JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 1/2010

APPLICATION NOS. 2/2010 & 6/2010

BETWEEN	**CAPITAL SOLUTIONS LTD.**	**APPLICANT**
A N D	**TERRYON WALSH**	**1st RESPONDENT**
A N D	**THE ADMINSTRATOR GENERAL OF JAMAICA**	**2nd RESPONDENT**
A N D	**KARLENE BISNOTT**	**3rd RESPONDENT**

Christopher Dunkley instructed by Phillipson Partners for the Applicant

Oswald James, and Leighton Miller instructed by James and Company for the 1st Respondent

Miss Maria Gayle for the 2nd Respondent

IN CHAMBERS

19, 20,21,22,25,26,27,28,29 January and 9 February, 2010

PHILLIPS, J.A.

[1] There were two applications before me, an application filed on behalf of the applicant Capital Solutions Limited and one filed on behalf of the first respondent, Terryon Walsh.

[2] The Application No. 2/2010 filed on behalf of the applicant on 6 January 2010, sought the following orders:

> "1. That the Order of Mr. Justice Brooks be stayed pending hearing of the Appeal.
>
> 2. Leave to appeal if required.
>
> 3. Such further and other relief as may be appropriate."

[3] The grounds of this application were that Brooks, J had refused a stay of execution of his order on 30 December 2010, that he had erred in ordering full payment out of account no. 6628-46 in purported enforcement of the order of Brown J (Ag), and that the learned judge ought not to have interpreted the order of Brown J (Ag) as permitting the payment of monies out of account in two days. The applicant also indicated that it intended to appeal the order of Brown J (Ag) and if the funds were paid out, it could render that appeal nugatory. The applicant filed two affidavits in support of the application, sworn to by its acting chief executive officer, Mrs. Vanceta Ramsay.

[4] The other application before me was No. 6/2010 filed on behalf of the first respondent on 13 January, 2010 which sought the following orders:

> "(1) That the Notice of Appeal be struck out;
>
> (2) That the Appellant/1st Applicant Capital Solutions Ltd's application for a stay of execution pending appeal, of the Order of Mr. Justice Brooks, be refused.

(3) That the Appellant Capital Solutions Ltd's application for a stay of execution pending appeal, of the Order of Mr. Justice Brown (Ag), be refused.

(4) Costs to the 1st Respondent."

[5] The grounds of this application were many. The 1st respondent stated that the claim was undefended below; that the applicant had no locus standi to bring the appeal as it was merely a stakeholder as in an interpleader action, and having disavowed any interest in the stake, (the funds in the account), it had held itself bound to pay out the funds to the successful claimant of the said funds, and that the applicant was estopped from adducing fresh evidence and re-litigating the matter. The 1st respondent then, as further grounds in support of the application to strike out the appeal, challenged six of the grounds of appeal on the basis that they were insufficient in law. The 1st respondent relied on her affidavit sworn to on 20 January 2010, in support of her application and in opposition to that of the applicant.

[6] On 9 February 2010, I made the following orders:

"(1) Leave to appeal granted, Notice and Grounds of Appeal filed January 6, 2010 to stand.

(2) The order of the Hon. Mr. Justice Brooks is stayed until the hearing of Supreme Court Civil Appeal No. 1/2010 or until further order.

(3) The applicant is restrained from making any payment out of the balance of proceeds currently in account

No. 6628-46 until the hearing of the appeal or until further order.

(4) Notice of Application for Court Order dated January 13, 2010, Application No. 6/2010 is refused.

(5) Costs to be costs in the Appeal.

(6) The appellant, Capital Solutions Limited is to prepare, file and serve order."

I promised to put my reasons in writing which I do now.

The proceedings

[7] The above applications relate to a rather unusual history of proceedings in the court. The 1st respondent, at my request, provided the court with a chronology of events which was extremely useful and which has assisted greatly in the production of these reasons.

[8] I will start with the fixed date claim form which was filed on 5 October 2009; the 1st respondent Terryon Walsh was the claimant and there were three named defendants, Capital Solutions Limited, the Administrator General (the 2nd respondent) and Karlene Bisnott (the 3rd respondent). The 1st respondent however only claimed against Capital Solutions Limited the following:

"a) A Declaration that she is a joint beneficial owner of Account No. 6628 – 46

b) An order that the 1st defendant execute all necessary documents and take the required steps to note the claimant as joint beneficial owner of Account No. 6628 -46.

c) Such further and other order as the court deems fit.

d) That there shall be liberty to apply."

[9] The grounds of the claim are set out in the fixed date claim form and essentially the 1st respondent stated that she had made substantial contributions to the said account; that prior to his death the account holder, Mr. Gladstone Bisnott, had given the applicant written instructions to add her to the account as a joint beneficial account-holder of the said account, however the holder had died before she could attend on the applicant to give effect to that intention; but subsequent to the death of the account holder she attended on the applicant and an officer of the applicant confirmed instructions that her name should have been placed on the account as joint beneficial owner. The fixed date claim form contained particulars of claim. Important additional information contained therein was that Mr Gladstone Bisnott as the account-holder of account no. 6628-46 had opened the said account on or about 12 May 2009. Also, the 1st respondent averred that she had caused certain deposits to have been made to the account from another account held by her in the bank, through another entity, all of which was known by the applicant and this took place at about the time of the opening of the account. So, the 1st respondent was claiming that the deposits in the account at its opening had some of her personal resources.

[10] The first hearing of the fixed date claim form came up before Brown J (Ag) on 19 November but was adjourned to 3 December, and then to 18 December 2009, when he made the following orders:

1. The relief prayed in paragraphs (a) and (b) of the Fixed Date Claim Form filed on the 5th day of October, 2009 are granted;

2. There shall be liberty to apply;

3. No order as to costs, and

4. The claimant's attorneys-at law to file the herein Order.

Immediately on receipt of this order the 1st respondent issued instructions to the applicant for her to obtain the entire funds standing in the account. Having not been successful in that regard she filed on 23 December 2009, a Notice of Application for Order Specifying Time, which sought orders from the court that the respondent comply with the order of Brown J (Ag) within 2 days of the service of the order, and more importantly that the monies in account no. 6628-46 be paid over in accordance with the 1st respondent's directions within the said two days of service of the order. The court was asked to direct that in all the circumstances of the case sufficient notice had been given of the application. The grounds of the application were that there had been an order of the court and the applicant had failed to comply with the same.

