RESPONDENT**
AND	**SMART TECHNOLOGIES JA.**	**2ND RESPONDENT**

Humphrey L. McPherson instructed by Humphrey McPherson and Co. for the applicant.

Miss Grace Ann Cameron for the respondents.

10 March and 1 June 2010

IN CHAMBERS

MCINTOSH, JA (AG.)

[1] On March 10, 2010, I refused the applicant's application for permission to appeal the decision of Rattray, J. handed down on October 21, 2009, whereby his applications to strike out the Respondents' defence

and for summary judgment were refused. The learned judge also refused him leave to appeal.

[2] In refusing the application before me I gave the barest outline of my reasons for so doing and I seek now to expand upon them.

[3] By Notice of Application for Court Orders filed on December 29, 2009, with affidavit in support, the applicant first sought permission to appeal, as indicated above, and then sought an order:

> (b) that a temporary injunction be granted the Claimant/Appellant to restrain the Defendants/Respondents from engaging in any or all commercial transactions in relation to the SMARTSTAFF Software pending the determination of the Appeal; or, in the alternative;
>
> (c) that the Defendants/Respondents pay into this Court 30% of all revenues generated from the SMARTSTAFF Software retroactive to October 9, 2008, the date of the granting of the Consent Order terminating proceedings in Claim No. 2207/HCV 1737, Damion Chambers vs. Microbridge Software Associates Ltd. and Horace Allison, pending the determination of the Appeal.

[4] The grounds on which the application rested may be summarized as follows:

> "i) There is a binding Contingency Agreement entered into on June 28th, 2007, between the parties;
>
> ii) There are serious issues to be tried;

iii) Damages would not be an adequate remedy for the Claimant/Appellant should he succeed in his action; and

iv) The balance of convenience lies with the Claimant/Appellant who is willing to give the usual undertaking as to damages to the Defendants and the Claimant will honour this undertaking."

[5] In his affidavit in response, filed on February 10, 2010, the 1st respondent set out the background to the application and there was no challenge to his averments. In paragraph 2 he stated that in and around December 2006, he engaged the services of the applicant, "as an Attorney-at-Law to pursue, amongst other things, civil suit Claim No. 2007/HCV 1737, against Microbridge Software Associates Limited and Horrace Allison in relation to my intellectual property rights to a software program named SMART STAFF…"

[6] On June 28, 2007, he entered into a contingency agreement with the applicant which stated as follows:

> "I, DAMION CHAMBERS, of 5 Arlene Avenue, Arlene Gardens, Kingston 19, in the parish of Saint Andrew, DO HEREBY AUTHORIZE HUMPHREY L. MCPHERSON & CO., Attorneys-at-Law of 65 ½ Half Way Tree Road, Kingston 10, to negotiate and to do such things as may be required for the settlement of my case; and so also to conduct any Court proceedings and to employ such other Counsel or Attorney as may be required for the aforesaid purposes.

> AND I HEREBY FURTHER AGREE, DECLARE AND AUTHORISE HUMPHREY L. MCPHERSON to retain thirty percent 30% of the monies recovered by negotiation or Court action in this matter as legal fees for services rendered."

[7] A settlement was arrived at between the parties and, on October 9, 2008, this was formalized in a consent order entered by Sinclair-Haynes, J. in the following terms:

> "1. The Claimant has all rights to the SMARTSTAFF Software.
>
> 2. The Defendants have retained no copies and will not make any copies of the said software for internal, commercial nor financial gain.
>
> 3. The Claimant is not liable to any 3rd party for any claim arising out of the use of the said software.
>
> 4. Microbridge Software Associates Limited is not liable for the use of the said software from the date of the Order hereof.
>
> 5. There is no order as to costs…"

[8] On the same day, a Notice of Discontinuance was also filed by the applicant, discontinuing the action against the respondents and wholly withdrawing same, "the matter having been settled by consent." **No monies, whether for compensation, damages, or costs, were recovered respondents.**

[9] That notwithstanding, the applicant thereafter demanded 30% of the value of the SMARTSTAFF Software, writing to the respondents on October

28, 2008, requesting that steps be taken "to valuate/appraise the SMARTSTAFF Software, the subject matter of proceedings within FOURTEEN (14) DAYS of the date you received this letter to enable our firm to be compensated pursuant to the enclosed duly executed Contingency Agreement dated June 28, 2007, entitling our firm to legal fees in the sum of Thirty Percent (30%) of the appraised value of said software".

