[2012] JMSC Civil 40

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2004 HCV 02068

BETWEEN	**MURDENA REDDEN** **(Executrix- Estate Adolphus Redden, deceased)**	**CLAIMANT**
AND	**HIGO EDWARDS**	**1ST DEFENDANT**
AND	**AUBREY BLAIR**	**2ND DEFENDANT**
AND	**LESTER BRAMWELL**	**3RD DEFENDANT**
AND	**JOEL McBEAN**	**4TH DEFENDANT**

Ms. Tashia Madourie instructed by Nunes, Scholefield, DeLeon & Co. for the 3rd Defendant/Applicant/Respondent.

Mrs. Ingrid Lee Clarke-Bennett & Ms. Shana Stevens, instructed by Pollard, Lee Clarke & Co. for the Claimant/Respondent/Applicant.

Application to Strike out Proceedings – Claim under Fatal Accident's Act & Law Reform (Miscellaneous Provisions) Act – Claim Filed by Person as Executrix, but Who Lacked Capacity of Executrix – Application to Substitute Validly-appointed Executrix – Whether Claim a Nullity or Amenable to Amendment – Civil Procedure Rules, Rules 19.4 & 26.3 (1) (b).

IN CHAMBERS

Heard November 28, 2011 & April 13, 2012.

Coram: F. Williams, J

The Nature of the 3rd Defendant's Application

1. By this application, the 3rd defendant/applicant seeks an order that "these proceedings be struck out as being an abuse of the process of the court".

2. The grounds on which the application is made, and which are recited in its Notice of Application dated the 2nd of June, 2010, are :- (i) That the Claimant commenced these proceedings as the Executrix of the Estate of Adolphus Redden when she did not in fact have that representative capacity. (ii) The Claimant's lack of representative capacity at the time of the commencement renders these proceedings void *ab initio*. (iii) The entire proceedings are a nullity and are an abuse of the process of the court.

The Nature of the Claimant's Application

3. Heard at the same time was the claimant's application to amend the pleadings by substituting another claimant for the present one. The application to amend was filed in June of 2005; but was not, it appears, vigorously pursued until recently, it, no doubt, assuming even greater importance in light of the 3rd defendant/applicant's application to strike out the claim. The application is made pursuant to Rule 26.3(1)(b) of the Civil Procedure Rules (CPR).

Background

4. By way of a claim form and particulars of claim filed on August 23, 2004, (and later amended on October 7, 2004), the claimant commenced this action. She did so in respect of the death of her husband, Adolphus Redden, who was injured in a motor-vehicle accident on February 11, 1998. Mr. Redden died on September 7 in the year 2003, and it is the contention of the claimant that he died from injuries he sustained in the said accident.

5. In the pleadings, Mrs. Redden was described thus: "Executrix of the Estate of Adolphus Redden". As it turns out, Mrs. Redden is not and has never been the

executrix of her husband's estate. That capacity is enjoyed by one Ivy Sterling, to whom a formal grant of probate was made on December 3, 2003.

6. The question that arises is whether it would now be legally permissible for Ms. Sterling's name to be substituted in place of Mrs. Redden's; or whether the entire proceedings are void *ab initio* and so ought to be struck out.

Summary of the 3rd Defendant/Applicant's Case

7. The 3rd defendant/applicant's case is founded on two main planks – these are the authorities of **Ingall v Moran** [1944] 1 K.B. 160 (CA); and **Hilton** v **Sutton Steam Laundry** [1946] 1 K.B. 65 (CA).

8. Counsel for the 3rd defendant/applicant relies on the authority of **Ingall v Moran** in support of the proposition or submission that, as it stands, the claim is a nullity. Inasmuch as the claimant commenced these proceedings in a representative capacity which she did not then (and still does not) have, the proceedings were void *ab initio*. **Hilton** v **Sutton Steam Laundry (**in which **Ingall v Moran** was applied), is to similar effect. Both cases establish that, the proceedings being void *ab initio*, they cannot be cured by amendment or substitution.

9. It was also contended on the 3rd defendant/applicant's behalf that, although Rule 19 of the Civil Procedure Rules (CPR) permits the addition and substitution of parties, such amendment or substitution can only be validly granted in respect of proceedings that are validly constituted. To do otherwise, by granting the claimant's application herein, would be, in effect, to attempt to alter the substantive law of succession, which is reflected in the case of **Ingall v Moran**.

10. These were the main bases of the 3rd defendant/applicant's case, though other cases were cited to buttress these and other points, and other subsidiary submissions made.

