

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL Nos. 31/78 & 61/78

BEFORE: The Hon. Mr. Justice Robinson, President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice White, J.A.

BETWEEN S.N. SHOUCAIR (Deceased) APPELLANT
AND THE COMMISSIONER OF INCOME TAX RESPONDENT

Dr. Lloyd Barnett and Mrs. Angela Hudson-Phillips for Appellant.

Mr. H.A. Hamilton and Mr. Lawrence Phillpotts Brown for Respondent.

2nd, 3rd, 5th, 6th, 11th, 12th March,
& 5th June, 1981

ROBINSON, P.:

Mr. S.N. Shoucair died on the 22nd March, 1969. Prior to his death, his income tax affairs were looked after by his son Mr. Edward Shoucair. The latter then represented himself as the agent of Mr. S.N. Shoucair and the Commissioner of Income Tax dealt with him as such. On the death of Mr. S.N. Shoucair, Mr. Edward Shoucair became one of the executors of his estate and thereafter dealt with the Commissioner of Income Tax as the representative of S.N. Shoucair, deceased. The Commissioner of Income Tax recognised him as such and dealt with him as such.

On 29.12.68, while Mr. S.N. Shoucair was still alive, he was served with a Notice of Assessment for the Year ending 31.12.62 assessing his Income Tax for that year at \$10,343.15. Mr. Edward Shoucair filed on behalf of his father a Notice of Objection dated 24.1.69. Several discussions and negotiations took place thereafter and in the light of other information which the Commissioner of Income Tax claims had come to his knowledge, he made some additional assessments eventually leading to a final determination whereby he issued a Notice of Decision, dated 15.11.76, confirming the additional assessments which he had made in respect of the year 1962 - and determining the Income Tax due in respect of that year at the sum of \$30,000.00. That Notice was addressed to "Mr. Edward Shoucair" and was stated to be in respect of the "Income Tax Objection Year of Assessment 1962."

On 31.12.69, 15.1.70 and 29.12.72, after the death of Mr. S.N. Shoucair, Notices of Additional Assessments were served on "Mr. Edward Shoucair, for Mr. S.N. Shoucair, dec'd." in respect of the years of Assessment 1963, 1964, 1968, and 1969 respectively.

The original assessments in respect of the years 1963 and 1964 had also been the subject of Notices of Objection by Mr. Edward Shoucair, acting then as agent for Mr. S.N. Shoucair and when the aforementioned additional assessments were made, after the death of Mr. S.N. Shoucair, on "Mr. Edward Shoucair for Mr. S.N. Shoucair, dec'd.", the Notices of Objection then made were made by Mr. Edward Shoucair in his capacity as Personal Representative for the estate of S.N. Shoucair, deceased. There can be no doubt that the Commissioner of Income Tax fully appreciated that after the death of Mr. S.N. Shoucair, he, the Commissioner, was dealing with Mr. Edward Shoucair in the latter's capacity as personal representative of the estate of S.N. Shoucair, deceased. Indeed his only authority for dealing with Mr. Edward Shoucair in relation to the income tax affairs of the

late S.N. Shoucair after the latter's death was that provided by Section 55(2) of the Income Tax Act which provides that -

"(2) Where a person chargeable with income tax shall die, the personal representative of such person shall be liable to and charged with the payment of the income tax which such person was chargeable with and shall be answerable for doing all such acts, matters and things as such person, if he were alive, would be required to do under this Act"

Accordingly, the Commissioner dealt with Mr. Edward Shoucair as being the personal representative of Mr. S.N. Shoucair, deceased, and as intimated earlier, addressed him as "Mr. Edward Shoucair, for Mr. S.N. Shoucair, dec'd."

