In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2009: No. 5

BETWEEN:

KEREN LOMAS

Appellant

and

LEO TROTT

Respondent

Date of Hearing: 27th March 2009
Date of Judgment: 8th April 2009

Juliana Snelling for the Appellant; and
The Respondent in person.

JUDGMENT

1. This matter comes before me on appeal from a decision of the learned Magistrate, Wor. Tyrone Chin, of 24th October 2008, in which he gave judgment for the respondent against the appellant in the sum of $5,023.61. The particulars of Mr. Trott's claim, which was dated 11th June 2008, were -

> "Lomas & Co. were paid funds for child maintenance then admitted in writing that funds were not used to support the child. Funds were misused by Lomas & Co. and not for the intended purpose. See attached documents including Matrimonial Causes Act references 1974 sect 31(6)(e)(f)."

There was no breakdown of how the precise sum claimed was calculated.

2. The background to the claim is that Mr. Trott was engaged in divorce litigation in the Supreme Court with his former wife over maintenance, both for herself and for the child of the family. The appellant, Ms. Lomas, practicing under the name of Lomas & Co., was the wife's attorney. In April 2007[1] the Registrar made what appears to be an interim order that –

> "The Petitioner [*Mr. Trott*] do pay to the Respondent [*the wife*] on 22nd day of each month into the office of Lomas & Co. periodical payments for the Respondent and the one child of the family . . . in the monthly sum of $1,000."

The payments were backdated to commence on 22nd March 2007. The sum ordered was not apportioned between the wife and the child, although it should have been. It is not, therefore, possible to say how much of that monthly sum was attributable to maintenance for the child. However, the Magistrate was told of a later order in which $433.33 was ordered to be paid to Lomas & Co. for the benefit of the child alone, with no element for the mother. That order was not produced in Court, but there was no dispute about its existence.

3. It seems that the payments under the Orders were duly made by Mr. Trott to Lomas & Co., but that some or all of the sums were then appropriated by Ms. Lomas to the payment of the mother's legal bills with that firm. The case before the Magistrate proceeded on the basis that that was done with the wife's consent.

4. The trial before the Magistrate took an unusual course. At the close of the complainant's evidence in chief, Ms. Lomas, who at that stage represented herself, made a submission of no case to answer. From the record, the gist of that submission was –

> "Mr. Trott paid the money into my office as ordered to do so by the Registrar of the Supreme Court and that is the end of the matter. He cannot dictate how Mrs. Trott uses the money."

[1] The exact date of the Order is unclear: on the copy at p. 4 of the record the day is obscured by the seal.

The learned Magistrate rejected that submission "as the monies paid by Mr. Trott to Lomas and Co. does have a component referring to [*the child*] in the first paragraph of the above mentioned order." At that point, somewhat oddly, he then allowed Ms. Lomas to cross-examine Mr. Trott, although she confined that to establishing the terms of the subsequent order, under which the payments for the child alone were quantified at $433.33 per month. Mr. Trott was then allowed to re-examine himself, which he did at length, albeit more by way of a final speech. Ms. Lomas herself then elected not to give evidence (an election she should have been put to before making her no case submission).

5. In appears from Mr. Trott's own evidence that Ms. Lomas's explanation to him was that she had appropriated some or all of the monies paid to her to the payment of legal fees owed by the wife. Indeed he produced a letter of 21st February 2008 from her to him[2], in which she stated that -

> "Lomas & Co. will be able to provide a printout of the trust account showing what payments have been received for and on behalf of [the child] which, by agreement with Mrs. Carroll-Trott, have been applied to her indebtedness with this office."

However, it seems that Ms. Lomas did not produce this at the trial. Nor did she produce the agreement under which she made the deductions, claiming privilege. That stance obviously caused the Magistrate some difficulty, for he commented on it adversely in his judgment. However, it is not at all clear that it would have made any difference if Ms. Lomas had given evidence to prove these matters, because it seems that the trial proceeded on the basis that it was Mr. Trott's case that the funds had been appropriated to the payment of legal fees, and at the end of the day the learned Magistrate acted on the basis that the monies were used "towards Mrs. Trott's indebtedness to Lomas & Co."

6. Mr. Trott's complaint was that the funds did not go to the direct benefit of his daughter:

[2] It was marked Exhibit No. 1

> "It is evident that my daughter did not benefit from these funds and it is my desire that these funds be reimbursed to myself as the intended use was not achieved or followed through with[3]."

7. At the end of the day the learned Magistrate held as follows:

> "The Court having heard the evidence of Mr. Trott and Ms. Lomas' application of no case to answer, orders judgment in favour of the Plaintiff, Leo Trott, in that the funds paid into Lomas & Co. were improperly used towards Mrs. Trott's indebtedness to Lomas & Co. and not for the purpose it was intended by the Registrar of the Supreme Court. Ms. Lomas' case was weakened by each incremental fact that she failed to properly or comprehensively cross examine Mr. Trott, that she failed to give sworn evidence in her defence, and that she failed to supply any form of billing records or trust accounts for Lomas & Co."