Summary of the Claimant's Case

11. For the claimant, it was submitted, as might be expected, that the proceedings are not a nullity nor incapable of rectification by way of amendment or substitution. The provisions of Rule 19.4 of the CPR are an entire and absolute answer to the application to strike out the claim. The present action was brought whilst the limitation period was current, the claimant having died in the year 2003, and the action having been filed in August 2004. A cause of action such as this, arises at the time of death (citing, in support, **Lorde v Transport Board** (1999) 58 WIR, 51). That case was also referred to in support of the related submission that time runs, not from the date of the accident; but from the date of death.

12. Submissions were also made to the effect that : (i) the application is necessary; (ii) the naming of the present claimant was due to a mistake; and (iii) the claim cannot be continued without the substitution being granted. These submissions were made in an effort to demonstrate the correctness of the claimant's contention as to the suitability of this case to the making of an order for substitution pursuant to Rule 19.4.

13. Most of the claimant's submissions, however, were devoted to resisting the applicant's contention that the proceedings are a nullity. In this regard the claimant's counsel sought to focus the court's attention on what in her view is the main difference between the case of **Ingall v Moran** and other cases based on that decision, on the one hand, and the facts and circumstances of the instant case, on the other. That important difference lies, it was contended, in the legal standing of an administrator (as was the plaintiff in the case of **Ingall v Moran**), as opposed to that of an executor (as in the instant case), where the matter of their capacities prior to the grant of representation is concerned. Dicta of Lord Goddard L.J in the very case of **Ingall v Moran** were referred to in support of this point.

14. In the instant case, the executrix has been incorrectly named; whereas in the **Ingall v Moran** line of cases, what is at issue is a lack of capacity – someone is

purporting to sue in a capacity that he or she lacks. Proceedings commenced in the wrong name are not a nullity. Counsel submitted that there is a close comparison to be noted between Rule 19.4 and Order 20, r. 5(3) of the English Rules of the Supreme Court. The English rule was discussed in the case of **Evans Constructions Co. Ltd. v Charrington & Co. Ltd.** [1983] Q.B.D 810, Griffiths L.J therein expressing the view (at page 825 D), that he saw no reason why the rule "...should not include a case where entirely the wrong name has been used, provided it was not misleading...".

15. The executrix in this case has indicated her willingness to be substituted claimant.

16. The **Ingall v Moran** line of cases have no application to a case involving an executor.

17. Great reliance was placed on the case of **The "Sardinia Sulcis" and "Al Tawwab"** [1991] Lloyd's Law Reports, 201 (The **"Al Tawwab"** case). Also relied on similarly was the case of **Evans Constructions Co. Ltd. v Charrington & Co. Ltd and Another** [1983]1 Q.B. 810 (The **Evans** case). These cases were relied on as supporting the argument that Order 20, rule 5 (and its Jamaican counterpart, Rule 19.4), could be used to obtain leave to amend pleadings not where there was a mistake as to the actual identity of the person to be sued (or, presumably, to sue); but could be so used where an error had been made in describing or naming the party, provided the identity of the person was known to the person making the mistake and the mistake was not misleading.

18. It may now be useful to look at the law and those legal principles in respect of which there is no dispute between the parties, before giving further consideration to the matter.

The Law

19. It is agreed between the parties that the case of **Ingall v Moran** accurately sets out some of the principles that are applicable to this matter. The head note to that case (which in my view, accurately sets out some of the main legal principles to be extracted therefrom), reads as follows:-

> "The plaintiff issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act, 1934, claiming to sue in a representative capacity as administrator of his son's estate, but he did not take out letters of administration until nearly two months after the date of the writ:-
> Held, that the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death could not be invoked so as to render the action competent".

20. Also of importance to this case is the dictum of Goddard, L.J at page 170 of the said judgment, where he observed in relation to the difference in law between an executor and an administrator, as follows:-

> "There is no doubt that where a deceased person leaves a will and therein names an executor the latter can institute actions before obtaining probate, though the actions may be stayed until the probate is granted: **Tarn v Commercial Bank of Sydney** [(1884) 12 Q.B.D. 294]. The reason for this is, no doubt, that the executor's title is derived from the will which operates from the death of the testator, and all he has to do is to prove the will, that is, to prove that the will which names him as executor is the last will of the deceased. He has a title to sue, but

> the court requires him to perfect his title and will not allow the action to proceed till this has been done. The action will be stayed, but not dismissed. An administrator is in a different position."

21. These, then, are the main principles to be extracted from **Ingall v Moran**. **Hilton v Sutton Steam Laundry** applied **Ingall v Moran** and so is to similar effect. The **"Al Tawwab"** case and the **Evans** case set out the other main principles relevant to this case. The difference between the positions of the applicant and respondent lies, not in the acceptance of these as the guiding principles, but in their application to the particular facts of this case.

