[2016] JMSC Civ. 206

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV02259

BETWEEN	**EVAN BENNETT**	**CLAIMANT**
AND	**RAYMOND RAMDATT**	**DEFENDANT**

Ms. Lisa May Gordon for the Claimant
Mr. Leslie Campbell for the Defendant

HEARD: NOVEMBER 9, 2016

REGISTRATION OF TITLES ACT, SECTION 63 CPR 21.7 WHETHER CLAIMANT CAN BRING CLAIM AS TRANSFEREE WHETHER COURT SHOULD APPOINT CLAIMANT AS REPRESENTATIVE LOCUS STANDI

CORAM: WINT-BLAIR, J (Ag.)

[1] This decision concerns a motion in limine brought by counsel for the Defendant, Mr. Campbell to strike out the claim on the grounds that the claimant had neither locus standi nor the interest by which he claimed. To this end, skeleton submissions were filed on May 13, 2016 which indicated that these issues would have been raised at trial.

[2] On November 9, 2016, the first day of fixed for trial. Ms. Gordon produced a notice of application for court orders filed November 8, 2016 to appoint a representative pursuant to Rule 21.7. It had been filed the day before trial began and it had not been served on counsel for the defendant.

[3] Rule 21.7 provides:

21.7 (1)

Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.

(2) A person may be appointed as a representative if that person -

(a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and

(b) has no interest adverse to that of the estate of the deceased person.

(3) The court may make such an order on or without an application.

(4) Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.

(5) A decision in proceedings in which the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate.

[4] There was no supporting affidavit filed as required by Rule 21.2(3)

(3) An application for such an order - (a) must be supported by affidavit evidence;

There was therefore no evidence to ground the application. "An issue as to an equitable interest can only be determined after cogent evidence is adduced to satisfy the court that, on the balance of probabilities, the defendant is entitled to such an interest: Per Harris, J.A. in **George Mobray v Andrew Joel Williams** JMCA Civ 26. There should have been an affidavit exhibiting a copy of the death certificate, stating whether the deceased died testate or intestate; whether the deceased person was an interested party and indicating any person interested in the order appointing a representative for the estate.

[5] The evidence cannot come from the submissions of counsel. Given the age of this matter and the fact that the trial commenced on November 9, 2016, it was expected that any such application would have been made well in advance of the trial date. Even if the application were granted it would be for the appointed representative to commence the process of obtaining a grant and not a grant in itself. This is clear from paragraph (5) of Rule 21.7 which uses the words "*as if*" to refer to the representative. This means that the representative is not yet an administrator or executor and the appointment does not confer this status upon the person interested in the order.

[6] Rule 21.7(4) makes it clear that until a representative is appointed there can be no further steps taken in the proceedings. This section operates as a stay. For the foregoing reasons, the application to appoint a representative under Rule 21.7 is refused.

[7] Counsel Ms. Gordon had also submitted that the application to appoint a representative could be granted as an administration claim. I do not agree as this is not an administration claim part 67 does not apply.

[8] Mr. Campbell argues that the claimant is not the holder of the title, neither is he acting on behalf of the title holder. He has no locus standi. The holder of an unregistered transfer does not have a right of action against a third party. His rights would be against the title holder. If his interest is unregistered he has no capacity to enforce this interest against the estate of Keith Bennett which must be represented. The title holder Keith Bennett, died intestate. If the claimant wants to represent him, he has to obtain a grant of Letters of Administration prior to filing the instant action. The claim filed is an incurable nullity.

[9] Section 63 provides:

> *"63.When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be*

effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title."

[10] The claimant desired registration of a transfer to a third party. The transfer concerned land which was part of his deceased father's estate. At the time of the purported transfer by the claimant, the land formed part of his father's estate. He, having died intestate, the estate would be held upon statutory trust for a surviving spouse, and thereafter his issue in accordance with section 4(1) of the Intestates' Estates and Property Charges Act. Section 6 imposes a trust for sale of the real and personal estate of a deceased who dies intestate. The section is set out below:

> *"6. For the purposes of this Part the residuary estate of the intestate, or any part thereof, directed to be held upon the "statutory trusts" shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an*

incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

[11] In the case of **George Mobray v. Andrew Joel Williams**, [2012] JMCA Civ 26, Harris, J.A. sets out the law applicable to and dispositive of this motion in limine. I hold that a registered title is conclusive evidence that the registered proprietor is the owner of the fee simple in the land described therein. Sections 68, 70 and 71 of the Registration of Titles Act provide for and entrench the indefeasibility of a registered title.

[12] Harris, J.A sets out the law in the following paragraphs and I quote extensively from her Ladyship's dictum as I cannot state the law with greater precision.

> ***[23] In specifying that the assets of the estate shall be held on trust for sale, the law contemplates that the residue would not come into existence until all liabilities of the estate, as stipulated by the Act, are satisfied. On the death of an intestate, his estate devolves on and vests in his personal representative upon a grant of letters of administration and remains so vested until the completion of the administration process: see Commissioner of Stamp Duties (Queensland) v Livingston [1964] 3 All ER 692. So then, what is the nature of the interest of a beneficiary of an estate prior to or during the administration process? There are a number of English authorities, dealing with testate and intestate succession, which show that although a beneficiary is entitled to share in the residuary estate, he/she has no legal or equitable interest therein: see Lord Sudeley v Attorney General [1897] AC 11; Re K (1986) Ch 180; and Lall v Lall [1965] 1 WLR 1249.***
>
> ***[24] In the Australian case of the Commissioner of Stamp Duties (Queensland) v Livingston, the Privy Council, although***

dealing with a case of testate succession, firmly established the principle that, in an un-administered estate, a beneficiary of an estate acquires no legal or equitable interest therein but is entitled to a chose in action capable of being invoked in respect of any matter related to the due administration of the estate. In that case, a widow died prior to the administration of her husband's estate in which she was entitled to the residue. It was held that she had no beneficial interest in the husband's estate.

