

GRENADA

IN THE COURT OF APPEAL

HCVAP 2011/032

CLAIM NO. GDAHCV 2011/0415

BETWEEN:

GREGORY KNIGHT
(by his lawful attorney Kent Knight)

Appellant

and

FIRST CARIBBEAN INTERNATIONAL BANK LIMITED

Respondent

and

CLAIM NO. GDAHCV 2011/0467

BETWEEN:

BRENDA KNIGHT

Respondent

and

KENT KNIGHT

Appellant

Before:

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

Appearances by written submissions:

Mr. Derick F. Sylvester of Derick F. Sylvester & Associates, Legal Practitioners for
Kent Knight

Ms. Shireen J. Wilkinson of Wilkinson, Wilkinson & Wilkinson, Legal Practitioners
for First Caribbean International Bank Limited

Ms. Giselle Whiteman of Giselle Whiteman Chambers, Legal Practitioners for
Brenda Knight

2012: January 20.

Civil appeal – Grant of Power of Attorney by elderly parent to allow access to joint bank account – Injunction granted by judge in court below prohibiting appellant in Claim No. GDAHCV 2011/0467 from acting under Power of Attorney

The appellant,¹ Gregory Knight, is nearly eighty-eight years old and the father of four children, including Kent and Brenda. Kent holds a general Power of Attorney from his father. Brenda and Gregory hold a joint savings account at First Caribbean International Bank Limited ("First Caribbean"), access to which is the subject of the claims made by the parties in the court below. Gregory is physically unwell and presently hospitalised.

Prior to hospitalisation, Gregory attempted to withdraw funds from his bank account at First Caribbean, but was not allowed to do so by the bank. First Caribbean explained that the issue was that on Gregory's last two visits, he had not been able to make his request to the officer attending to him. He could not form a sentence, so the bank had been unable to assist him.

Gregory subsequently gave Kent the abovementioned Power of Attorney, authorising him expressly to manage all his affairs in relation to the joint account with Brenda at the bank. However, First Caribbean would not permit him to withdraw money from the account despite presenting the Power of Attorney. This caused Gregory to be concerned since he was hospitalised and required funds to pay for his medical expenses as well as the salary of his helper.

Kent, acting on Gregory's behalf, applied to the High Court for an injunction to compel the bank to permit him to operate the account at First Caribbean. Brenda, on the other hand, applied for an injunction to restrain Kent from acting under the Power of Attorney, including withdrawing money from the joint account, and to surrender the Power of Attorney to the court pending the hearing and determination of the matter. The learned judge granted the interim injunction applied for by Brenda, and refused Gregory's injunction. Kent, acting on Gregory's behalf, appealed.

Held: dismissing the appeal with costs in the amount of \$1,500.00 to be paid by Gregory to First Caribbean, that:

1. The learned judge was entitled to take the view that the Power of Attorney should be called in to court and that the account should be frozen pending the outcome of the trial. There was no reason for the judge to believe that the freezing of the account would leave Gregory's domestic bills unpaid in the meantime.
2. In the circumstances of this particular family case, the element of an undertaking as to damages would not have been a significant one before the learned trial judge. She would have therefore been justified in giving it little weight.

¹ In Claim No. GDAHCV 2011/0415.

3. The issue of balance of convenience does not appear to have any relevance to the circumstances of this case. The balance of the elderly, hospitalized parent's convenience was not a real issue.

DECISION

- [1] **MITCHELL, J.A. [AG.]:** This is one of those sad family disputes between children over the care and control of an elderly parent. However, the point for me to determine in this appeal is not the merits of the case between them but the matter of the granting of an interim injunction relating to the operating of the elderly parent's bank account.
- [2] A perusal of the file reveals that on 21st October 2011, Her Ladyship the Hon. Madam Justice Clare Henry in Grenada ordered the two civil claims with numbers GDAHCV 2011/0415 and GDAHCV 2011/0467 be consolidated. Due to the multiplicity of appellants and respondents and of Knights in this matter I mean no disrespect by referring to the parties from now on by their first names only in order to be able to distinguish them clearly.
- [3] In the first case, there was an application by Gregory through his attorney Kent for an injunction ordering the bank to honour the contents of the Power of Attorney dated 16th September 2011. In the second case, there was an application by Brenda for an injunction restraining Kent from acting under the same Power of Attorney. At the time that the learned trial judge ordered the matters consolidated, she ordered Brenda to serve her application for an injunction on Kent at his address in England by Federal Express, and on his counsel in Grenada via fax. She adjourned the consolidated matters for later hearing. On 31st October 2011, the learned trial judge heard the applications. She granted an interim prohibitory injunction in favour of Brenda. She also ordered Kent Knight to immediately surrender to the Court the Power of Attorney until the hearing and determination of the matter. She refused the injunction that Gregory had applied for.