Discussion

22. There are some three conclusions which we might immediately draw in this case, based on the principles enunciated in **Ingall v Moran**. For one, if Ms. Sterling (the duly-appointed executrix) had filed this action, there would be no difficulty – she having been so appointed in 2003 and the action having been filed in 2004. For another, had she filed suit in her name as executrix before having been so appointed, that would not have rendered her claim invalid. Third, if there had been no will and Ms. Sterling or Ms. Redden had filed the action as administratrix before being so appointed, the action would be void *ab initio*.

23. The conundrum, however, in this case arises because, although an executrix was appointed from in December of 2003, for some reason, the action was brought in the name of someone claiming as executrix who could not either at the time of the filing of the action or subsequently become executrix, Ms. Sterling having already been so appointed. To compound matters, the limitation period relevant to this case has now expired. The resolution of the matter calls for, *inter alia*, an examination of Rule 19.4 of the CPR, on which the claimant seeks to rely.

Rule 19.4 of the CPR

24. The terms of Rule 19.4 are as follows:-

> "(1) This rule applies to a change of parties after the end of a relevant limitation period.
> (2) The court may add or substitute a party only if-
> (a) the relevant limitation period was current when the proceedings were started; and
> (b) the addition or substitution is necessary.
> (3) The addition or substitution of a party is necessary only if the court is satisfied that-
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;
> (b) the interest or liability of the former party has passed to the new party; or
> (c) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant."

25. In the **Evans** case, the approach to be used in attempting to ascertain whether a particular case concerns a mistake in naming a party or a mistake as to identity, was discussed by Donaldson L.J, who observed, inter alia, (at page 821 H), that :-

> "Which category is involved in any particular case depends on the intentions of the person making the mistake and they have to be determined on the evidence in light of all the surrounding circumstances".

26. In light of this guidance, it is to the affidavit evidence in this case to which we must look in order to discern "the intentions of the person making the mistake..." In the Further Affidavit of Ingrid Lee Clarke Bennett filed on the 13th day of September, 2011, counsel for the claimant avers that the naming of Mrs. Redden

as the claimant was due to a misunderstanding. The relevant paragraphs of her affidavit are paragraphs 3 to 7 and are set out as follows:-

> "3. That Murdena Redden was inadvertently stated in the aforesaid Claim Form and Particulars as the Claimant and Executrix for the estate of Adolphus Redden.
>
> 4. That this was based upon a misunderstanding which occurred when I was taking instructions from Ms. Redden. I asked her whether there was an Executor of her husband's estate and thought that she had indicated that it was her.
>
> 5. Based upon this I proceeded to prepare the relevant documents in which Mrs. Redden was named as the Executrix and as we believed it was urgent that the claim be filed, we decided to submit the receipt of the will and probate documents after we filed the claim.
>
> 6. That at the time we filed the claim, the estate had already been probated however we were not in possession of the documents. Mrs. Redden had in fact advised me that she would get the documents to me as soon as possible which further cemented the misunderstanding which had occurred.
>
> 7. That the true and correct Executrix of Adolphus Redden is IVY STERLING and I exhibit a copy of probate granted in the deceased's Will which was only brought to my attention after the claim was filed, the Executrix having migrated to the United States of America."

It should be noted as well that Ms. Sterling has filed a consent, indicating her willingness to be substituted as claimant in this action.

27. In the case of **Flickinger v Preble and Xtabi Resort Club & Cottages Limited** (Suit No. C.L F 013 of 1997 – delivered January 31, 2005), Sykes, J (after reviewing the relevant authorities on the subject), expressed the view that the process of attempting the discern the intentions of the person making the mistake might also be assisted by perusing the particulars of claim "to see what is being alleged in order to get a better understanding of the claimant's intention". (See paragraph 31 of his judgment). With this view I entirely agree.

28. The particulars of claim in this case show that the action was brought by the claimant as "the Executrix of Adolphus Redden, deceased", (see paragraph 1 of the Amended Particulars of Claim). The action is brought in an effort to recover damages pursuant to the Law Reform (Miscellaneous Provisions) Act; and also the Fatal Accidents Act, with Mrs. Redden being named as the sole dependant. The bases of the claim are allegations of negligent driving on the part of the first and/or third defendants. To these particulars the 3rd defendant/applicant has filed a defence dated February 24, 2005, denying the allegations of negligence and he atternpts to ascribe blame for the accident to the deceased, Mr. Redden. In paragraph 11 of the defence he states:-

> "11. Still further and/or in the alternative, this Defendant will say that the Claimant's cause of action as endorsed on the Claim that was filed herein on August 23, 2004 arose more than 6 years prior to the filing of this claim, that is in February 11, 1998 and is thereby statute barred by virtue of Part IV of the Limitations Act and Section 11 of the United Kingdom Statute 21 James 1 Cap. 16."