[11] On 29 December, 2009 the applicant reacted by setting out its understanding of the order of Brown J (Ag) and its opposition to what the 1st respondent was attempting to do by filing its own notice of application for court orders seeking an order that the order of Brown J (Ag) be stayed for a period of 28 days, pending the hearing of the appeal, or alternatively, that the applicant be permitted 14 days within which to file its application under the liberty to apply order of the court, and that the application for the order specifying time be adjourned for a further date to be heard with the application for liberty to apply. The grounds of this application in essence indicated that the applicant intended to appeal the order of Brown J (Ag) and the time had not elapsed within which to do so; that although the order of the court had only declared the 1st respondent a joint beneficial owner of the account, she had given the applicant instructions to pay over the entire account proceeds to her attorneys–at–law; that there was no indication that the 2nd respondent, the Administrator General, had been advised of the application and the urgent need therefor; and that the applicant intended to "exercise its liberty to apply" and to file affidavits in support thereof with particular reference to the terms and conditions under which the particular account was held with the applicant, as the 1st respondent should also be bound by those arrangements. Finally, the applicant complained about the

short time of service of the application as a result of which it had not been able to obtain complete instructions.

[12] The applications were heard on 30 December 2009 by Brooks, J and the following orders were made:

> "a) The time for service of the Application filed herein on the 23rd day of December, 2009 is abridged and the application is deemed properly served.
>
> b) That the 1st Respondent/Defendant complies with the Order of Evon Brown J (Ag) within two (2) days of the service of this Order.
>
> c) That the money in Account No. 6628-46 is to be paid over in accordance with the Claimant's direction within two(2) days of the service of this Order.
>
> d) Costs to the 1st respondent to be taxed, if not agreed.
>
> e) Leave to appeal refused."

[13] On 6 January 2009, the applicant filed three documents, the notice and grounds of appeal, notice of application for stay of the judgment of Brooks J and of permission to appeal, if necessary, in the Court of Appeal, and notice of application for court orders under liberty to apply in the Supreme Court. The issues in the latter application, and for which the applicant was requiring the directions of the court, related to whether the order of Brown J (Ag) declaring the 1st respondent to be a joint beneficial owner of the account rendered her entitled to the joint proceeds of the account with the estate, or whether the 1st respondent

was entitled to a right of survivorship. There was also an issue with regard to whether that joint beneficial ownership permitted the applicant to enforce the terms of account no. 6628-46 previously held in the sole name of Gladstone Bisnott, then deceased. The issue seemed to be that the applicant had not wished to disclose any information about the account to the 1st respondent before she had been found to have a joint interest in the beneficial ownership of the account, but since that had occurred, then the issue of the manner in which the account was held, and any limitations attendant thereon, or former claims against it, would apply to the 1st respondent. Needless to say, that application had not been heard when the matter came before me, but there was great urgency attaching to the application for the stay of execution of the order of Brooks J bearing in mind the order for immediate payment out of the funds in account no. 6628-46. In fact, the documents before me indicated that the failure to comply with the said order had resulted in a committal application which was pending before the court against a senior officer of the applicant. The notice of appeal filed essentially challenged the orders made by Brooks J on 30 December 2010.

The applications

[14] There were two affidavits filed on behalf of the applicant in Application No. 2/2010. The first affidavit sworn to by Mrs Vanceta Ramsay, prayed for the stay of execution of the judgment of Brooks J on

the basis, inter alia, that the learned judge had misinterpreted the order of Brown J (Ag), and that if a stay was not granted, should the Supreme Court direct otherwise, or should the appeal against the judgment of Brown J (Ag) be successful, then it would be rendered nugatory. In the second affidavit, Mrs. Ramsay stated that it had always been her understanding that once the beneficially entitled interests had been identified, the parties would proceed under "the liberty to apply" with regard to the terms and conditions which attached to account no. 6628-46, being the basis of the arrangements between the account holder and the applicant, and they would share their one-half interests subject to those terms and conditions.

[15] Mrs Ramsay further deponed that subsequent to the order of Brown J (Ag), documentation with regard to the account had been made available to the attorneys-at-law for the 1st respondent, as well as documentation for the 1st respondent to open an account with the applicant. None of those documents were placed before me, the reason given being that the documents were not before the court below and the intention was that they would be placed before the judge hearing the liberty to apply application. Mrs. Ramsay stated that funds had been transferred to the account opened in the name of Mr. Bisnott from an account of another client of the applicant, which funds had been paid in tranches pursuant to instructions. The remaining balance, she said, was

paid by way of a promissory note, which was secured by a judgment in another matter, which was on appeal. No demand for payments by Mr. Bisnott had ever gone unsatisfied, and he was aware at all times, that his investment account was subject to the judgment. Additionally, she stated that the applicant had had no dealings with the 1st respondent, prior to the application which had been made to the court for a declaration of her beneficial entitlement in respect of the account.

[16] The affidavit of the 1st respondent rejected the statements made by Mrs. Ramsay as untrue. She said that, on several occasions Mr. Bisnott had told her of his frustrations with regard to his futile attempts to get monies from the subject account. In her view, Mr. Bisnott would not have agreed to any limitation to access to the account as they had joint plans to use the funds as working capital for a business venture, 'Fyahside' restaurant. Further, she knew of at least one cheque which had been obtained from the applicant in the amount of J$1.77M which had been returned due, she believed, to insufficient funds. She attached a copy of this cheque to her affidavit which had the notation, 'refer to drawer' thereon. She also indicated that to her knowledge and understanding the account was a deposit account and not an investment account. Further, she stated that she had met with persons at the applicant company prior to the filing of the action, who said that they knew of the instructions that her name should be placed on the account, had known of her, and had

anticipated and expected her attendance at the offices of the applicant.

