



[2018] JMSC Civ 19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011/M02710

BETWEEN	RUTH ANN ROUSSEAU	CLAIMANT
AND	RAYMOND ROUSSEAU	DEFENDANT

IN CHAMBERS

Mrs. Pamela Benka-Coker, Q.C. & Mrs. Debra E. McDonald for the claimant

Mrs. Michele Champagnie & Mr. Vincent Henry for the defendant

Heard: July 4, July 6, October 30, 2017, January 15 and 18, 2018

Appeal – Application for extension of time to obtain leave to appeal – Application for leave to appeal

Ms. C. TIE, J

The Application

- [1]** This is an application for an extension of time to obtain leave to appeal as well as for leave to appeal the order made by this court on June 8, 2017.
- [2]** That order arose out of an application for specific disclosure and production of documents filed on April 26, 2017. Therein each party made similar applications seeking information as to the financial means of the other as well as information relating to business entities that each party was allegedly associated with. This information, they contended, was important for the resolution of the issue of the

maintenance of the children and the enforceability of a Deed of Arrangements signed by the parties regarding that issue.

[3] In this regards Mrs. Rousseau sought disclosure by Mr. Rousseau of information as it relates to Bearings and Accessories Ltd and Industrial Solutions Inc. She based her application on the fact that Mr. Rousseau in an affidavit had referred to Bearings and Accessories as 'my business' and further indicated that Bearings and Accessories Ltd pays bills for him. Also, the shares in Bearings and Accessories Ltd are held by Industrial Solutions Inc.

[4] The information sought in relation to these companies was essentially as follows-

- Income tax returns

- Copies of the audited financial statements

- details of bank accounts and their balances

- A list of the investments held by these business entities and details such as the face value of same

- A list of the shares held by these business entities and details such as the value of same

- A list of the companies in which each business entity has a beneficial interest and the value of same

- details of the beneficial interest of these business entities in any trust and the value of same

- Real estate owned either legally or beneficially, solely or jointly and the value of same

- A list of all assets held by the business entities on behalf of, or for the benefit of Mr. Rousseau

- [5] As regards the application in relation to the companies, the court refused the application as it was of the view that the applications could not properly be entertained given that these entities were not parties to the application. The court determined that these businesses are incorporated and therefore have a separate legal personality. It would therefore be the entity that would be required to disclose. The court indicated that the entities not being parties to the case and having not been served, it would be improper for an application of this nature to be considered without the entities, which are the subject of the applications, being given the opportunity to be heard.
- [6] Mrs. Rousseau is dissatisfied with the court's refusal of her application as it relates to the business entities, hence the application for extension of time to obtain leave to appeal and for leave to appeal.
- [7] The test to be applied by this court in considering an application for leave to appeal is that set out in Rule 1.8(9) of the Court of Appeal Rules 2002, which provides that: "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

The Applicant's Submissions

- [8] From the written and oral submissions, the applicant argues that there is a real chance of success, and the bases for same may be summarised thus:-
- That the court utilised a restricted interpretation of CPR 28.6 and that it is incorrect to hold that in all circumstances where the records of a company is being sought, that the company has to be a party of the proceedings. Such a requirement would result in increased costs and would introduce issues that would complicate and prolong the application.
 - That Mr. Rousseau is relying on the financial condition of Bearings and Accessories to say that he cannot honour the provisions of the deed of

arrangements and hence the documents being sought are directly relevant to the substantive issue.

- That an erroneous conclusion was made as regards the business entities being separate legal entities from the respondent.

-That Mr. Rousseau has access to and direct control of the documents sought.

-That the amendments to the Companies Act has mitigated against circumstances in which individuals use the structure of a company to protect the true identity of the owner. The amendments oblige the disclosure of the beneficial owners of the company as well as those who exercise ultimate control. That by virtue of this amendment, Raymond and Stephen Rousseau have control of the companies by virtue of their combined shareholding and as such they have the authority to disclose the financial information being sought.

-That the matter is one of public importance.

The Respondent's Submissions

[9] From the written and oral submissions, the grounds for opposition to the application are based primarily on the premise that the proposed appeal has no reasonable prospect of success and may be encapsulated as follows:-

-That the explanation for the delay is not cogent

-There is no affidavit of merit and hence there is no evidence before the court in support of the application that this appeal will have a real chance of success.

-That the documents being sought are not directly relevant to the issue to be determined which is the means of Mr Rousseau and not the means of Bearings and Accessories or the means of Industrial Solutions Limited.

-The companies have not been notified of the applications and have not been given an opportunity to be heard which amounts to a breach of natural justice

-The request ignores the doctrine of separate legal personality.

Analysis

- [10]** Given that the paramount consideration in applications for leave to appeal is whether there is a real chance of success, the issue of the delay in making the application requires little attention save to acknowledge that the delay was brief and has not prejudiced my decision in this application. I also will not be detained by the absence of an affidavit of merit given my ultimate resolution of this application.
- [11]** In considering this application, the starting point has to be the reasons for the ruling which the applicant is aggrieved by. Inter alia, I stated “As regards the respective applications in relation to the companies, having regard to Rules 28.1 and 28.6(1) I am of the view that the application cannot properly be entertained as these entities are not parties to the application.” I also made reference to the fact that these entities are incorporated and have separate legal personalities. I indicated that these entities having not been served, it would have been improper for an application of this nature to be entertained without the entities which are the subject of the applications being given the opportunity to be heard.
- [12]** The position of the applicant in this regard is that the interpretation by the court of CPR 28.6 was restricted and that there was no requirement that in all circumstances where the records of a company is being sought, that the company has to be a part of the proceedings.
- [13]** The provisions of the CPR are clear in this regard. It defines an order for specific disclosure as one in which a ‘party’ is to do certain things. ‘Party’ has a particular definition under the CPR which would not encompass the companies in issue. I am satisfied that the companies, being incorporated, are separate and distinct

from Mr. Rousseau in spite of his reference to one of the companies as 'my business'. His language cannot negate the legal implications of incorporation. There has been no evidence from which it could be concluded otherwise.

- [14]** Additionally, there is nothing from which it could have been concluded at the hearing of the application for disclosure that he was solely in control of the entities. He is one of three directors and a co managing director along with his brother for Bearings and Accessories Limited. He is also not a majority shareholder of Industrial Solutions Limited. This as well militated against the granting of an order for disclosure as sought as he could not properly unilaterally act in the manner that the application for disclosure sought. Even if the recent amendments to the Companies Act assists the position of the applicant as regards Mr. Rousseau having ultimate control along with his brother, at the very least, his brother would have to be notified of the hearing and given an opportunity to be heard.
- [15]** Whilst there may be circumstances wherein notice of an application will defeat the purpose of a court order, and hence service may be dispensed with, I am of the view that there was no justifiable reason in this case to proceed with the application where the companies, which were the subjects of the application were not parties and had not even been notified. As a consequence, the application was refused. Nothing compelling has been presented to support the contention that service on the companies was not necessary.
- [16]** Concerns as regards increased costs and the possible introduction of issues that would complicate and prolong the application, as the applicant contends, could not justify a deviation from the aforementioned position as regards the necessity for service.
- [17]** I am of the view that an appeal against the order of the court, given the rationale for same, has no real prospect of succeeding. The applications are therefore refused.