- [4] On 18th November 2011, Kent appealed to the Court of Appeal against the order of 31st October 2011 by filing a “Notice of Appeal (Interlocutory Appeal) (pursuant to CPR 62.10, SRO 26 of 2011)”. The appeal seeks a setting aside of the order and a mandatory injunction ordering First Caribbean International Bank Limited (“First Caribbean”) to honour the contents of the Power of Attorney, among other things. No appeal is made against the consolidation order of 28th October 2011.
- [5] Kent has been trying to obtain the consent of the other parties to have the appeal dealt with under rule 62.6 of the **Civil Procedure Rules 2000** (“CPR”) as a summary appeal. No such consent has been produced. Rather, there is an indication that one of the parties has refused to consent. The matter cannot, therefore, proceed under CPR 62.6 as a summary appeal. Instead it proceeds as an interlocutory appeal under CPR 62.10.
- [6] CPR 62.10 provides in essence that the appellant is to file six bundles of the record, including the judgment or order appealed against, in a bound, indexed and paginated bundle. A respondent who intends to oppose the notice of appeal must within 7 days of receipt of the appeal file and serve a notice of opposition and may within 14 days file and serve six copies of written submissions and any other documents in a bound, indexed and paginated bundle. The general rule is that interlocutory appeals are considered on paper by a single judge of the Court of Appeal, but the judge may direct the parties to make oral submissions or may direct that the matter be heard by the full Court. The appeal before the court complies with the rule. I have read the submissions and do not consider that the matter requires the attention of the full Court.
- [7] First Caribbean, on 25th November 2011, filed a Notice of Opposition to the appeal. It comes in two parts, part A and part B. Part A relates to the order of 21st October 2011 and part B to the order of 31st October 2011.
- [8] There is no point in First Caribbean requesting the Court of Appeal, at part A.1 of the Notice of Opposition, to uphold the order of 21st October 2011. Nor is there any point in the request at paragraph A.2 requesting the Court to strike out the

Notice of Appeal on the ground that the consolidation order which is appealed against is an interlocutory one and the appellant has not obtained the requisite leave of the Court to proceed pursuant to CPR 62.10. There is no appeal against the consolidation order of 28th October 2011. There is only an appeal against the injunction granted on 31st October 2011 and no leave is required for an appeal against an injunction.²

- [9] CPR 62.5(1) provides that the time for filing of a notice of appeal against the grant of an injunction is 21 days from the date of the decision. The decision in question was made on 31st October 2011 and the appeal was lodged on 19th November 2011. The appeal is thus within the time limit for filing. There is no procedural objection that can be made to the court dealing with this matter.
- [10] The facts that were before the learned trial judge may be summarised in this way. Gregory was born on 21st December 1923 and is nearly eighty-eight years old. He is the father of four children including Kent and Brenda. Kent holds a general Power of Attorney from his father Gregory, as previously described. Kent presently lives in England. Gregory, together with his daughter Brenda, holds a joint savings account at First Caribbean. Gregory is physically unwell and is presently hospitalised.
- [11] Gregory, prior to hospitalisation, attempted to withdraw funds from his bank account but was refused by the bank. His counsel wrote the bank on 16th August 2011 inquiring about the issue and suggesting that Gregory had been told that he could not withdraw funds since his daughter was a signatory. The bank replied that the issue was not that Brenda was a signatory. The problem instead was that on Gregory's last two visits to the bank he had not been able to make his request to the officer attending him. He could not form a sentence, and so the bank had been unable to assist him. In order for the bank to assist a customer the request had to be clear and the customer cannot be coached by a third party.

² Reeves v Platinum Trading Management Limited (2008) 72 WIR 195.

