[2017] JMSC Civ 145

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 06013

BETWEEN	**SHINELLEE BENT (dece'd) (by her mother and next friend Kerron Merchant)**	**CLAIMANT**
AND	**ONEIL HUDSON**	**1st DEFENDANT**
AND	**KARL BEHARIE**	**2ND DEFENDANT**
AND	**ORLANDO JAMES**	**3RD DEFENDANT**

Leonard Green and Miss Tasha Kaye Perue for the Claimant instructed by Chen Green and Company.

Miss Kelly Greenaway instructed by Samuda and Johnson for 3rd Defendant

Heard: 16th December 2013; 19th February, 2014 and 13th October, 2017

DAYE, J

Application - Jurisdiction to hear claim – Claimant was not appointed personal representation of the deceased intestate estate.

Application for mother and next friend of the deceased to be appointed guardian ad litem for deceased intestate – estate amendment to claim – doctrine of relation back.

[1] Shinellee Bent died on the 7th day of May 2008 at age 15 as a result of a motor vehicle accident along the Rose Hall main road in the parish of St. James. Her mother Kerron Merchant filed a Claim Form on the 27th September, 2011 against the 1st and 3rd defendants owners, and 2nd defendant, one of the driver of the vehicle involved in the motor vehicle accident. Her claim was for damages for negligence for the death of her daughter pursuant to the Law Reform (Miscellaneous Provision) Act 1955.

[2] On the 3rd April 2012 Notice of Application for Court Order was filed on behalf of the 3rd defendant owner of one of the vehicle seeking declarations that the claim was not filed within three (3) years i.e it was statute barred. Further the claim was not commenced by the personal representative of the deceased estate. Alternatively, the applicant sought an order that the claim be struck out.

[3] The grounds of this application are similar to the two pleas raised and argued by the defendant in **Ingall v. Moran** [1944] 1 All E.R. 97. The present applicant relied on this authority in their written submissions. The claimant/respondent made a separate application by Notice of Court Order on the 28th November 2013 that the mother of the deceased, intestate, and beneficiary under the estate of the deceased be appointed guardian **ad litem** to deceased estate pending the grant of letters of administration. The respondent in Moran's case relied on the doctrine of the relation back.

[4] On the facts of the case a father filed a writ for damages for negligence for his son's death in an accident. He obtained judgment under the Law Reform (Miscellaneous Provision Act) 1934 for loss of expectation of life of his son. The father filed the writ before he obtained letters of administration in the estate of his son who died intestate. His father could only sue in a representative capacity. Scott L.J. held the writ was a nullity. It could not commence an action, so the judgment on which the writ was filed was also a nullity. Luxmoore LJ held the doctrine of relation back was not applicable. The doctrine of relation back of an administrator's title to the intestate's property relate not to the date of the

intestate's death but when the grant was obtained. It cannot be invoked so as to render an action competent which was incompetent when the writ was issued. He found no proper action was commenced before the statutory period of limitation expired.

[5] The court discussed the difference between an executor of a will who obtained title to sue from the will before probate is obtained and an administrator who only obtain title to sue in a representative capacity after he obtain letters of administration.

[6] Luxmoore L.J explained the practice in Chancey Division of a person starting proceedings to protect an estate before becoming an administrator. The practice was for the person, in a proper case, to apply for a receiver **pendante grant** which is endorsed on the writ. This writ is issued to obtain an interim relief. The person who institutes such writ must have a beneficial interest in the intestate's estate such as an heir of law, next of kin or a creditor. The person who obtained this temporary grant can then apply to amend the writ by adding if necessary, a claim for administration of the estate. Goddard L.J held it was wrong for the plaintiff to describe himself in the writ as the administrator. The plaintiff had not title to sue and the writ was bad.

[7] The claimant/applicant in the 2nd application also relied on the following extract to support their application:

> ***"There is doubt, firstly, that as many legal authorities make it clear it is a general rule that administrators ad litem will typically be appointed by a court, in circumstances wherein no one had been appointed by the court as an administrator of the deceased estate and a claim is required to be brought either by the deceased's estate or alternately against that deceased's estate. See Raymond Clarke – Law of Succession (11th ed.) p. 439."***

[8] This extract was cited by K. Anderson, J in **Roy Electra Jobson v. Administrator General of Jamaica & Ors**. S.C.C.L. 2013 HCV 03027 del.

September 12, 2013. This was an application to set aside and exparte order appointing the claimant administrator **ad litem** of the deceased estate when the administration was granted letters of administration in the estate of the deceased. The application was not made in time and was denied.

[9] SUBMISSION OF THIRD DEFENDANT/APPLICANT 1ST APPLICATION

a) There is no affidavit evidence that claimant is the mother of the deceased. There is only as assertion of mother child relationship in the Claim Form and the Particulars of Claim.

   On the present state of application this submission cannot be resisted. The real issue is what effect this have on both applications. The absence of such evidence would not defeat the applicant/claimant's application.

b) The claim was not commenced within three (3) years after the death of Shinellee Bent nor has the court extended the period of time for the said claim to be pursued by the personal representative and or near relation of the deceased.