[17] At the hearing, a further affidavit of Mrs. Ramsay in another suit ***Black Brothers Inc. Ltd and Kenneth Black v Capital Solutions Limited, and Parlanex Corporation***) (Claim No. 2008 HCV 04075) was submitted by counsel for the 1st respondent, in an attempt to attack Mrs Ramsay's credibility, as statements made therein allegedly contradicted the contents of the affidavits filed in this court. In the affidavit Mrs. Ramsay gave details of monies owed by Black Brothers Inc. Ltd**.** and continuing facilities which had been afforded that company, by the applicant herein, and the fact that a judgment had been obtained against them, and that there had been an acknowledgment of USD$2,800,000.00 due to the applicant. The paragraph relied on by counsel for the 1st respondent reads as follows:

> "Most recently the Respondent has become the subject of Court litigation for payment on an account which is being defended as not being due and payable as at the time of the suit. Notwithstanding, had the Respondent not been carrying the Appellant's facility as it has, the business decision to pay out that 1st respondent would have been available. As it is, that 1st respondent has taken out committal proceedings for non-payment of monies."

The submissions

[18] Counsel for the applicant in his written submissions stated that the learned judge had erred when he ordered that all the monies in the account were to be paid out in a specified time, to wit, two days within service of the order. Counsel reminded the court of certain information which was before the court in the proceedings below, which was that the said account no. 6628-46 was in the sole name of Mr. Bisnott and that he had died intestate leaving two minor children. His widow (the 3rd respondent) had filed an affidavit and application to be named administrator of the estate of Mr. Gladstone Bisnott which was filed by the attorney-at-law for the 1st respondent and on which the 1st respondent relied, indicating that she was relinquishing any claim to be beneficially entitled to the funds in the account. The 2nd respondent however had entered an acknowledgement on behalf of the minor children. The applicant, he submitted, therefore really came to the court, as an interpleader, claiming no interest in the funds.

[19] In the matter below the applicant had also informed the learned judge (Brown J (Ag)) of a competing claim on the funds which had been used to open the account and although the learned judge had at first adjourned the hearing so that the other matter could be heard, as it was not disposed of on the date fixed for the hearing of the same, he proceeded to hear the matter, (the orders of which having been acted

on by Brooks J, are now the subject of the appeal) when it came back before him. He made the orders as set out herein, and the 1st respondent attempted to collect the monies the day after the order had been made.

[20] It was submitted that subsequent to the orders of Brown J (Ag) the applicant had been endeavouring to communicate the terms and conditions on which the account was held, as it was the applicant's view that the 1st respondent, as beneficial owner of the account would have to be subject to those conditions. Further, the court ought to have indicated, or indicate on the application for liberty to apply, whether the 1st respondent as a joint owner of the account was entitled to one-half of the proceeds of the account or whether, subsequent to the death of the account holder, the right of survivorship was to be applied to the account.

[21] It was further submitted that the learned judge, Brooks J, had addressed his mind to those matters, but had asked whether the details of the terms and conditions of the account were before Brown, J (Ag) and he had not appeared impressed with the response, also given to me, that, as that information was confidential, it would not have been put before the court until the 1st respondent had been found to be beneficially entitled as a joint owner of the account. It was submitted that the learned judge's misunderstanding of the previous order led him

into error, and as a consequence, the applicant was severely prejudiced (as set out hereunder) as the order,

> "i) Enforces a particular interpretation of the Order of Brown J (Ag.) which may itself be otherwise interpreted by the Court.
>
> ii) Rendered Liberty to Apply nugatory.
>
> iii) Rendered any contemplated Appeal nugatory.
>
> iv) Brought the investment account #6628-46 to immediate maturity without any information as to the terms and conditions under which it was held.
>
> v) Afforded the Appellant no reasonable opportunity under Liberty to Apply to detail the conditions of the deceased's account.
>
> vi) Exposed the Appellant to enforcement proceedings; The Respondent has now brought committal proceedings against the Chief Executive Officer of the Appellant for non compliance of the Court's Order."

[22] On the basis of the above, the applicant indicated that it now therefore intended to rely on the application for liberty to apply, the application for stay pending appeal, for permission to appeal, and on the notice and grounds of appeal.

[23] The applicant further submitted that the learned judge, (Brooks J) fell into error when he treated the 1st respondent as a judgment creditor, when Brown J(Ag) had only declared her a joint beneficiary of an

account. The main complaint was that since the original account holder could not have acted as the 1st respondent had attempted to do, there was therefore clearly a misunderstanding of the order by the court. Counsel submitted further in his written submissions that the account was an investment and not a deposit account, and that all monies disbursed on the account had been duly negotiated. Counsel also indicated that there was no inconsistency in the position taken by the applicant as the funds in the account, due to the terms and conditions on which they were held, would not yet be due.

[24] In his oral submissions at the hearing before me, counsel reiterated much of what had been set out in the written submissions save to endorse that the court ought to grant the application for leave to appeal, if necessary. Counsel submitted that the order made by Brooks, J was final in its import, but in any event the application for leave to appeal and the notice of appeal had been filed in time, that is within 14 days of the order, the subject of the appeal, and as he had submitted that the applicant had a real chance of success on appeal, the court ought to grant leave to appeal. He also submitted that on any perusal of the affidavits, the applicant would be prejudiced if the stay was not granted and the appeal was successful, as the appeal would have been rendered nugatory.

[25] Counsel voiced his concern in relation to the two minor children and submitted that the applicant ought to have the protection of a court order stating, as had not yet been stated, that the right of survivorship could operate subsequent to the death of the account holder particularly in the absence of any written instructions to add the 1st respondent's name to the account. Counsel maintained that the court ought not to have shortened the time for the hearing of the application 'specifying time for an act to be done,' and ought to have allowed the application to have been heard with the application for 'liberty to apply'. It was not the intention of the applicant to ask for any adjustment or variation to the order of Brown J (Ag) but for clarification as to its meaning, intent and application. Counsel indicated that he was relying on the principles enunciated in the leading Court of Appeal case on this area of the law, ***Flowers Foliage and Plants of Jamaica v Jamaica Citizens Bank Limited*** (1997) 34 JLR 447.