- [12] On 16th September 2011, Gregory gave a Power of Attorney to Kent authorising him expressly to manage all his affairs in relation to the joint account with Brenda at the bank. On 20th September 2011, Kent attended the bank. He attempted to withdraw funds from Gregory's account. He was not permitted to do so despite presenting the Power of Attorney. According to Gregory's case, he is concerned because he is hospitalised and requires funds to pay for his medical expenses and to pay the salary of his helper.
- [13] Kent, acting on his behalf, applied to the High Court for an injunction to compel the bank to permit Kent to operate Gregory's bank account. Brenda applied for an injunction to restrain Kent from acting under the Power of Attorney including withdrawing money from Gregory's bank account and to surrender the Power of Attorney to the court pending the hearing and determination of the matter. These two now consolidated matters have not yet been determined. All that has happened is that the learned trial judge has granted the interim injunction applied for by Brenda. Kent, acting on Gregory's behalf, has appealed.
- [14] There are five grounds of appeal. The first is that the learned trial judge erred in law when she held there was a serious issue to be tried as to the mental capacity of Gregory at the time he executed the Power of Attorney and when she granted the prohibitory injunction upon that basis without considering the balance of convenience. Mr. Sylvester, on Gregory's behalf, submits³ that the learned trial judge, having determined that there was a serious issue to be tried, ought to have directed her attention to the balance of convenience test and the question whether damages was an adequate remedy. The rule ever since **American Cyanamid Co. v Ethicon Ltd.**⁴ is that if common law damages would be an adequate remedy no interim injunction should normally be granted.
- [15] Having examined the affidavits before the learned trial judge and without going into detail it would appear that she had evidence before her on which she was

³ At paragraph 1.1 of his submissions filed on 18th November 2011.

⁴ [1975] A.C. 396.

entitled to take the view that the Power of Attorney given by Gregory should be called in to court and that the account should be frozen pending the outcome of the trial. There was no reason for the judge to believe that the freezing of the account would leave Gregory's domestic bills unpaid in the meantime. She would appear to have had before her evidence upon which to decide that it was, on balance, better to grant the injunction. I see no merit in this ground of appeal.

[16] Ground 2 appears to be a complaint that Brenda gave no undertaking as to damages. The point has been made in **American Cyanamid** that normally an injunction should be given only where the applicant is able to compensate the respondent for any loss which such injunction may cause him in the event it is later adjudged that the injunction ought not to have been granted.

[17] In the circumstances of this family case, involving as it does the freezing of the bank account of the elderly parent and the calling in of a Power of an Attorney given by that elderly relative pending the outcome of the case, the element of an undertaking as to damages would not have been a significant one before the learned trial judge. She would have been justified in giving it little weight.

[18] Ground 3 is that the learned trial judge failed to consider whether the balance of convenience lies in favour of granting the injunction. Mr. Sylvester submits that the bank had no real prospects of successfully defending the claim at trial and the court should have gone on to consider where the balance of convenience lies. Various authorities are cited in support of this principle, which is not in doubt.

[19] The issue of balance of convenience does not appear to have any relevance to the circumstances of this case. This was a case of an elderly parent who gave a Power of Attorney to one child while another child was the joint signatory on the same parent's bank account. They were both concerned over his welfare. Each sibling wished to access the parent's bank account without reference to the other sibling. The two children would thus appear to be quarrelling over who should have the care and custody of their elderly parent and the right to use his bank account for his support. The balance of the elderly, hospitalised parent's

convenience was not a real issue. Neither of the remaining grounds has any merit.

[20] The full record of appeal and any transcript of the hearing is not before the court so as to reveal clearly what happened at the hearing into the granting of the injunction by the learned trial judge. However, the judge would seem to have taken the view that this is a case for the issues to be worked out after she has heard all the evidence by one child against the other, and by the bank which is caught between the two of them. In the meantime the learned judge, by calling in the lately granted Power of Attorney, would appear to have decided to return the situation to the *status quo ante* the making of the disputed Power of Attorney. That was an eminently sensible way to have dealt with the dispute pending final trial.

[21] There is no merit in this appeal. I would dismiss it with costs of \$1,500.00 to be paid by Gregory to First Caribbean.

Don Mitchell
Justice of Appeal [Ag.]