[2012] JMCA App 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 1/2010

APPLICATION NO 30/2010

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**TERRYON WALSH**	**APPLICANT**
A N D	**CAPITAL SOLUTIONS LIMITED**	**1ST RESPONDENT**
A N D	**THE ADMINISTRATOR GENERAL OF JAMAICA**	**2ND RESPONDENT**
A N D	**KARLENE BISNOTT**	**3RD RESPONDENT**

Leighton Miller and Oswald James for the applicant

Christopher Dunkley and Miss Jody-Anne Maxwell instructed by Phillipson Partners for the 1st respondent

Miss Nicola Ann Pinnock for the 2nd respondent (watching)

21 and 22 October 2010; 29 July 2011 and 9 March 2012

HARRISON JA

[1] I have read in draft the reasons for judgment of my sister McIntosh JA. I agree with her reasoning and have nothing to add.

HARRIS JA

[2] I too have read the reasons for judgment of McIntosh JA and agree with her reasoning.

MCINTOSH JA

[3] By notice of application for court orders filed on 28 April 2010 the applicant, Terryon Walsh, sought the following orders:

> that –
>
> "1. The Notice of Appeal is struck out;
>
> 2. In the alternative, the order of Phillips, J.A. made on the 9th day of February, 2010, is discharged;
>
> 3. Cost to the Applicant."

It was set for hearing on 30 June 2010, at which time the court conducted a case management conference and made orders for the appeal and the application to be heard on the same date, commencing with the hearing of the application. In the event, only the application was heard and the court reserved its decision, which was delivered on 29 July 2011 when it dismissed Miss Walsh's application for an order striking out the appeal, thereby disposing of the matter as, in the circumstances, no pronouncement was deemed necessary on the alternative order sought. The following are my reasons for that decision.

A summary of the events leading to the application

[4] On 12 May 2009 account number 6628-46 was opened by Gladstone Bisnott, in his sole name, at Capital Solutions Limited, with funds which Miss Walsh contended included some of her personal resources, such as sums taken from another account held by her at the said financial institution. Mr Bisnott had subsequently given her written instructions for the financial institution to add her name as a joint holder of the account but he had died before those instructions could be effected. An officer at Capital Solutions Limited had confirmed knowledge of those instructions.

[5] On 5 October 2009 Miss Walsh filed a fixed date claim form seeking a declaration that she was a joint beneficial owner of account number 6628-46 and an order that Capital Solutions Limited execute all necessary documents and take the required steps to note her as such. Miss Walsh listed three defendants, namely, Capital Solutions Limited as the 1st defendant, the Administrator General of Jamaica as the 2nd defendant and Karlene Bisnott (widow of Gladstone Bisnott) as the 3rd defendant, but pursued the claim against Capital Solutions Limited only.

[6] The fixed date claim form was heard on 18 December 2009, by E. Brown J (Ag), (as he then was) who granted the declaration sought by Miss Walsh and ordered that Capital Solutions Limited "execute all necessary documents and take the required steps to note Miss Walsh as joint beneficial owner of Account No. 6628-46." The learned judge also granted liberty to apply and made no order as to costs.

[7] The following day, 19 December 2009, Miss Walsh attempted to withdraw all of the funds from the account but Capital Solutions Limited was of the view that, as joint beneficial owner, she would have to be subject to the terms and conditions on which the account was held and did not release the funds to her. Capital Solutions Limited was of the further view that there was a need for clarity as to whether as beneficial owner, Miss Walsh was entitled to one half of the proceeds or whether on the death of the joint holder the right of survivorship would apply.

[8] Having been unsuccessful in her efforts to withdraw the funds, Miss Walsh filed a notice of application for court orders, in the Supreme Court, on 23 December 2009, seeking the court's direction on the time within which Capital Solutions Limited should comply with the order of E. Brown J (Ag) and, an order for the payment of the funds held in the account, in accordance with her instructions. Compliance with both directions was requested to be within two days of the service of the order.

[9] On 29 December 2009 Capital Solutions Limited filed its own notice of application for court orders seeking a stay of execution of the order of E. Brown J (Ag) for a period of 28 days from the hearing of the application, pending appeal, or, alternatively, an order (i) allowing it 14 days within which to file an application under the liberty to apply provision in the order and (ii) granting an adjournment of Miss Walsh's application, to a further date, for both applications to be heard together. In its grounds for the application, Capital Solutions Limited stated, *inter alia,* that the time allowed for appealing the order of E. Brown J (Ag) had not yet elapsed and that it needed to seek

directions from the court "with respect to Account No 6628-46 formerly held to the account of Gladstone Bisnott deceased", at its institution "and in particular