Thus were the Notices of Assessment dated 31.12.69, 15.1.70 and 29.12.72 served on "Mr. Edward Shoucair for Mr. S.N. Shoucair (dec'd.)." Thus were the Notices of Objection dated 3.1.73 served by Mr. Edward Shoucair as Executor of S.N. Shoucair, dec'd. - a fact recognised in para. 2 (o) of the Statement of Case dated 10.1.77 and filed on behalf of the Commissioner of Income Tax as Respondent in the Revenue Court Appeal No. 36 of 1976.

And thus were the Notices of Decision dated 15.11.76 and relating to the Notices of Objection in respect of each of the years 1962, 1963, 1964, 1968 and 1969, served on Mr. Edward Shoucair, he being the personal representative of Mr. S.N. Shoucair, deceased. That these Notices of Decision were addressed to "Mr. Edward Shoucair" without the additions which were included in the Notices of Assessment referred to above, i.e. "for Mr. S.N. Shoucair, (dec'd.)" did not matter as Section 75 of the Income Tax Act provides, inter alia, that -

"(3) An assessment or the duty charged thereon shall not be impeached or affected -

(a) by reason of a mistake therein as to -

(i) The name or surname of a person liable;

Provided that in cases of assessment the notice thereof shall be duly served on the person intended to be charged"

There can be no doubt that Mr. Edward Shoucair was the person whom the Commissioner intended to charge, pursuant to Section 55(2) of the Income Tax Act.

And there can be no doubt that if there were to be an appeal from the decisions contained in those Notices, it could only properly be by Mr. Edward Shoucair as the personal representative of the late Mr. S.N. Shoucair.

And of course, there can be no doubt, also, that it could not possibly be by Mr. S.N. Shoucair himself, as he was then dead.

Now the Act provides, by Section 76(1), that -

"76(1) Any person (.....objector) who has disputed his assessment by notice of objection under sec. 75, and who is dissatisfied with the decision of the Commissioner therein, may appeal to the Revenue Court within thirty days of the date of receiving the Commissioner's decision

This, Mr. Edward Shoucair, as being the personal representative of the late S.N. Shoucair, and as being the person liable to and charged with the payment, did. And in so doing, he followed the procedures laid down in the Revenue Court Rules, 1972.

He filed a Notice of Appeal and served a copy thereof on the Respondent within the time specified. (See Rule 5). He followed the requirements of Rule 8 almost to the letter. Rule 8 provides that a Notice of Appeal shall be signed by the Appellant or his Attorney-at-Law. (See 8(a)). Mr. Edward Shoucair signed it as "Edward Shoucair - Representative of S.N. Shoucair (Dec'd.)"

Rule 8 requires that a Notice of Appeal shall contain an address within Jamaica at which documents may be served upon the Appellant or his Attorney-at-Law. (See 8(c)). Mr. Edward Shoucair supplied his own address for service as "40 Port Royal Street, Kingston."

Rule 8 requires that the Notice of Appeal shall follow as closely as maybe Form B in the Schedule to the Rules. (See 8(d)). This Mr. Edward Shoucair did.

The only reason why Mr. Shoucair might not have obtained full marks had his Notice of Appeal being submitted as a specimen in answer to a question in a Law Examination was that, although he made it quite clear that he was the Appellant, that he was appealing in his capacity as the representative of S.N. Shoucair deceased,

and although he had expressly signed the Notice as such, he had abbreviated the name of the "Appellant" in the heading of the Notice by showing the Appellant at that part merely as "S.N. Shoucair, Dec'd."

This could and did mislead nobody, not the Respondent, not the Revenue Court itself.