[10] This demand was not met, the respondents contending that it was contrary to any verbal or written agreement between them and, as a result of this contention, the applicant filed a claim in the Supreme Court, which was numbered HCV 05704/2008, seeking damages for breach of contract. In his Particulars of Claim filed on December 16, 2008, he alleged that the respondents have breached the Contingency Agreement by refusing to value the SMARTSTAFF Software to enable the Claimant to be paid the 30% fee of the value of said software, pursuant to the Contingency Agreement. Further, the Particulars state, at paragraph 11, "the Defendants have breached the Contingency Agreement by refusing to account for monies generated from the transaction in the SMARTSTAFF Software to enable the Claimant to be paid the 30% fee pursuant to Contingency Agreement".

[11] The respondents filed their defence on January 28, 2009, pleading the strict terms of the Contingency Agreement and the applicant filed a

Notice of Application for Court Orders on March 23, 2009, seeking, inter alia, an order for summary judgment, on the grounds that:

> "a. the Defendants' Defence discloses no reasonable grounds for defending the claim; or
>
> b. the Defendants' Defence is an abuse of the process of the court; or
>
> c. the Defendants' Defence is likely to obstruct the just disposal of the proceedings."

[12] This application did not find favour with Rattray, J. and it was accordingly refused. Having not received leave to appeal that refusal the applicant sought the permission of this court to do so.

The General Rule

[13] The applicant relied, in the main, on the provisions of Rule 1.8 of the Court of Appeal Rules, 2002, rule 1.8(9) of which reads as follows:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

This really is the determining factor in this application and the authorities are clear on what is meant by "real chance of success". **Swain v Hillman** [2001] 1All ER 91, referred to by Mr. McPherson, is one such authority. It simply means that the prospect (the word used in the authorities and which I consider to be synonymous with "chance") of success must be

realistic rather than fanciful. Further, in considering a request for permission to appeal, a court is not required to analyse whether the grounds of the proposed appeal will succeed but whether there is a real prospect of success. (See **Hunt v Peasegood** (2000) The Times, 20 October, 2000).

Did the applicant show that he has a real chance of success on appeal?

[14] In his written submissions as well as in the grounds of his proposed appeal it was clear that the applicant placed great reliance on the case of **Amalgamated Investment and Property Co. Ltd. v. Texas Commerce International Bank Ltd** [1982] QB 84 as well as the learning to be distilled from Anson's Law of Contract, 28th Edition, pages 112; 121 -124; and Treitel on the Law of Contract, Eighth Edition, pages 111 – 115. Indeed in the grounds of the proposed appeal he contended that the court was "shackled by the decision in **Amalgamated Investment and Property Co. Ltd.**" and that the learned judge broke the law in failing to apply that decision to interpret 30% of the monies recovered, as stated in the Contingency Agreement, to mean 30% of the value of the software.

[15] Mr McPherson also expressed the view that the recently decided case of **Margie Geddes v Messrs. McDonald Millengen,** [2010] JMCA Civ 2 at [7], [8], was relevant to this application, being concerned with contingency agreements and the law relating thereto. He was of the view that the **Geddes** case provided support for his claim to be entitled to

payment on this contingency agreement. However, counsel for the respondents quite rightly disagreed with this view as it is clearly misconceived.

[16] In his judgment, Cooke, J.A. referred to section 21 subsection 8 of the Legal Profession (Amendment) Act, 2007 which reads:

> "21 (8) In this section, "contingency fees" means any sum (whether fixed or calculated either as a percentage of the proceeds or otherwise) payable only in the event of success in the prosecution of any action suit or other contentious proceeding."

[17] He considered this legislation as crucial to the issues involved among which, he said, was the question of whether, on the evidence, there was a lawful contingency agreement. At paragraph [8], he referred to the respondent's position that its contingency fee agreement on its professional services encompassed litigation and winding up proceedings and having ruled out any entitlement to payment on the litigation aspect, on the ground that there was no success in the prosecution of the action or suit, said:

> "The only question therefore is whether the respondent's professional services as to the winding up proceeding can properly be regarded as success in a contentious proceeding. I think not. "Contentious" envisages an adversarial combat which arises from a dispute between contending parties. The respondent's affidavits speak to advice which was given to the appellant as to how best she

> should act so that a surplus would be obtained following winding up proceedings … It is impossible for me to say that the legal professional services rendered, in this regard, to the appellant can be possibly regarded as "success in contentious proceedings"."