> (a) the activity on the account prior to Gladstone Bisnott's death, relative to the Application and Affidavits in support of the [applicant].
>
> (b) the terms under which Gladstone Bisnott deceased [sic] account was held and continues at the … institution.
>
> (c) declarations that the joint beneficial owners become bound to any terms and conditions as were applicable to Gladstone Bisnott, now deceased". (ground 4)

[10] Both applications were heard by Brooks J (as he then was) on 30 December 2009 whereupon he refused the application of Capital Solutions Limited in its entirety and granted Miss Walsh's application, ordering Capital Solutions Limited to comply with the order of E. Brown J (Ag) and to pay over the monies held in the account in accordance with her directions, within two days of the service of his order. He awarded the costs of both applications to Miss Walsh, to be taxed, if not agreed and refused Capital Solutions Limited leave to appeal.

[11] On 6 January 2010 Capital Solutions Limited filed, (a) notice and grounds of appeal against the order of Brooks J and (b) notice of application for a stay of the order, pending the appeal. That same day, Capital Solutions Limited also filed a notice of application for court orders in the Supreme Court, seeking clarification under the liberty to apply provision in the order of E. Brown J (Ag), as to the reach and effect of the learned judge's order. The application at (b) above was one of two applications for hearing in chambers before Phillips JA. The second was filed by Miss Walsh on 13

January 2010 in which she sought an order striking out the notice of appeal filed by Capital Solutions Limited as well as an order refusing its application for a stay of execution pending appeals against the orders of Brooks J and E. Brown J (Ag), with an award of costs to her.

[12] The applications were heard by Phillips JA on divers days commencing on 19 January 2010 and, on 9 February 2010, the learned judge of appeal sanctioned the notice and grounds of appeal which had been filed by Capital Solutions Limited and granted it a stay of execution of the order of Brooks J made on 30 December 2009, until the hearing of its appeal. The learned judge of appeal also restrained Capital Solutions Limited from making any payment out of the balance of the proceeds held in the account and refused Miss Walsh's application to strike out the appeal.

The notice and grounds of appeal

[13] In sum, Capital Solutions Limited complained in its notice and grounds of appeal, that Brooks J:-

a) did not afford it an opportunity to seek further directions under liberty to apply in the order of Brown J (Ag), with a view to determining whether the estate of Gladstone Bisnott had any residual interest in account number 6628-46;

b) did not give any or any sufficient consideration to a competing claim against the funds at issue (despite being alerted to claim no. B -

00007 of 2009 – ***Conroy Forte v Worldwise … Investments Ltd et al***); and

c) inasmuch as there was still time to file an appeal against the order of Brown J (Ag), did not give any or any sufficient consideration to whether his order would result in dissipation of the funds in the account which would render an appeal against the order of Brown J (Ag) nugatory in circumstances where the 2nd Respondent represents the interests of two minor children.

On the basis of these complaints Capital Solutions Limited seeks orders that (i) "the Order of Brooks J delivered on December 30, 2009 be set aside" (ii) the appeal "be joined to be heard with the Appeal from E. Brown, J. (Ag.)", (iii) such consequential orders as to the court seems appropriate and (iv) costs.

[14] Miss Walsh argued, however, that there is no merit in this appeal and listed 12 grounds in her application, five of which were directly concerned with her contention that the appeal should be struck out. They are as follows:

Grounds 1 - 4

"1. There is no Notice of Application against the order of Brown, J (Ag) made on the 18th day of December, 2009.

2. There is no application to extend the time within which to file the Notice of Appeal against the order of Brown J (Ag) made on the 18th day of December 2009

3. The Appellant has no reasonable prospect of success in the appeal.

4. The appeal is an abuse of the process of the court."

Ground 11

"11. The 1st Respondent has no beneficial interest in the account and no *locus standi* to bring this appeal."

The remaining grounds related to the alternative order sought.

The application to strike out the appeal

[15] The court's power to strike out an appeal is derived from rule 1.13(a) of the Court of Appeal Rules 2002 (the CAR) which provides that:

" The court may -

(a) strike out the whole or part of a notice of appeal or counter notice;"

In essence, Mr Miller argued on behalf of Miss Walsh that the court should exercise its powers under this rule to strike out the appeal of Capital Solutions Limited as it lacked the requisite *locus standi* to bring an appeal in this matter since, on its own admission, it has no property interest in the funds in account number 6628-46. Further, Mr Miller submitted, if it did have *locus standi*, the appeal was an abuse of the process of the court in that Capital Solutions Limited had declared itself to have no beneficial interest in the account so that its only function was that of stakeholder with the responsibility to pay out the funds to the surviving joint holder, namely Miss Walsh. Counsel argued that the applications in the court below were undefended and no evidence was provided to the court in proof of any interest in the account apart from Miss Walsh's. In

circumstances where the court already ruled that she was entitled to the funds in the account and where Capital Solutions Limited declared that it was not disputing the beneficial ownership, it was Mr Miller's contention that bringing this appeal was clearly an abuse of process.