[26] In reply, counsel for the 1st respondent in his written submissions stated that account no. 6628-46 was a deposit account and he relied on the definition of 'deposit' in the Financial Institutions Act as the applicant is a licensee under that Act. He relied on the fact that the 1st respondent had sued Karlene Bisnott, the widow of the deceased and she had concurred with the 1st respondent's claim as to the beneficial ownership of the funds. She had also sued the 2nd respondent and the 2nd

respondent had not objected to the declaration being granted. Additionally the applicant had indicated that it was a disinterested stakeholder and so should just have merely complied with the order of the court, and in that capacity, he submitted, they had no locus standi on appeal.

[27] Counsel referred to the bases for a grant of a stay of execution of a judgment and the provisions of the Court of Appeal Rules in particular rule 2.14 which states:

> "Except so far as the court below or the court or a single judge may otherwise direct-
>
> (a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and
>
> (b) no intermediate act or proceedings is invalidated by an appeal."

and the rules of the Supreme Court at 42.13 of the Civil Procedure Rules (CPR) which reads:

> "A judgment debtor may apply to the court to stay execution or other relief on the grounds of –
>
> (a) matters which have occurred since the date of the judgment or order; or
>
> (b) facts which arose too late to be put before the court at trial, and the court may grant such relief, upon such terms, as it thinks just."

He submitted that although there are no factors outlined in the rules for the exercise of the court's discretion, the courts have held consistently, that the starting point is, that the applicant should show that there are good reasons to deny the judgment creditor the fruits of his judgment, which he submitted, the applicant had failed to do. Counsel relied on the Court of Appeal case already referred to, that is ***Flowers Foliage and Plants,*** and also to the ***Linotype-Hell Finance Limited v Baker*** [1992] 4 All ER 887 and stated that the applicant, pursuant to the ruling in the latter case, should have shown that if the stay was not granted, it would have been ruined. However, to the contrary, the applicant had not made any such assertion as it only held the monies, in the capacity of a financial institution, and had not indicated that there would be any adverse effect on its finances if there was an immediate payout of the funds.

[28] Counsel also relied on the case of ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd.*** [2001] EWCA Civ. 2065 for the principle that an applicant in making an application for a stay of execution of a judgment, must place before the court information with regard to its financial inability to satisfy the judgment debt, and must in doing so be 'full, frank and clear'. Counsel submitted that in the instant case the applicant had not put any such information before the court. Counsel also referred the court to several other authorities in support of the submission for the bases of the grant of a stay of execution and in

support of his submission that the stay of execution of the judgment of Brooks, J ought to be refused, to wit: ***Beverley Levy v. Ken Sales Marketing Ltd.*** (unreported) Court of Appeal, Application No. 146/06 delivered 22 February 2007; ***Leicester Circuits Ltd. v. Coates Brothers PLC*** [2002] EWCA Civ. 474; ***Milford Trading Company Limited v. Garth Pearce*** (unreported) Court of Appeal, Application No. 46/09 delivered 28 May 2009; ***National Commercial Bank Jamaica Limited & Another v. Robert Forbes*** (unreported) Court of Appeal, Application No. 182A/07) delivered 13 February 2008; ***C & H Property Development Company Limited v. Oswald James Another*** (unreported) Court of Appeal, Application No. 132/08) delivered 24 October 2008; ***Rahul Singh & Others v. Kingston Telecom Ltd & Another*** (unreported) Court of Appeal, Application Nos. 72 & 80/2006) delivered 5 December 2006.

[29] In his further written submissions, counsel challenged the position taken by the applicant that the said account was subject to any peculiar security, and or hypothecation and/or that the original account holder had agreed to any such limitation on the account, as there was no documentation to that effect provided to the court, as opposed to the copy of the 'Account Status and Statement,' produced to the court by the 1st respondent, as Exhibit 1 to her affidavit of 7January 2010, in support of the committal application filed in the Supreme Court, which has the maturity date stated as "on call".

[30] Counsel further challenged the stance of the applicant with particular reference to the legal framework relative to the application for liberty to apply and submitted that the position taken by the applicant was in effect impugning the order of the court, which could only be challenged on appeal and the matters currently being raised were therefore outside the scope of 'liberty to apply'. Counsel submitted on his understanding of the true interpretation to be given to that aspect of the court's order. He relied on the general legal position that "the circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared …'. However, it was submitted , the effect of the liberty to apply provision is circumscribed. Counsel relied on the principle set out in Halsbury's Laws of England, 4th edition, Reissue, Vol. 37/2001 para. 1230 which states that, "it does not enable the court to deal with matters which do not arise in the course of working out the judgment or to vary the terms of the order except possibly on proof of change of circumstances". Counsel also relied on ***Cristel v Cristel*** [1951] 2 KB 725, a case of some antiquity, and finally submitted that the 'liberty to apply' order was really a judicial device not too dissimilar to its procedural cousin the 'slip rule', intended to supplement the main orders in form and convenience so that the main orders can be carried out. In the instant case, he submitted, the applicant, intending to place before the court

details of the activity on the account, and the terms and conditions of the contractual arrangements of the account holder with it, would be completely outside the scope of 'liberty to apply.'.

[31] Counsel then referred to two cases to support his contention with regard to the right of survivorship, that is, the Jamaican case of ***Reid v Jones*** (1979) 16 JLR 512 and ***Russell v Scott*** (1936) 55 CLR 440, an Australian case. It was submitted that the law was correctly stated by Bingham, J in the Jamaican case that,

> "where a chose in action would normally accrue to the survivor of two persons in whom it is jointly vested, very strong documentary evidence must be tendered to show that the deceased by some unequivocal act in his lifetime did not intend that the survivor should be entitled to survivorship."

[32] Counsel relied on a passage in the dicta of Dixon and Evatt, JJ in ***Russell v Scott,*** which states:

> "Once it appears, as it does in the present case, that a definite intention existed, that the balance at the credit of the bank account should belong to the survivor, these cases become, in our opinion, indistinguishable."