[25] Viscount Radcliffe, at page 696 placed the principle in the following context:

> ***"What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, In the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests; but it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust on property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund."***

An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what

its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realisation are very far from being interchangeable terms."

In Re Leigh's Will Trust [1969] 3 All ER 432 Buckley, J at 434 opined that in Commissioner of Stamp Duties (Queensland) v Livingston the following propositions were enunciated:

"(i) the entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased's legal personal representative for the purposes of administration without any differentiation between legal and equitable interests; (ii) no residuary legatee or person entitled on the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased; (iii) each such legatee or person so entitled to a chose in action, viz. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate; (iv) each such legatee or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered."

[13] Relying upon the extensive citation of Harris, J.A. above, I hold that in the instant case at the date of the purported sale of the land by the claimant, the estate of Keith Bennett remained un-administered. This means that until a grant of administration is obtained, the legal estate remains vested in the estate. It is upon a grant of administration that, the assets of the estate vest in the administrator. The claimant, although a beneficiary of the estate of Keith Bennett would not have been entitled to any legal or equitable right therein. He could not have had the right to sell any of the assets of the estate or pass title at the time he is said to have sold the land.

[14] He would only have been entitled to a chose in action in the un-administered estate. Such chose in action is a transmissible interest. This is the means by which he may receive the benefits which may accrue to him from the estate. There is no one who is under any obligation or duty to honour any sale carried out by the claimant. As his chose in action is not assignable pursuant to the proviso to section 5 of the Property Transfer Act.

[15] Harris, J.A. later goes on to hold at paragraph 30 (ibid):

> ***"A transfer falls within the meaning of an assignment. In Crusoe d. Blencowe v Bugby 2 BL W766 the Court stated that, "assign transfer, and set over" are words of assignment. The appellant, as the administrator of his estate, would not have had the capacity to pass title to the respondent. He would, undoubtedly, have been barred by the proviso of the Act, at any future date to convey the land to the respondent.***"

Modifying the dictum of Harris, J.A. and applying it to the instant case I find that in respect of the administration of the estate of Keith Bennett as prescribed by section 6 of the Intestates' Estates and Property Charges Act, the legal personal representative would be required by law to sell the property to meet the liabilities, if the need arose. Thus, as a transferee, the claimant cannot pass title.

[16] However, even assuming that there would be adequate funds in the estate to meet the liabilities, as specified in section 6 of the Intestates' Estate and Property Charges Act; and that there would have been a residuary estate to transfer to the claimant, this is not enough. The probability that there will be a residue is insufficient to show that the claimant had a transmissible interest which he could have alienated at the time of the purported sale. The residuary estate, under which the claimant would be likely to have obtained a benefit, must be ascertained. This has not been done.

Harris, J.A. goes on to state as follows:

[31] In speaking to this proposition, Viscount Finlay, in Dr Barnado's Homes National Incorporated Association v. Commissioners for Special Purposes of the Income Tax Acts [1921] 2 AC 1, said at page 11:

> ***"The legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the property properly administered and applied for his benefit when the administration is complete"***

[32] The foregoing also applies in a case of intestacy. Emmanuel's right to share in the property would only arise after the residue had actually been ascertained. Any share in his mother's estate to which he may have been entitled could not be determined with certitude so as to establish that an administrator of his estate could pass title to the respondent. At the time of the purported sale, Emmanuel's interest in the land being a chose in action which was unassignable, it could not have been transmissible to the respondent.

The instant case is no different. The law as set down by Harris, J.A. applies and is dispositive of this application.

[17] Mr. Campbell has also cited **Ingall v Moran** [1944] K.B. 160 which held that the plaintiff issued a writ in an action under the Law Reform Miscellaneous Provisions Act (LRMPA) suing in a representative capacity as administrator of his son's estate. He did not obtain a grant of letters of administration until nearly 2 months after the date of the writ. It was held that the action was incompetent at the date of its inception by the issue of the writ and that the doctrine of relation back of an administrator's title on obtaining a grant of Letters of Administration as to the date of the intestate's death could not be invoked so as to render the action competent.

[18] Mr. Campbell also relied upon the case of **Millburn-Snell and others v Evans** [**2011] EWCA Civ 577**, a decision of the Court of Appeal in the UK in this case the daughters of the deceased issued proceedings as the deceased's personal representatives the day after their father's death. The defence disputed their title to sue. The defendant applied to strike out the claim on the ground that the claimants had neither sought nor obtained a grant of letters of administration of his estate. The claimants admitted their lack of title but asked the judge to exercise his discretion under CPR 19.8(1) to authorize them to continue the claim nonetheless. The judge declined and struck out the claim. The Rule cited is similar in substance to our Rule 21.7. On appeal it was held that it is settled law that whereas an executor derived his title to sue from the will and not from the grant of probate, he could validly sue before obtaining a grant. Contrastingly, an administrator derives his title to sue solely from the grant of administration. A claim purportedly brought on behalf of an intestate's estate by a claimant without a grant was an incurable nullity. Affirming **Ingall v Moran.**

[19] Rule 26.3(1) (c) allows the court to strike out a statement of case if it appears to disclose no reasonable ground for bringing a claim. The claimant cannot embark upon a trial as he has no standing before the court with which to do so, this is settled law.

For the reasons set out above I hereby make the following orders:

1. The claimant's case is struck out.
2. Costs to the defendant to be taxed if not agreed.
3. Defendant's attorney to prepare file and serve this order.
4. Leave to appeal refused.