[16] On the other hand, Mr Christopher Dunkley, counsel for Capital Solutions Limited, submitted that although it has no property interest in the funds, Capital Solutions Limited has an interest in seeking to ensure that it does not make double payments inasmuch as there may be other claims on the account besides that of Miss Walsh. It therefore had the necessary *locus standi* to bring this appeal. Furthermore, Mr Dunkley argued, the appellant is entitled to appeal an order which adversely affects it and to be allowed to seek appropriate directions in relation to the effect of the declaratory order by Brown J (Ag). There are matters of substance which require the direction of the court before Capital Solutions Limited would be in a position to comply with the order, Mr Dunkley submitted, and therefore, it cannot reasonably be said that Capital Solutions Limited was abusing the process of the court in its efforts to obtain those directions.

[17] I found that there was merit in Mr Dunkley's submission that Capital Solutions Limited had the necessary locus standi to bring an appeal in this matter. It was a party to the action commenced in the Supreme Court and the claim concerned an account held at its financial institution. The orders made as a result of the claim required Capital Solutions Limited to take certain action and in seeking clarification and/or

directions as to how to proceed in compliance with those orders, it cannot reasonably be said that appealing the order which denied it the opportunity to obtain those directions/clarifications amounted to an abuse of the process of the court. It seemed to me that it is only just and right that Capital Solutions Limited should be heard in an appeal from an order which directly affected it (see ***Richard Spence v Maurice Hitchins et al*** (SCCA No. 127/2005 Application No. 29/2006, a decision delivered on 16 November 2009) and I accordingly concluded that grounds four and 11 were unsustainable and must fail.

[18] It was Mr Miller's further contention that Capital Solutions Limited had no real prospect of successfully appealing the order of Brooks J because Capital Solutions Limited had not appealed the order of Brown J (Ag) or sought a stay of its execution (grounds one to three). Therefore, Mr Miller submitted, it cannot be argued that the order was ambiguous or capable of any interpretation that the estate of Gladstone Bisnott was entitled to a share in the account. He further submitted that the evidence clearly indicated that the intention of Mr Bisnott was that Miss Walsh should be beneficially entitled to the funds in the account, to the exclusion of his estate. In fact, counsel argued, Mr Bisnott would have held the funds on a resulting trust for Miss Walsh as the evidence showed that the funds belonged to her. At the end of the day, it was Mr Miller's submission that the clear fact was that the order of Brown J (Ag), declaring Miss Walsh beneficially entitled to the account, "excludes the estate of Gladstone Bisnott whether Ms Walsh's entitlement arises under the doctrine of the right of survivorship or under the doctrine of a resulting trust".

[19] Further, counsel argued, there was no basis for any contention that Brooks J had infringed the liberty to apply order of E. Brown J (Ag) when he prevented Capital Solutions Limited from adducing evidence of particular restrictions on which the account was held. Mr Miller pointed out that Capital Solutions Limited had advanced no evidence which showed any restriction or any acknowledgement of any restriction on the account by Mr Bisnott and it was of significance that the one document introduced into evidence before Brooks J was from Miss Walsh, namely, a statement issued by Capital Solutions Limited which showed that the account was "on call". Therefore, Mr Miller argued, Capital Solutions Limited had failed to show that it had a real prospect of success in the appeal.

[20] Mr Dunkley's concern was with the manner in which Brooks J had exercised his discretion, however. There was no material before the court, counsel argued, that would justify the immediate result which the order of Brooks J involved. He conceded that relevant information had not been presented to the court concerning the terms and conditions under which the account was held by Mr Bisnott, but explained that Capital Solutions Limited owed a duty of confidentiality to its customers and was in no position to disclose information on restrictions on the account until Brown J (Ag) had made the declaratory orders. Counsel's ready answer to Mr Miller's submission that disclosure was permissible by virtue of the 4th Schedule to the Financial Institutions Act, which provides for financial institutions to divulge account information in certain circumstances such as in the course of civil proceedings, was that the schedule was not applicable in the

instant case as it referred to licensees and customers and Miss Walsh was not then a customer of Capital Solutions Limited. The interests of the parties would be properly balanced, Mr Dunkley submitted, by putting all available material before the court and this was what Capital Solutions Limited was seeking to do.