[33] In light of the above, counsel was bold to submit, the Australian case put 'the matter of the right of survivorship of the surviving joint account holder beyond doubt'.

[34] It would therefore, he submitted, not require any clarification from the court under the 'liberty to apply,' as ordered by the court. Counsel then pursued his application to strike out the appeal. He relied on rules 26.3 (1) (b) and 26.3(1) (c) of the CPR , which state:

> "26.3 (1) In addition to any other powers under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim."

Counsel submitted that this appeal was an abuse of process as the applicant does not take issue with the fact that the court has held that the 1st respondent is a joint beneficial owner of the account, but is taking issue that the 1st respondent is not entitled to the entire proceeds in the account, thereby bringing into question the law that a joint beneficial owner is entitled by right of survivorship, to the entire account. Counsel described this appeal "as a collateral attack on the liability expressed in the judgment, and a means whereby, if successful on appeal, the applicant could avoid its obligations under a judgment it was not really challenging." Counsel also stated that the applicant had the opportunity

to place all the material it is referring to now, before the court and having not done so, it was too late as one should not be permitted to re-litigate, (see ***Bradford & Bingley Building Society v Seddon***, [1999]1 WLR 1482) and in any event, he submitted, there was no reasonable ground for bringing the appeal.

[35] Finally, counsel went through each ground of appeal and addressed them sequentially submitting that there was no basis on which the applicant ought to be permitted to proceed. As the material is much the same as has already been submitted and set out herein, in my opinion no useful purpose could possibly be served by repeating those submissions and making this judgment longer that it already is turning out to be, bearing in mind also, the overall view that I have taken with regard to the remedies sought in both these applications before me, as is set out below.

Analysis

[36] There have been many submissions made to me in this matter. I intend to deal with those that are determinative of the applications. For instance, I do not intend to say anything about the committal application as I am not of the view that any aspect of that application was before me.

Locus standi

[37] I can dispose of this submission very easily. The applicant was a party in the action filed in the Supreme Court The claims and orders were made in relation to an account at their institution. The orders of both judges required action on the part of the applicant. Although the 1st respondent has submitted that the applicant is a disinterested party and/or an interpleader with no claim to the funds, nonetheless, in my view, the applicant has a clear interest in ensuring that it is acting in compliance with the mandate from its customer, (though deceased) as well as its understanding of the court's order, and to protect itself from any professed alleged third party claims. Accordingly, I adopt the words of Panton P. in ***Richard Spence v Maurice Hitchins et al*** SCCA No.127/05, Application No. 29/06 delivered 16 November 2009 where he said:

> "There can be no doubt that the applicants are affected by the judgment of Brooks, J……and it is only just and right that they should be heard in the appeal."

Permission to appeal.

[38] The Court of Appeal Rules state that if an appeal is one that requires the permission, either of the court below, or of this court, then the application must be made within 14 days of the order against which permission is sought. If the application can be made to either court, then it must first be made to the court below. The application made to the

court can be considered by a single judge of appeal. The general rule is that permission to appeal will only be given in civil cases if the court considers that the appeal has a real chance of success. An order giving permission to appeal may be made subject to conditions (rules 1.8 (1) (2)(5)(9) and (10).) Also, where permission to appeal is granted, the appeal must be filed within14 days of the date of such permission (rule (1.11(1)(b). Additionally, when the notice of appeal is filed, the order granting permission should be attached to the notice of appeal (rule 2.2(3)). In the instant case, the application was first made orally to Brooks, J and was refused. The application was renewed before me on the basis that the application had been filed in time, (6 January 2010) and the notice of appeal had also been filed on the same day. However, the applicant submitted that permission was sought, if necessary, as the order could be considered a final one which would not require the permission of the court.

[39] There is no doubt, and I so find that the order of Brooks, J is an interlocutory order on the principles enunciated in cases such as ***White v Bruntun,*** 2 All ER [1984] 606, ***Leymon Strachan v The Gleaner Co. Ltd.*** SCCA No. 133/99 delivered 6 April 2001 and ***Rayton Manufacturing Ltd et al v Workers Savings and Loan Bank Ltd et al*** Application No. 36/2009 delivered July 2009. The order on the fixed date claim form had already been made in the matter, by Brown J (Ag) and the application before

Brooks J could only have been considered as one being made for consequential relief, or to obtain compliance with the order previously made. It may have had the effect of finality which may not have been contemplated by the order of Brown J (Ag), but it was nonetheless an interlocutory order and if the application had been refused , there would no doubt have been further hearings in the matter. Permission to appeal was therefore required. The notice of appeal therefore filed on 6 January, 2010, without the applicant first obtaining an order for permission to appeal, would have been ineffective. The applicant, in order to comply with the rules must, therefore, convince the court that its appeal has a real chance of success.

[40] A real chance of success has been decided by the authorities to mean a realistic as opposed to a fanciful prospect of success (see ***Swain v Hillman*** [2001] 1 All ER 91, which was applied by this court, in ***Paulette Bailey, et al v Incorporated Lay Body of the Church in Jamaica and the Caymas Islands in the province of the West Indies*** SCCA No. 103/2004, delivered 25 May 2005). The issue therefore is whether the applicant has a real chance of success on appeal.

[41] Once I have determined that issue, I would have disposed of that aspect of the application relating to the status of the appeal, but as that is also the main question to be answered in the application for the stay of

execution of the judgment, I will deal with this issue of the real chance of success, when also considering the application for the stay of execution which I will do now.

Stay of execution of the order of Brooks, J

[42] The Court of Appeal Rules state that, except so far as the court below or the court may otherwise direct, an appeal does not operate as a stay of execution of the decision of the court below (rule 2.14 (a)). This court has been guided over the years by the principles enunciated in its decision in ***Flowers Foliage and Plants of Jamaica v Jamaica Citizens Bank Limited*** and the case of ***Linotype- Hell Finance Ltd v Baker,*** both cases referred to earlier in this judgment, having been relied on by both counsel. It is now well established that a stay should not be granted, (and it is therefore incumbent on the applicant to show) unless the appeal has some prospect of success. Also, if an applicant can say that unless the stay is granted, he will be ruined, and he has some prospect of success on appeal, then a stay ought to be granted.