8. On this appeal it is the appellant's case that Mr. Trott cannot dictate how the money should be used, once it is paid across in accordance with the Court Order, and that "the use of the monies to pay the custodial parent's legal fees was a benefit to the child, since the custodial parent was paying her attorney to secure the best possible maintenance order for herself and the child[4]."

9. In support of the argument that the payment of legal fees could properly be regarded as benefitting the child, the appellant relied upon various recent family law cases in England, in which it was held that the court had jurisdiction to include an element for the payment of a mother's legal costs in an order for financial provision for a child, on the basis that such a payment was capable of being for the benefit of the child. Thus, in M-T v T [2006] EWHC 2494 (Fam), Charles J had to consider the provisions of Sch. 1 of the Children Act 1989. That schedule allows the court, on the application of a parent or guardian, to order either or both parents to make to the applicant 'for the benefit of the child' such periodical payments as may be specified in the order. It is, therefore, in substantially the same terms as section 27(1)(d) of the Matrimonial Causes Act 1974 ('the

[3] See the conclusion of the plaintiff's examination in chief on page 15 of the record.
[4] See Ground 2(c) of the Notice of Appeal of 23rd February 2009.

Act'), which is the operational provision in this case[5]. Section 27(1)(d) provides that on granting a decree of divorce or at any time thereafter the court may make –

> "(d) an order that either party to the marriage shall make to such person as may be specified in the order for the benefit of the child of the family, or to such child, such periodical payments for such term, as may be so specified;"

10. In M-T v T (supra) Charles J held (and I quote the headnote as a convenient summary of the decision on this point):

> "An overview of Sch. 1 showed that the applicant parent applied in a representative capacity, to obtain an order for the benefit of the child or children. As a matter of construction of Sch. 1, legal costs are not excluded as a matter of jurisdiction. Given that the applicant was in a representative or quasi-representative capacity, a payment in respect of the costs of bringing the case on behalf of the children was a payment for the benefit of the child. It was for the benefit of the relevant children that the applicant should be enabled to litigate with an appropriate equality of arms (see paras [18], [21], [22])."

11. I think that it is enough to dispose of this appeal that the use of the monies to pay the mother's legal fees is capable of being a payment for the benefit of the child. That means that the fact and nature of the payments did not by themselves demonstrate that there had been a misuse of the funds. Mr. Trott could demonstrate no more than that, and his claim should have been dismissed as disclosing no case to answer.

12. Nor, if there was cause for complaint, was Mr. Trott the proper party to bring the case. Ms. Lomas held these funds in her client trust account on trust for the wife. That follows from the form of the order, which was that the monthly payments be made to the wife[6]. The mechanism for this was that they were to be paid "into the office of Lomas & Co.", but that was just the collecting mechanism. If, therefore, the payments were

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[5] The respondent in his summons before the Magistrates' Court refers to section 31(6)(e) and (f) of the Act, but those provisions apply in the case of a neglect to maintain during the subsistence of a marriage. That was not the jurisdiction being exercised here, but nothing turns upon that.

[6] The Order said –
"IT IS HEREBY ORDERED that:
1. The Petitioner do pay to the Respondent on 22nd day of each month into the office of Lomas & Co. periodical payments for the Respondent and the one child of the family . . . in the monthly sum of $1,000;"

misappropriated by Lomas & Co., the proper claimant would be the wife not the husband who had paid the money in. The money was held by the firm on her account. The husband, on the other hand, got a good receipt from Lomas & Co. for his liability under the court order, and that liability was discharged by his payment. He had, therefore, no further direct claim on the funds that he paid to the firm.

13. It does appear that there is an old line cases[7], not referred to at the hearing, holding that a lawyer may not exercise an attorney's lien for unpaid fees against sums paid to his firm as maintenance for a wife. However, that does not apply here. This was not a case of the exercise of an attorney's lien, but instead proceeded on the basis that the wife had agreed to Lomas & Co. retaining the funds. The respondent did seek to put before me a faxed letter from the wife, dated 26th March 2009 (the day before the hearing of the appeal), in which she says that she now feels that she was "coerced and intimidated into giving maintenance delegated for my daughter to cover indebtedness owed to Lomas & Company." However, that was evidence that could and should have been called at the trial, when it could have been subject to proper cross-examination. It is too late now. But in event, if it gives rise to a cause of action it is, for the reason set out above, one belonging to the wife, not to Mr. Trott.