[21] Brooks J had severely prejudiced Capital Solutions Limited, Mr Dunkley contended, (in the proceedings before the single judge) in that his order (a) enforced a particular interpretation of the order of Brown J (Ag) which may itself be otherwise interpreted by the court; (b) rendered liberty to apply nugatory; (c) rendered any contemplated appeal nugatory; (d) brought the investment account number 6628-46 to immediate maturity without any information as to the terms and conditions under which it was held; (e) afforded Capital Solutions Limited no reasonable opportunity under liberty to apply to detail the conditions of the deceased's account; and (f) exposed Capital Solutions Limited to enforcement proceedings, Miss Walsh having brought committal proceedings against Capital Solutions Limited for non-compliance with the order.

[22] It was Mr Dunkley's submission that Capital Solutions Limited had needed clarification of the order of Brown J (Ag), on whether the order rendered Miss Walsh jointly entitled to the proceeds of the account with the estate of Gladstone Bisnott or whether she is entitled to claim a right of survivorship. These were issues, counsel argued, which Capital Solutions Limited required to be settled on the court's direction before it could properly determine that Miss Walsh was entitled to the full proceeds of

the account, which was the effect of the order of Brooks J, and it was seeking the opportunity to obtain those directions under the liberty to apply provision of the order of Brown J (Ag). Counsel relied on ***Swain v Hillman*** [2001] 1 All ER 91 for the meaning of the expression "real chance of success" which is a realistic prospect of success as distinct from that which would be considered fanciful and submitted that in all the circumstances, Capital Solutions Limited has a real chance of succeeding in its appeal. This, it seemed to me, was really the crux of the matter.

[23] Does Capital Solutions Limited have a realistic chance of success in the appeal it has lodged against the decision of Brooks J? Again, I found merit in the submissions of Mr Dunkley. Capital Solutions Limited was seeking to utilize the "liberty to apply" provision in the order of Brown J (Ag) and had sought an adjournment from Brooks J to address that application but was denied the opportunity to do so. (The note of the proceedings before Brooks J records the attorney for Capital Solutions Limited as advising the court that "There is other evidence we hope to bring to the attention of the court by way of liberty to apply", to which the learned judge responded that "Liberty to apply is not for that purpose, that is the function of an appeal with an application to adduce fresh evidence.") In the note of his oral judgment, delivered on 30 December 2009, Brooks J said, "There is nothing in the provision for liberty to apply to prevent the 1st Defendant [Capital Solutions Limited] making immediate payment to the claimant [Terryon Walsh]." Brooks J went on to express the view that whatever terms and conditions govern the contract between the financial institution and its customer concerning this deposit would affect Miss Walsh in the same manner that it affected Mr

Bisnott, but the learned judge pointed out that no evidence had been put forward to support any restriction on her withdrawing the funds in the account and closing it if she wished. Suffice it to say that there was no guidance from Brown J (Ag) as to his intention in the provision of liberty to apply, (although the note of the proceedings before Brooks J reflected the view of Miss Walsh's attorney that liberty to apply was granted "in respect of the accounting", but this, in my opinion, was not helpful).

[24] The authorities show that a liberty to apply provision is either expressed or 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 seek the guidance of the court, but it does not permit a request for a variation of the order (see ***Cristel v Cristel*** [1951] 2 KB 725). The areas of concern regarding which Capital Solutions Limited was seeking the opportunity to have the court clarify, were set out in ground 4 of its application before Brooks J (see paragraph 7 above) and the application which it subsequently filed on 6 January 2010, under the liberty to apply provision of the order of Brown J (Ag), reflected those same concerns. It was seeking directions (i) in an effort to ensure that it was protected against any third party claims or any residual claim for a half interest in the account by the estate of the deceased, Gladstone Bisnott; and (ii) to ascertain whether Miss Walsh held the account on the same terms and conditions as Mr Bisnott did up to the time of his death. It seemed to me that it was for the judge, before whom the application for those directions would be heard, to determine whether the matters raised properly came within the scope of liberty to apply or whether Capital Solutions Limited would have to pursue another course.

[25] Brooks J did accept that Miss Walsh, as joint holder, would be bound by whatever terms and conditions attached to the account formerly held in the sole name of Mr Bisnott, and it may well be argued that it was an unreasonable exercise of his discretion to deny Capital Solutions Limited an opportunity to have its application heard with Miss Walsh's application. It would only have been after those applications were determined that Capital Solutions Limited may have had to consider which course it would pursue with regard to the order of Brown J (Ag). Ultimately, I was of the view that Capital Solutions Limited was entitled to seek the directions of the court, Brown J (Ag) having given it liberty to apply with no indication as to the scope of that order and in circumstances where questions arose which may need the direction of the court for compliance. It therefore has a real prospect of succeeding in its appeal. This rendered grounds one to three unsustainable, in my view.

[26] Based upon the foregoing reasons, it was concluded that Miss Walsh's application to strike out the appeal should be refused with costs to Capital Solutions Limited. This effectively disposed of the matter and, as noted in paragraph [1] above, there was no need to have made an order in relation to the alternative order sought.