Rule 10 of the Revenue Court Rules, 1972, requires the Respondent to file and serve on the Appellant a Statement of Case. This the Respondent did and same was served on "Edward N. Shoucair, Representative of S.N. Shoucair, (Dec'd.), 40 Port Royal Street, Kingston." And although in the Statement of Case, the Respondent sometimes referred to the Appellant as "S.N. Shoucair" (See, for example, para. 2(a) to (m)), the Respondent nevertheless conceded and asserted in para. 3 thereof (at the end of Reason (i)) that "Mr. S.N. Shoucair died in 1969 (sub-para. (m)) and so cannot be the Appellant in this case." And, having so asserted, the Respondent proceeded to ask "that the Appellant do pay to the Respondent the costs of an incident to the hearing of the Appeal to this Honourable Court." The Respondent could hardly have been making this request in respect of the late Mr. S.N. Shoucair, and when as appears later, the Court acceded to this request, the Court, too, could not have been referring to the late S.N. Shoucair, but rather to the person whom all knew to be Appellant, namely the Appellant who was required by Rule 10 to be served with the Statement of Case and who was so served, i.e. "Edward N. Shoucair, Representative of S.N. Shoucair, (Dec'd.), 40 Port Royal Street, Kingston," and the Appellant to whom the Notices of Hearing were sent by the Revenue Court itself, i.e. "Edward Shoucair, Esq., Representative for S.N. Shoucair, dec'd.," (Appellant), 40 Port Royal Street, Kingston."

In these circumstances, I should have thought that it would have been a mere cosmetic formality to correct the heading of the Notice of Appeal by inserting before the words "S.N. Shoucair, (Dec'd), the words "Edward Shoucair, Representative of," and particularly so having regard to the fact that the Notice of Appeal

was so signed by the Appellant. I should have thought, too, that no authority would be required for so doing. If, however, authority was required, then one need only look at the case of Whittam v. W.J. Daniel & Co. Ltd. [1962] 1 Q.B. 271; [1961] 3 A.E.R. 796, in which, intending to sue in negligence a Company by the name of W.J. Daniel & Co. Ltd., the Plaintiff inadvertently omitted the word "Limited" in describing the Defendant. It was argued that as there was no person, firm, or company by the name of "W.J. Daniel & Co.," no person had been sued, and that a belated correction should not be permitted, especially after the period of limitation had passed. This argument was rejected. The Court of Appeal held that the correction sought was the correction of a mere misnomer as in all the circumstances of the case there could have been no doubt whatever as to who it was that the Plaintiff intended to sue, and that the mere omission of the word "Limited" did not mean that there was not a known defendant to the proceedings.

(The firm W.J. Daniel & Co. had ceased to exist long before the Plaintiff was born and long before the date of the accident).

The case was distinguished from that of Davies v. Elsby Brothers Ltd. [1961] 1 W.L.R. 170; [1960] 3 A.E.R. 672 where the facts were that, up to a year before the accident in respect of which the Plaintiff sued there was a partnership firm called "Elsby Brothers" who did employ the Plaintiff in the action, and therefore there was room for reasonable doubt when the limited company got a writ, whether it was they who were intended to be sued or whether it was the partnership firm that had ceased to exist only shortly before. This was not the correction of a misnomer; there had been two different entities, and the writ had not specified the date of the accident.

Devlin, L.J. in the Davies case, prescribed the test to be applied as follows: at page 676D -

"The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got

"my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer."

Quoting with obvious approval and applying that test in the Whittam case, Donovan L.J. went on to say at p. 799C, that "There could have been no doubt in the mind of the defendants when they got the writ that it was they whom the plaintiff intended to sue and that she had simply got the name wrong." And later in his judgment, he referred to the case of Alexander Mountain & Co. v. Rumere Ltd. [1948] 2 K.B. 436; [1948] 2 A.E.R. 482; which established that in the case of a mere misnomer of the name of the Plaintiff in the writ an amendment can be made at any time and the matter need not fall within provisions of the English R.S.C. Ord. 16, r. 2, which is the English equivalent to our Section 90 of the Judicature (Civil Procedure Code) Law. Cap. 177 of the 1953 Revised Laws of Jamaica. In that case, the English R.S.C. Ord. 48A, r. 1 had provided that an action can be brought in a firm's name only where there are two or more partners. A.M. was the sole proprietor of a business which he carried on in the name of "A.M. & Co. " After his death, his executrix, who continued to carry on the business under the same trading name, brought an action in the name of "A.M. & Co. (trading as a firm)," the action being in respect of a contract made by A.M. during his lifetime. On an application to amend the writ by substituting the executrix as plaintiff, it was held by the Court of Appeal, reversing the decision of Lord Goddard, C.J., that while the action did not fall within R.S.C. Ord. 16 r. 2, as having been "commenced in the name of the wrong person as plaintiff," the case might properly be treated as one of misnomer and the writ amended by substituting the executrix as plaintiff.