[18] This was the unanimous opinion of the court (per Harrison, J.A. at paragraph 23 of the judgment – "It is abundantly clear to me, however, that by virtue of the amendment, success in the prosecution of the action, suit or proceeding, is the criterion for such fees being paid by the client" and Dukharan J.A. at paragraph 43 – "It is clear to me that the legal professional services rendered by the respondent cannot be regarded as "success in contentious proceedings". The respondent in my view would not be entitled to payment as they (sic) were not successful in the prosecution of any action or suit").

[19] There is no dispute about the legality of this contingency agreement and it is beyond question that the agreement is subject to the amended Act as it came into effect on April 24, 2007 and the agreement was signed on June 28, 2007. Therefore, insofar as it related to "court action" the provision of section 21(8) would apply and no contingency fees would have been payable as there was no successful prosecution of the action, the matter having been brought to a conclusion on an agreement reached by the parties.

[20] The Contingency Agreement also authorized the retention of "*30% of the monies recovered by negotiation".* But, on the conclusion of the matter, no monies were recovered by the respondents – not even as costs.

[21] The applicant relied on **Amalgamated Investment and Property Co. Ltd**. and discussions in Anson's Law of Contract, 28th Edition and Treitel's Law of Contract, Eighth Edition, relating to the principle of estoppel by convention, for his contention that fees are due to him under the agreement. According to Mr McPherson, Rattray, J. erred in not applying the decision in **Amalgamated Investment and Property Co. Ltd.** to interpret "30% of the monies recovered…" as stated in the Contingency Agreement, to mean 30% of the value of the software. It would seem then that it is not the agreement as it stood, that entitled him to 30% of the appraised value of the software, as stated in his letter of October 28, 2008, (referred to earlier), but an interpretation of the agreement based on the principle of estoppel by convention and it is therefore necessary to consider whether there is any foundation for that contention.

[22] Estoppel by convention may arise where both parties to a transaction have acted on an agreed assumption as to the existence of a state of facts or as to the true construction of a document. In the words

of Lord Denning M.R., from his speech in **Amalgamated Investment and Property Co. Ltd.**

> *"When parties in their course of dealing in a transaction have acted upon an agreed assumption that a particular state of facts between them is to be accepted as true, each is to be regarded as estopped as against the other from questioning, as regards that transaction, the truth of the statement of facts so assumed where it would be unjust and unconscionable to resile from that common assumption."*

[23] To summarize then, the effect of estoppel by convention is to preclude a party from denying an agreed assumption as to fact or as to the meaning of a document. However, there was nothing in the material provided to this court that showed any potential for the application of the principle of estoppel by convention. There was nothing in the supporting affidavit and the documents relied on, relating to any negotiations and there was nothing to show that the parties acted on "an agreed assumption as to fact or as to the true construction of the document". Nor indeed was there any document or other material to support the interpretation contended for by the applicant so that the principle applied in **Amalgamated Investment and Property Co. Ltd** had absolutely no bearing on the instant case. This, according to the written submissions of counsel for the respondents, was also the view of Rattray, J. in the court below.

[24] Furthermore, if reliance is being placed on an interpretation of the Contingency Agreement to mean 30% of the value of the software, then the matter was not appropriate for the grant of summary judgment and ought to go to trial. Indeed, ground (ii) of the application for leave is that there are serious issues to be tried, in which event his claim should therefore proceed to trial.

[25] So, at the end of the day, the applicant failed to show that there is any real chance of succeeding on an appeal in this matter and permission to appeal was accordingly refused. The application for a temporary injunction pending appeal and the alternative application for payment into court pending appeal were also refused as there is no appeal, which makes it unnecessary to consider the grounds concerning adequacy of damages and the balance of convenience.

[26] The Order of the Court was therefore that the Notice of Application for Court Orders dated December 29, 2009 was dismissed with costs to the respondents to be agreed or taxed.