14. M-T v T (supra) does make it clear, the wife herself holds money paid to her for the benefit of a child on a form trust. Thus, at paragraph 18, Charles J said:

> "[18] What is the context of Sch. 1? It provides that an applicant, usually a parent, can bring an application for the benefit of the child. You stand back and ask how the applicant holds money ordered under Sch. 1. The answer is that those moneys, to adopt an analogy, would be held for a purpose and possibly on a purpose trust. It seems to me that an overview of Sch. 1 shows that the applicant is applying in a representative capacity. I do not use that expression in a technical sense, but the applicant is applying to obtain an order for the benefit of the child or children and therefore somebody else."

[7] See e.g. Halsbury's Laws, 4th ed., vol. 66 (2009), paragraph 1007, citing Cross v Cross (1880) 43 LT 533; Leete v Leete (1879) 48 LJP 61. Contrast Ex p Bremner (1866) LR 1 P & D 254.

It may be, therefore, that in an appropriate case a paying parent (either in their own capacity or as a representative of the infant child beneficiary) could bring proceedings against a custodial parent who misused monies paid for the benefit of a child, but that is not this case. Any such claim should normally be raised in the ancillary relief or similar proceedings in which the relevant order for payment was made in the first place, not in a separate action. And in any event, before the paying party could pursue the money into the hands of third party payees, he would have to establish the breach of trust of the recipient parent.

15. That is enough to dispose of this appeal, but there is one further point that was not raised by the respondent, but with which I need to deal. I doubt if the Magistrates' Court had jurisdiction to entertain this claim. The order concerned was a Supreme Court Order, so the Magistrates' Court did not have jurisdiction to vary it or adjust the rights of the parties under it. Nor did the plaintiff seek to do so. He asked for the money back, and so his claim was in the nature of an action for money had and received. Such a claim is not within the jurisdiction of the Magistrates' Court, which is strictly limited by the statutory provisions which create it. The civil jurisdiction of the Magistrates' Court is limited to contractual debts and actions for damages.[8] There was no contract here, nor was this properly a claim for damages. However, the appeal was not argued on that basis, and I do not decide it on that basis, because, for the reasons set out above, the plaintiff did not have a cause of action against Ms. Lomas in any event.

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[8] See section 15 of the Magistrates Act 1948 which provides -

> **"Civil jurisdiction of court of summary jurisdiction**
> 15 The civil jurisdiction of a court of summary jurisdiction shall be limited —
> (a) to actions wherein the plaintiff seeks to recover a debt or demand in money, payable by the defendant with or without interest, upon a contract express or implied; or
> (b) to actions wherein the plaintiff seeks to recover damages alleged to have been suffered by reason of any act, default, neglect or omission on the part of the defendant:
> Provided that if the court of summary jurisdiction for any reason at any stage of the proceedings considers any cause or matter arising before it under the powers conferred by this subsection more suitable for argument in and disposal by the Supreme Court then the court of summary jurisdiction may decline the consideration or further consideration of such cause or matter."

16. Before leaving this case there are two points of practice which arise. Appeals from the Magistrates' Court are conducted on the record[9]. While the Court does have power to receive further evidence[10] that is normally done by way of an affidavit to supplement the record, and requires a proper application. In this case the appellant sought to put material relating to the underlying divorce proceedings before me by way of written submission, and I refused that. This was particularly so in light of the appellant's election not to call evidence in the Magistrates' Court. It would be an unusual case indeed where an appellate court would allow a plaintiff who had elected not to give evidence below to do so on appeal.

17. The second point concerns unnecessary copying. On a straightforward appeal such as this it is not necessary, or indeed appropriate, for counsel to copy the whole record and put it in a bundle. The court has both the original record and a copy of it in the court file. It does not need a third copy. In most matters it is also not necessary to reproduce lengthy statutes wholesale[11]. It was not necessary here to copy the whole of the Matrimonial Causes Act 1974: an extract of the relevant sections would have sufficed.

18. I will hear the parties on costs.

Dated the 8th day of April 2009

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[9] See Civil Appeals Act, 1971, section 14(2):

"(2) All appeals to the Court shall be by way of re-hearing on the record . . . "

[10] Ibid., s. 14(5) –

"(5) The Court shall, on the hearing of an appeal, have all the powers as to amendment and otherwise possessed by the Court in the exercise of its original jurisdiction, together with full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition."

[11] See the Practice Direction "Civil Procedure" of 25th May 2006 (Circular No. 8 of 2006), paragraph 5:

"Unnecessary Copying

5. This direction applies to the copying of authorities and other material for the use of the Court on any hearing, whether interlocutory or final. Counsel should do their best to minimize unnecessary copying, and in particular counsel should:

(a) only supply cases which it is intended to cite in argument;

(b) where the reference is to a short statement of principle, and not the facts or argument in the case, copy only the head-note and the relevant page;

(c) assume that the Judge has access to the Revised Laws of Bermuda, and never copy whole statutes."

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Richard Ground
Chief Justice