Here the application was by the Executrix who sought leave to amend the writ by substituting for the description of plaintiff, "Alexander Mountain & Co.," the words "Doris Mountain, widow, executrix of Alexander Mountain, deceased."

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Cohen, L.J. distinguished this case from the cases of Tetlow v. Orela Ltd. [1920] 2 Ch. 24; and Clay v. Oxford [1866] L.R. 2 Exch. 54 in the following words; at page 484A;

"In both those cases the writ was issued on behalf of a dead man, in the mistaken belief that he was alive. In the present case there was no such misapprehension. "

Similarly, in the case with which we are now dealing, there never was any misapprehension as to who the appellant really was, and is.

See also Establissement Baudelot v.R.S. Graham & Co. Ltd. [1953] 1 All E.R. 149.

In any event the cases referred to above and the argument based upon them relate to the initiating of a legal process before the Courts, and the argument seeks to apply them by analogy to the application for intervention by the Revenue Court. This intervention is however in fact in the nature of an appellate process. It relates to a dispute already in train between the parties, the tax-payer and the Revenue, and it by no means follows that cases and principles relating to the initiation of legal process are applicable to what is in nature an appellate process where the parties know who each is and the appeal is in relation to an existing dispute in which they are already in law and in fact involved. No case was cited to us in relation to misnomer in an appellate process, but prima facie it is obviously easier to apply the "misnomer" rules to such a situation. See also Mercer Alloys Corporation v. Rolls Royce Ltd. [1972] 1 All E.R. 211 (the inherent jurisdiction of the Court to make such amendments as are necessary to meet the justice of the case).

As intimated earlier herein, neither the Respondent nor the Revenue Court itself was under any misapprehension as to who the Appellant was, and although they treated and dealt with Mr. Edward Shoucair as such, they nevertheless violated nearly, if not all the Revenue Court Rules which were required to be followed on the filing and serving of the Notice of Appeal.

Rule 10(1) requires the Respondent to file and serve upon the Appellant a Statement of Case within 30 days of receiving his copy of the Notice of Appeal. The Respondent was 3 days late in filing his Statement of Case and in attempting service on the Appellant, yet Rule 10(2) was not followed. (Rule 10(2)) provides that -

"(2)If the Respondent fails to file a Statement of Case within the time allowed by this Rule or within such further time as may be allowed under Rule 32 the Appeal may be allowed by the Court or Judge with costs."

Rule 15 provides that -

"15. Except with the consent of the parties in writing not less than 30 clear days Notice shall be given to the Appellant and to the Respondent of the date and place fixed for the hearing of an appeal."

Rule 14 requires the Notice to be given by the Registrar of the Court. No attempt was made to give such Notice to the Appellant until 2 days before the date fixed for the hearing.

Despite this however, the Revenue Court was erroneously led to believe that all the prerequisites had been complied with, and although the Appellant was neither present nor represented, the learned Judge proceeded, on 26.4.78, to strike out the Appeal on the ground that it was not properly before the Court in that the "Appeal should have been filed by Personal Representative of the deceased tax payer." Ironically, this is precisely what had been done. The Notice of Appeal had been signed by "Edward Shoucair - Representative of S.N. Shoucair (Dec'd.)." It stated thereon that "Address for Service is 40 Port Royal Street, Kingston" and that it was "Filed by Edward Shoucair."

