

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 130/2012

**BETWEEN CDF SCAFFOLDING & BUILDING
EQUIPMENT LIMITED**

AND OWEN CHAMBERS APPLICANTS

AND IVAN SMITH RESPONDENT

Miss Carol Davis for the applicants

Miss Sandra Johnson for the respondent

1 and 13 November 2012

IN CHAMBERS

MORRISON JA

[1] This is an application for permission to appeal against an order made by Anderson J on 31 May 2012, striking out the applicants' claim in Claim No 2011HCV00894. The single issue which arises on this application is whether the proposed appeal has "a real chance of success", pursuant to rule 1.8(9) of the Court of Appeal Rules 2002.

[2] The respondent is the widower of the late Kathleen Elfreda Chambers Smith ('Mrs Smith'), who died on 8 December 2007. He is also the duly appointed administrator of

her estate, a Grant of Administration having been made to him by the Supreme Court on 10 March 2008. The first named applicant is a company in which Mrs Smith was the majority shareholder and the second named applicant is the brother of Mrs Smith and a director of the company.

[3] By fixed date claim form filed on 23 February 2011, the applicants brought action seeking orders (i) revoking or setting aside the Grant of Administration to the respondent on the ground of fraud and (ii) that the Grant of Administration to Mrs Smith's estate be made to the Administrator General of Jamaica. The claim form was accompanied by an affidavit sworn to on 23 February 2011 by the second named applicant, in which he impugned the Oath of Administrator sworn to by the respondent on 26 January 2008.

[4] The basis of the challenge was that, in the light of information contained in a letter dated 17 March 2008 written by the attorney-at-law who acted for the respondent in obtaining the grant, the value of Mrs Smith's estate had been grossly understated by the respondents in the oath. As a result, the second named applicant contended in his affidavit, the statements made by the respondent in the oath "were untrue and I verily believe that the [respondent] well knew them to be untrue". The affidavit ended in this way:

"Throughout her life my sister was to my knowledge a very upright and honest person and she was justly proud of her reputation. She managed the 1st Claimant company, which has a reputation of honesty based on its record and the fact that its directors have always conducted themselves in a proper manner. I verily believe that the dishonesty of the

Defendant is a scourge on my sister's memory. Further, when it is discovered, I verily believe that it will adversely affect the reputation of the 1st Claimant company. In the circumstances I humbly ask this Honourable Court to grant the Orders in the Fixed Date Claim Form herein."

[5] By notice of application filed on 8 April 2011, the respondent sought the following order:

- "1. This action be struck out or dismissed or be stayed for:
 - i. Failing to Disclose a reasonable ground for bringing the Claim
 - ii. Failing to Disclose that he Claimant has nay locus standi to bring the Claim by virtue of the Civil Procedure Rules, 2002 (Amended)
 - iii. Failing to comply with Rule 68.55 (3)
 - iv. Failing to comply with Rule 68.56
 - v. Being groundless, vexatious and an abuse of the Court's process and is an attempt to delay the trial of the Claim No. HCV 03090/2008
 2. Costs of this application to be paid by the 2nd Claimant personally.
 3. Such further or other relief as this Honourable Court deems fit
- That the grounds on which the Applicant is seeking the Order(s) are as follows:-
- (a) By virtue of Rule 68.55 (3) 68.56
 - (b) By virtue of Rule 68.68 of the CPR 2002, (Amended) Revised"

[6] The strike out application came on for hearing before Anderson J on 13 April 2012 and, on 31 May 2012, he ordered that the applicants' claim be struck out as

prayed and made an order for costs in the respondent's favour. The learned judge took the view that the outcome of the challenge to the action based on the provisions of rules 68.55(3) and/or rule 68.56 of the Civil Procedure Rules 2002 ('the CPR') would be determinative of the application and he therefore dealt with the matter on that basis first. These rules are in that part of the CPR dealing with contentious probate proceedings, which the applicants' action undoubtedly was. Rule 68.55(1) provides for the commencement of probate proceedings by way of fixed date claim form, and rule 68.55(3) provides that the claim form "must state the nature of the interest of the claimant and of the defendant in the estate of the deceased person to which the claim relates". The learned judge was of the view that, since neither of the applicants claimed to be 'interested' in Mrs Smith's estate, the clear and express terms of the rule had not been complied with and that this failure rendered the claim a nullity. The respondent's application to strike out the action accordingly succeeded.