[43] As I indicated to counsel when these applications were being heard, the judgment of Morrison JA in ***Cable and Wireless Jamaica Limited (t/a Lime) v Digicel (Jamaica) Limited (formerly Mossel Jamaica Limited)*** SCCA No.148/2009 delivered 16 December 2009 had recently come to my attention, wherein he referred to a case cited to him by

counsel which the learned judge described as a 'less well known and apparently unreported decision', that is, ***Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited*** (FC297/6273/C, judgment delivered 23 July 1997. In the judgment, Phillips LJ,(as he then was) said this:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the applicant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the applicant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But if there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice. The starting point must be that the normal rule as indicated by Order 59, rule 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal."

[44] In my view this dictum seems directly applicable to this case, particularly because of the issues set out herein in the submissions of counsel.

[45] The question is whether a greater injustice will be caused by the grant or the refusal of the stay of execution. If the entire proceeds are paid out to the 1st respondent in circumstances where that was not what the court meant, would the mischief thus created, and which would be borne by the minor beneficiaries and the applicant, be irreparable?

[46] One could say that there appear to be some questions which could arise in respect of the order made by Brown J, (Ag). I set out a few below:

(1) Was the judge making an order that the 1st respondent, (Walsh) was the holder of account 6628-46, from its inception, which would include legal and equitable ownership of the account and the right of survivorship, which would vest on the opening of the account?

(ii) Was the judge saying that the 1st respondent was beneficially entitled to the balance in the account along with the estate of Gladstone Bisnott?

(iii) Was the judge saying that as a joint beneficial owner of the account she was entitled to all the monies in the account to the exclusion of the estate, on the basis of a resulting trust?

(iv) Was the judge saying if the 1st respondent was to be noted as a joint beneficial owner of the account, that vis-vis the applicant, she was subject to the same terms and conditions of the original holder of the account, bearing in mind that the documentation in respect of the account would appear to be relevant to the efficacy and implementation of the second order made by the learned judge on 18 December 2009?

(v) Did the judge conclude that the position taken by the 3rd respondent on affidavit in the matter before him, before any order had been made for the due administration of the estate, bound the minor children?

(vi) Is it possible that the learned trial judge Brown J (Ag) viewed these matters as being subject to liberty to apply, as the phrase is clearly stated in the order, and if it did not apply to those questions then in the judge's view, in the circumstances of this case, what did the phrase embrace?"

[47] Certain facts are also not in dispute in this matter which bear on the questions set out above.

> The account no.6628-46 was opened in the name of Gladstone Bisnott alone.
>
> The account remained in that state up and until his death and appeared to have been solely operated by him during his life-time.

[48] I am mindful of the fact that this is an application for a stay of execution of a judgment and the issues between the parties are the subject of an appeal, (if permission to appeal is granted, and the appeal is not struck out) and so will have to be decided if and when the appeal is heard. The court may find that there are no uncertainties in the order, and that no aspect of it requires clarification, and/or a working out of the same. So at this stage, I should not give any view on the merit of the different positions taken by the parties before the court (see ***Sewing Machines Rentals Limited v Wilson & Another*** [1976] 1 WLR 37).

[49] I will therefore only make a few comments on the cases referred to in an effort to ascertain whether the applicant has some or a real prospect of success on appeal.

Right of survivorship.

[50] The 1st respondent relied on the case of ***Reid v Jones*** in support of the proposition, that the order of the court that the 1st respondent was a joint beneficial owner of the account, meant that the 1st respondent was entitled pursuant to the right of survivorship, to the entire proceeds in the account. This case however concerned the operation of a joint savings account opened and maintained by a husband and wife, in circumstances in which on the wife's death, the husband authorized his attorney-at-law by power of attorney, to withdraw the funds. This was met with various competing claims from the deceased's estate, as she had by her will, bequeathed all monies in financial institutions to her two nieces. In that case the court held:

> "Where a chose in action would normally accrue to the survivor of two persons in whom it is jointly vested, very strong documentary evidence must be tendered to show that the deceased by some unequivocal act in his lifetime did not intend that the survivor be entitled to survivorship. In the instant case, no such evidence was produced. Consequently, the testator has power only to bequeath such sums in financial institutions to her nieces as belonged absolutely and indefeasibly to her and did not relate to any joint accounts opened and maintained during her lifetime with her husband."

[51] In that case, the issue to be determined, as stated by Bingham, J (Ag) (as he then was) was whether the money in the joint account was to

be paid over to the husband, as the survivor under the survivorship clause in the joint account, or whether it should be paid over to the executors of the deceased's estate, pursuant to her will, that is to say, would that devise in the will "displace or provide a sufficient contrary intention to defeat the rule of survivorship, that applies in cases of joint accounts where there is a survivorship clause, set out in the mandate given to the bank, by the parties to the account."

[52] It was therefore to the mandate that court had to look to supply the intention of the parties to the joint account. This issue was answered thus:

> " Here the survivorship clause operated to give the Plaintiff the entire beneficial interest in the fund, and this cannot be displaced by any clause in any purported will of the Testator."

[53] In the instant case, the order made by Brown, J (Ag) with regard to the beneficial interest of the 1st respondent in the account, was made after the account holder had died. There was no documentary information before him, or before me, with regard to any survivorship clause in relation to the account, and therefore it remains to be seen if this case can give any assistance in respect of the right of survivorship to the funds in the account on the death of the sole account holder .