   The court recognised Shinellee died on the 7th May, 2008 and the claim was filed on the 8th September, 2011. The claim was filed three (3) years and four (4) month after the death of Shinellee Bent. The Law Reform (Miscellaneous Provisions) Act do not expressly provide for a limitation period of three (3) years for tort claims that survive the death of the deceased. It refers to the Fatal Accident Act in Sec. 2 (5) and provided the claim under the Act is in addition to claims for the benefit of the defendant of the deceased under the Fatal Accident Act. This latter Act provide claims under that Act should commence within three (3) years after the death of the deceased person or any extended time granted by the Court (Sec. 4 (2). The Limitation Act is the other law that stipulates the time for bringing an action of tort.

c) The claim was not commenced by and in the name of the personal representative or near relations of Shinellee Bent, deceased, for the benefit of the near relation of the deceased. The 3rd defendant submitted the claim was

commenced in the name of Kerron Merchant, mother of the deceased as her next friend. In order to commence proceedings by next friend an order was required under R. 29 of the C.P.R. 2002. Further it was submitted a claim commenced in tort by a next friend is for a minor who is alive.

The defendant is correct in this submission. The issue is, does this mean the claim total. Similarly the claim does not show it was brought for the benefit of the estate of the deceased or behalf of the near relations of the deceased. Again does it means the claim is incurable bad. The authority of **Ingall v. Moran** (supra) hold that claim not brought in the representative capacity of the claimant either as executor or administrator is a nullity. Particularly, if the deceased died intestate, the claimant must obtain Letters of Administration before filing a claim. The mother Kerron Merchant did not obtained Letters of Administration before filing her claim. She had no title to sue for the estate of her daughter. The claimant in their application aver that the claimant commence proceedings on about 2012 to obtain Letter of Administration. But such application would be outside the three (3) year limitation period. Only an application for extension of time could assist. Also the claimant has not exhibited any document filed in support of the assertion that application for Letters of Administration was filed.

AMENDMENT

[10] The possible remedy would be an amendment to the Claim Form. But an amendment cannot pass the submission that **Millburn –Snell v. Evans** [2012] W.L.R 41 held that a claim which is incurable bad and is a nullity cannot be cured by an amendment.

[11] The facts of this case were the claimant were the only three daughters of the deceased who died intestate. The commenced a claim against the defendant as personal representative of the deceased estate. They claimed that their father's estate was beneficially entitled to 50% of a farm owned by the defendant and also 50% beneficially entitled to a driving school business carried on at the property. They based their claim that their late father and the defendant were in

business for several years. They were relying on the principle of proprietary estoppel. The defendant applied five (5) days before the trial to have the claim struck out on the ground that the claimants had no title to file the claim. They submitted that the claimants did not establish that they obtained probate or Letters of Administration to the estate of their father. Accordingly they could not claim as personal representatives of the estate of the deceased.

Rimmer L.J. in delivering the judgment of the court held the Court of Appeal was bound by **Ingall v Moran**. He said at paragraph 16:

"16 I regard it is clear law, at least since Ingall's case that an action commenced by a claimant purportedly as an Administrator, when the claimant does not have that capacity, is a nullity. That principle was recognised and applied by this court in **Hilton v. Sutton Steam Laundry** [1946] KB 65 (per Lord Greene MR) and **Burns v. Campbell** [1952] 1 KB 15 (per Denning LJ at p 17 and Hodson LJ at p 18). In **Finegan v. Cementation Co. Ltd**. [1953] 1 QB 688,700 Jenkins LJ said:

> ***"As to the law, so far as this court is concerned it seems to be to be settled by Ingall v. Moran and Hilton v. Sutton Steam Laundry and I may add Burns v. Campbell, that an action commenced by a plaintiff in a representative capacity which the plaintiff does not in fact possess is a nullity, and, further, that it makes no difference that the claim made in such an action is a claim under the Fatal Accidents Acts which the plaintiff could have supported in a personal capacity as being one of the defendants to whom the benefit of the Acts extends."***

[12] The judge applied the principle of **Chetty v. Chetty** [1952] 1 AC 603, PC that an executor derives his title to sue from the will and not from the grant of probate and so can validly sue before obtaining a grant, although he will have to obtain it later in order to prove his title, but an administrator derives his title to sue solely from its grant of administration. The court disapprove the interpretation placed on Ingall's case based on CPR in 17.4 in **Hag v. Singh** [2001] 1 W.L.R 1594,

that permitted an amendment to a claim after limitation expired if the personal capacity of the claimant had changed to a representative capacity.

[13] Specifically on the issue of amendment under the C.P.R. Rule 17.4 the Court said a claim 'born dead and is a nullity' cannot be given life by an amendment. This in my view is also applicable to a late application to appoint a claimant, guardian ad litem who did not originally brought the claim as a true personal representative of the estate of the deceased.

[14] Counsel Mr. Leonard Green submitted generally that the court had a discretion to extend time under Rule 2 of the C.P.R. that established the overriding objective to try a case justly. The court's discretion is not as widely as counsel contend. Moreover, no application to extend time or to file an amendment or to file the claim was made to the court.

CONCLUSION

[15] Like the court said in I**ngall's** case it regretted it had to set aside the judgment given to the father arising from the fatal accident of his son, so too I regret that I have to strike out the claim of Shinellee Bent (deceased by her mother and next friend Kerron Merchant. Also I refused the application of this claimant to appoint Kerron Merchant guardian **ad litem** to protect the interest of the estate of Shinellee Bent.