[7] In her outline submissions in support of the application for leave to appeal, Miss Davis submitted there was a real chance of success on an appeal from the learned judge's judgment, in that, firstly, the applicants did not offend rule 68.55(3), the second named applicant having stated his interest as the brother of the deceased and a director of the company in which the deceased was also a director and shareholder: his interest was therefore to protect the deceased's memory from "the scourge of dishonesty caused by the Respondent's fraud". The judge's interpretation of the rule was too restrictive and contrary to the overriding objective, in that it unfairly drove the applicants from the seat of justice. Secondly, the learned judge erred in failing to

consider the court's inherent jurisdiction to protect its own processes from fraud. Miss Davis conceded, as she had frankly done at the hearing before Anderson J, that the applicants had no financial interest in Mrs Smith's estate. Rather, the second named applicant's interest lay in "protecting the reputation of his sister".

[8] Miss Johnson countered by submitting that the judge's decision was correct, as the applicants had no *locus standi* to challenge the grant and the claim was therefore lacking in credibility and without merit.

[9] On the question of a definition of 'interest', the learned editor of 'Words and Phrases Legally Defined' (2nd edn, volume 3, page 79) refers to ***Bearmans Ltd and another v Metropolitan Police District Receiver*** [1961] 1 All ER 384, in which Devlin LJ (as he then was) said this (at page 391):

"The word "interest" is not a word which has any well-defined meaning, and anybody who was asked what it meant would at once want to know the context in which it was used before he could venture an opinion. It may mean a direct financial interest on the one hand, or on the other hand it may mean nothing more than the ordinary human interest which everybody has in the outcome of proceedings in which he is likely to be a witness. Just as in ordinary speech one would require to know the context, so in construing the word in an Act of parliament it is essential – more necessary in this case than in most – to look at the scope and purpose of the Act; and I think that if one does that one will be led to the conclusion that sub-s. (3) is to be given a narrow rather than a broad meaning."

[10] The word 'interest' in rule 68.55(3) must therefore derive its meaning from its context, which is that of contentious probate proceedings. In these circumstances, it

seems to me to be apt to convey a narrow, rather than a broad, meaning. An example of the kind of interest which the rule contemplates is provided by ***O'Brien v Seagrave*** [2007] 3 All ER 633, in which Judge Mackie QC considered a potential financial claim under the Inheritance (Provision for Family and Dependants) Act 1975 to be a sufficient interest for the purposes of CPR 57.7(1) (a rule *in pari materia* with rule 68.55(3)). In my view, Anderson J was therefore plainly right in thinking that, in the light of the context in which the word 'interest' is used in rule 68.55(3), the second named applicant's concern about matters concerning the deceased's estate could not amount to an interest for the purposes of the rule. What the claimant is required to show is some kind of claim of entitlement, whether financial, or to a grant of administration in the event that a previous grant of administration is revoked by the court, or otherwise.

[11] In addition to the absence in fact of an interest in Mrs Smith's estate in any relevant sense, the claim form did not state any interest at all, as rule 68.55(3) requires, and no particulars of claim were filed with the claim form, as mandated by rule 68.55(4)(a). Taking all the circumstances together, it therefore appears to me that the applicants have not demonstrated, as they must, that the proposed appeal has any, far less a real, chance of success.

[12] The application for permission to appeal is accordingly refused and the respondent must have the costs of the application, to be taxed if not sooner agreed.