29. The practice in matters under both the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act is for the personal representative to bring both claims. (Paragraphs 9 & 10 of the applicant's written submissions reflect an awareness of this).

30. After carefully considering all the cases cited by counsel for the parties, the court is left with a situation in which none of those cases (nor any of those unearthed by the court's own researches), is a mirror image of the facts in this case. The facts are rather unusual. In attempting to resolve the matter, the court is of the view that it should consider not just the principles outlined above; but that it should also have especial regard to a particular section of the **Al Tawwab** case. In that section, Lloyd, L.J., having reviewed several authorities such as **Thistle Hotels Ltd v Sir Robert McAlpine & Sons Ltd**., (C.A.) Apr. 6, 1989, unreported, in which leave to amend or substitute a party was granted, observed (at page 207 of the judgment),that:-

> "In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case".

31. Stocker, L.J. in the same case, and agreeing with Lloyd, L.J., stated (at page 209) the test to be as follows :-

> "...can the intending plaintiff or defendant be identified by reference to a description which is specific to the particular case – e.g. landlord, employer, owners or ship owners?"

32. Stocker, L.J. had earlier observed (at page 208), that:-

> "...I should, for my part, be content to rest my

> conclusion that the appeal of the defendants be dismissed on the proposition that the writ itself identifies the party intending to sue- viz. the owners of the vessel Sardinia Sulcis. At all times the owners of that vessel existed. The only error ... was the name of the owners."

33. Applying this approach to the instant case, it becomes apparent that the identity of the person who it was intended to bring the suit was the "Executrix Estate of Adolphus Redden". The error lay in the naming of the person of that identity or description. In coming to this view, I accept the affidavit evidence of counsel for the claimant who attributes the error to a misunderstanding in taking instructions. This misunderstanding might very well have been fed by the fact that instructions were being received from the widow of the deceased (and perhaps even from the not unreasonable assumption that she might have been the one to have been named executrix).

34. I am of the view that the facts and circumstances of this case make the matter one that is amenable to substitution of Ms. Sterling's name for that of Mrs. Redden pursuant to the provisions of Rule 19.4 of the CPR (and under any of the sub-rules except sub-rule 19.4(3) (b).

35. In relation to Rule 19.4 (2), I find that the relevant limitation period was current when the action was filed (accepting the claimant's submission – based mainly on **Lorde v Transport Board** - that in a matter of this nature the limitation period begins to run from the death of the deceased). I find as well (as the making of these two applications indicates), that the substitution is necessary (the court being satisfied that the naming of Mrs. Redden instead of Ms. Sterling as executrix was a mistake). And I find as well that the claim cannot be properly carried on without the substitution.

36. The court's additional finding is that the action is not a nullity or void *ab initio*. The basis of this finding is that the **Ingall v Moran** line of cases differ from the instant case by virtue of the fact that those cases deal with administrators, whose position at law is considerably different from that of an executor or executrix, as in the instant case. As was discussed by Goddard L.J, in **Ingall v Moran**, the will (which names the personal representative), speaks from death, entitling the executor/executrix to bring proceedings even before probate has been granted, with the highest remedy available to a challenger to his or her right to do so being that the action might be stayed until probate is granted, but it will not be dismissed. In the case of an administrator, on the other hand, it is the letters of administration that clothe him or her with authority to act. Mr. Redden having died on September 7, in the year 2003, Ms. Sterling having been granted probate on December 3, 2003 and the action having been filed on August 23, 2004, there clearly was a validly-appointed executrix (and thus someone competent to have filed the action), when the action was filed. In the result, what exists in the pleadings is an irregularity that is curable by substitution; and not a nullity. Further, it has not been demonstrated that the defendants have been misled by the error (as was discussed in the **Evans** case).

37. The 3rd defendant/applicant's application will therefore be dismissed with no order as to costs; and the claimant's application will be granted, with costs to the 3rd defendant/respondent to be agreed or taxed.

Orders

It is hereby ordered that:-

1. Application to Strike out Proceedings dismissed, with no order as to costs.
2. Permission be granted to the Applicant (Murdena Redden) to substitute the Claimant and that she be replaced with Ivy Sterling who is the real and true Executrix of the estate of Adolphus Redden.
3. Costs of the application to the 3rd defendant/respondent.