[54] The 1st respondent also relied on the case of ***Russell v Scott,*** This case concerned an elderly old lady, Mrs. Russell, (the donor) of

considerable wealth, who had opened an account in her own name in the Commonwealth Savings Bank. She deposited her savings into the account and withdrew sums for her current expenses. But, she had become forgetful and careless and on one occasion had misplaced some forms for withdrawing money, and so a representative of the bank suggested to her nephew (the appellant) who had treated her with much kindness and consideration in the handling of her business, and the money in her accounts, that an account should be opened in her name and that of the nephew. This was done. The funds to the credit of the old account were transferred to this account. The donor had also indicated to the managing clerk of her solicitors, when in possession of the savings account book to the joint account in the names of herself and her nephew, that the nephew would look after her and pay her accounts, and that the monies remaining in the account at her death would belong to the nephew. She died leaving a will, appointing the nephew her executor and devised and bequeathed all the residue of her real and personal property to the nephew and Perry Eric McDonnell Scott in equal shares. Perry brought an action claiming that the monies in the account, (and a small sum removed therefrom by the nephew) were to be shared. The nephew claimed that the funds in the account were solely his. The learned judge at first instance concluded that the amount in the account

did not pass to the nephew. The nephew appealed and the appeal was allowed. Starke, J in delivering his judgment said:

> "A person who deposits money in a bank on a joint account vests the right to the debt or the chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship… The vesting of the right and title to the debt or chose in action takes effect immediately, and is not dependant upon the death of either of the persons in whose names the money has been deposited."

[55] The learned judge at the first instance had made the finding that the money had been deposited in the account originally opened in their joint names and opened for the convenience and protection of the donor, the purpose being for her protection during her life and not for benefiting the nephew, whilst she lived. But the monies were intended by her to be the nephew's at her death, so the legal right to the monies were the nephew's by right of survivorship. Starke, J made the finding that this rebutted the presumption of resulting trust in the donor's favour and her estate in the remaining funds in the account at her death.

[56] Dixon and Evatt, JJ, stated the issue in the case to be this:

> "…whether the survivor of two persons opening a joint bank account is beneficially entitled to the balance standing at credit when the other dies, if all the moneys paid in have been provided by the deceased acting with the intention of conferring a beneficial interest upon the survivor in the balance left at his or her death but not otherwise, and of retaining in the meantime the

right to use in any manner the moneys deposited."

Both judges then continued:

> "The contract between the bank and the customers constituted them joint creditors. They had, of course, no right of property in any of the moneys deposited with the bank. The relation between the bank and its customers is that of debtor and creditor. The aunt and the nephew upon opening the joint account became jointly entitled at common law to a chose in action. The chose in action consisted in the contractual right against the bank, i.e., in a debt, but a debt fluctuating in amount as moneys might be deposited and withdrawn. At common law this chose in action passed or accrued to the survivor. Indeed it may be said that, in the case of the Commonwealth Savings Bank, the legal right of survivorship is statutory (see Statutory Rule No. 77of 1928, clause 23).
>
> The right at law to the balance standing at the credit of the account on the death of the aunt was thus vested in the nephew. The claim that it forms part of her estate must depend upon equity. It must depend upon the existence of an equitable obligation making him a trustee for the estate What makes him a trustee of the legal right which survives to him? It is true a presumption that he is a trustee is raised by the fact of the aunt's supplying the money that gave the legal right a value. As the relationship between them was not such as to raise a presumption of advancement , prima facie there is a resulting trust. But that is a mere question of onus of proof . The presumption of resulting trust does no more than call for proof of an intention to confer beneficial ownership; and in the present case satisfactory proof is forthcoming that one purpose of the transaction was to confer upon the nephew the beneficial ownership of the sum standing at the credit of

> the account when the aunt died. As a legal right exists in him to this sum of money, what equity is there defeating her intention that he should enjoy the legal right beneficially? Both upon principle and upon English authority we answer, none."

[57] McTiernan J, said it this way:

> "It is clear that the appellant and his aunt became the joint creditors of the bank and, as such, joint owners of a chose in action, the legal interest in which would upon her death accrue to the appellant. The question is whether the appellant as the survivor is under an equitable obligation to exercise his legal right to reduce this chose in action into possession for the benefit of the residuary beneficiaries under her will.
>
> Now under the terms of the assignment to him jointly with the assignor he was bound to exercise the legal rights which he thereby acquired for the purpose expressed by the assignor. His legal interest was saddled with that particular trust during her lifetime. But that trust did not exhaust the interest taken by him as a joint legal owner of the chose in action, and if there was no evidence to rebut the implication of a resulting trust he would be bound to hold the interest unexhausted by the particular trust subject to a resulting trust in favour of the lady or her personal representative. A resulting trust did not arise because it was the intention of the deceased that the appellant should after her decease be entitled to operate on the account for his own benefit."

[58] It remains to be seen whether this case can also assist the 1st respondent in the interpretation of the law and its application, as in this case the account was opened in the joint names of the elderly lady and

her nephew and the issue appeared to be, as in the case of ***Reid v Jones,*** whether the testamentary disposition could operate in circumstances, where the legal right in the fund, based on the joint ownership of the account, would have vested in the survivor, by law. Further, even if there was evidence, that a resulting trust could have existed to the benefit of the estate, was there evidence to rebut that resulting trust, so that the legal interest would be allowed to take effect, unfettered by the trust, and 'in respect of his **jus accresendi**, his conscience could not be bound' ?

[59] In the instant case, the account was not opened, maintained and operated by the deceased Gladston Bisnott and the 1st respondent. So the question is how would these principles have operated to arrive at the order made? And how were the questions in the instant case answered by the order? Is it clear? Does it require any working out to be effective?

[60] In the preparation of these reasons, a case out of the Supreme Court of Canada came to my attention, that is, ***Michael Pecore v Paula Pecore and Shawn Pecore,*** (2007) 1 S.C.R. 795, 2007 SCC 17) delivered by the nine judges of the court on 3 May 2007. In this case an aging father gratuitously placed the bulk of his funds in a joint account with his daughter, P. There were three adult children, but P was closest to him; in fact he had been estranged from one of his daughters until a short time

before his death. The other siblings also were financially secure, whilst P was not and additionally was obliged to care for her quadriplegic husband, M. The father assisted P financially. He also bequeathed the residue of his estate to P and M, but did not mention the accounts that he had opened in the joint names of P and himself. The issue in the case was whether M could claim any interest in the sums standing to the credit of the accounts at the death of the father. The first instance court, the Court of Appeal and the Supreme Court all held that P was entitled to the funds in the account.