Be that as it may, the Appellant then applied by Summons, supported by appropriate affidavits, "for an order -

- (i) That the Order herein made in the absence of the Appellant on the 26th April, 1978 be set aside.
- (ii) That the Appeal herein may pursuant to Rule 19 of the Revenue Court Rules, 1972 be re-entered for hearing (Rule 19(2) provides for this).
- (iii) That pursuant to Section 90 of the Judicature (Civil Procedure Code) Law, the name of the Appellant be deleted and the name of Edward Shoucair, Personal Representative of S.N. Shoucair deceased, be substituted therefor.

Handwritten signature

(iv) That the costs of this Application be provided for."

For the reasons already indicated, Orders (i) and (ii) should readily have been made. Order (iii) should also have been made, not pursuant to Section 90 of the Civil Procedure Code but rather on the ground of mere misnomer and Order (iv), in all the circumstances, could very well have been made to abide the outcome of the appeal, or perhaps there could have been no order as to the costs of the application.

Instead, however, the learned Judge dismissed the Application, again with costs to the Respondent. Counsel for the Respondent argued (in the Revenue Court) that the wrong appellant was before the Court and it was then too late to substitute another appellant. That, of course, was not the request, which, in effect, was merely for a change in the name by which the Appellant was to be styled in the title to the Notice of Appeal.

Next, it was argued by Counsel for the Respondent that to allow the names of parties to be substituted at that stage would be to deprive the Respondent from the statutory protection afforded him by Section 55(2) of the Income Tax Act whereby "..... no claim for relief shall be made by, the personal representative of a deceased person in respect of profits or gains or income which arose or accrued to him before his death beyond the end of the third year next following the year of assessment in which the deceased person died." The appeal to the Revenue Court was certainly not a "Claim for relief" in the sense intended by Section 55. The claim for relief had already been made, and well in time, to the Respondent. That claim had eventually proved unsuccessful. This was an appeal which Section 76 of the Income Tax Act affords to a person whose claim for relief has been unsuccessful and who is dissatisfied with the Respondent's decision in respect of his claim for relief. The argument therefore, was without merit.

It appears that the learned Judge attached great importance to the case of Finnegan v. Cementation Co. Ltd. [1953] 1 Q.B. 688. But with the greatest of respect to the learned Judge, that case

bore no resemblance to the instant case and had no relevance. It was a case in which a person purported to bring an action as Administratrix in England of a deceased person at a time when she was not in fact the administratrix in England of that person. The action was therefore held to be a nullity for the simple reason that it was brought in a representative capacity under the Fatal Accidents Act by a person who did not have that capacity. Unfortunately for the Appellant in that case when she did get round to obtaining administration in England the limitation period had already run out, hence she had no remedy. In the instant case the appeal had been brought by a person who was in fact the personal representative of the deceased and as such was in fact entitled to bring the Appeal.

For all the reasons set out above, these Appeals are allowed. In Appeal No. 31 of 1978, - the Order of the learned Judge made in the Revenue Court on the 26th April, 1978 is set aside, and it is hereby ordered:

- (a) That the said appeal be re-entered for hearing.
- (b) That the title on the Notice of Appeal be amended by inserting before the words "S.N. Shoucair (Dec'd.)", the words "Edward Shoucair, Personal Representative of."

In Appeal No. 61 of 1978, the Order of the learned Judge made in the Revenue Court on the 24th November, 1978 is set aside and a similar order is hereby made as in Appeal No. 31 of 1978.

The Respondent is to pay to the Appellant Edward Shoucair, Personal Representative of S.N. Shoucair, deceased, the costs of these Appeals, to be agreed or taxed, and also the costs of the hearing in the Revenue Court on 31.7.78, 20 & 24.11.78.

CARBERRY, J.A.

I concur.

WHITE, J.A.:

I concur.