[61] The courts discussed the principles of advancement, whether they were applicable to adult children, when financially dependent, the effect of the rebuttal of the presumption by way of the resulting trust, or evidence as to the actual intention of the donor(the father in this case).

[62] Certain statements of the common law were made in this case, and I set out some of the same as being relevant to the issues bearing on the real chance of success on appeal in the instant case:

> "With joint accounts, the rights of survivorship, both legal and equitable, vest when the account is opened. The gift of those rights is therefore **inter vivos** in nature. Since the nature of a joint account is that the balance will fluctuate over time, the gift in these circumstances is the transferee's survivorship interest in the account balance at the time of the transferor's death. The presumption of a resulting trust means in that

context that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor.

The types of evidence that should be considered in ascertaining a transferor's intent will depend on the facts of each case. The evidence considered by a court may include the wording used in bank documents, the control and use of the funds in the account, the granting of a power of attorney, the tax treatment of the joint account, and evidence subsequent to the transfer if such evidence is relevant to the transferor's intention at the time of the transfer. The weight to be placed on a particular piece of evidence in determining intent should be left to the discretion of the trial judge.

In this case, the trial judge erred in applying the presumption of advancement. P although financially insecure, was not a minor child. The presumption of a resulting trust should therefore have been applied. Nonetheless, this error does not affect the disposition of the appeal because the trial judge found that the evidence clearly demonstrated on the part of the father that the balance left in the joint accounts was to go to P alone on his death through survivorship. This strong finding regarding the father's actual intention shows that the trial judge's conclusion would have been the same even if he had applied the presumption of a resulting trust.' '…….per Abella, J In any event, bank account documents which, as in this case, specifically confirm a survivor ship interest should be deemed to reflect an intention that what has been signed is sincerely meant. There is no justification for ignoring the presumptive relevance of clear language in banking documents in determining the transferor's intention."

[63] This case therefore underscores the importance of the interests which vest on the opening of joint accounts, and also of the contractual arrangements concerning the said accounts, and the interpretation and application of the law in respect of joint holders of accounts.

In my view, it still remains to be seen how these issues will be determined by the Court of Appeal.

Liberty to apply

[64] Counsel for the respondent relied on the case of ***Cristel v Cristel,*** in support of his contention that the facts of the case before me did not fall within the scope and ambit of the phrase "liberty to apply". The facts of ***Cristel v Cristel*** were that a husband who had deserted his wife had obtained an order for possession of the matrimonial home, which his wife occupied, and which he wished to sell with vacant possession, and which order was made by agreement and suspended until he provided suitable alternative accommodation in the form of a two or three bedroom house or bungalow. The order gave "liberty to apply" and so when the husband located a two bedroom flat, he applied to the Master to vary the order to read 'or flat' which the Master refused and which Devlin J, on appeal, referred back to the Master to decide whether the flat was suitable other accommodation. On appeal by the wife, it was held:

> "that the word 'liberty to apply' referred prima facie to the working out of the actual terms of

> the master's order. That the word 'house' did not cover a flat, and the insertion of the words 'or flat' would amount to a variation of the order; and in the absence of any change of circumstances the judge had no power to vary the order of the master."

L.J Somervell had this to say:

> "Prima facie, 'Liberty to apply is expressed, and if not expressed will be implied, where the order drawn up is one which requires working out, and the working out involves matters on which it may be necessary to obtain the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied."

He concluded that the words, 'liberty to apply' in his opinion referred to

the working out of the actual terms of the order.

L.J. Denning stated:

> "But when there is no change of circumstances, I do not think that the court can alter or vary the agreement of the parties under the "liberty to apply'. It can only do what is necessary to carry the agreement into effect."

L.J Hodson stated:

> "The words 'liberty to apply' in their context add nothing to the order, which, of itself, required something further to be done for it to be worked out. Therefore without the existence of those words, it would have been open to the husband to come to the court and show that he had provided suitable alternative accommodation in the form of a two or three bedroom house or bungalow; but, for the reasons which have been given by Somervell, L.J.' I am of opinion that it is not open to him to come and ask the court to alter the agreement by adding the words 'or flat'

to the description of the accommodation contained in the order."

[65] So, in my view, the questions arising in the circumstances of the instant case would be:

(i) Did the order of Brown, J (Ag) require any working out?

(ii) If the answer to (i) is yes, did the working out of the order involve any matters on which it may have been necessary to obtain the decision of the court?

(iii) Are the matters which have been set out in the affidavits and the submissions and which are the subject of the appeal, variations to the order?

(iv) Are the said matters referred to above necessary to carry the order into effect?

(v) Is it open to the applicant to come to the court to show the basis on which the 1st respondent could hold the account?

[66] I wish to make it clear that I am not at this stage making any determination as to whether these matters fall under the phrase 'liberty to apply', as there is still such an application before the Supreme Court which has not yet been heard, and one of the grounds of appeal is that the order for the payment out of the entire funds in the account ignored this aspect of the court's order, and which is also why, it has been submitted that the learned judge erred when he failed to adjourn the 1st respondent's application, so that the two applications could have been heard together.

[67] However on the basis of all that has been set out above, I find that there is basis on which the applicant could say that Brooks J. erred, and I therefore find that there is a real prospect of success on appeal herein. Based on this finding. I granted permission to appeal and a stay of execution of the judgment of Brooks J and refused the application by the 1st respondent to strike out the appeal. It is necessary to state that there was no application before me to stay the execution of the judgment of Brown, J (Ag).

[68] It was necessary to order however that the sums standing to the credit of account no. 6646-38, not be paid out in respect of any other perceived third party claims, before the resolution of the appeal, and that in the circumstances of this case, the matter should be heard with some dispatch. I therefore ordered that the stay of execution of the judgment of Brooks J be pending the outcome of the appeal or further order, so that if there is any undue delay on the part of the applicant in pursuing the hearing of the appeal, then the 1st respondent could make an application in respect of the stay, and this court could consider whether a further order should be made as a consequence thereof (see ***Sewing Machines Rentals Limited v Wilson & Another*** (supra).

[69] It was for these reasons that I made the orders as set out in paragraph 6 above.