

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006/HCV 981

BETWEEN	ROBERT STEPHENSON	1 <sup>ST</sup> CLAIMANT
AND	MARCIA STEPHENSON	2 <sup>ND</sup> CLAIMANT
AND	ROBERT BARBER	1 <sup>ST</sup> DEFENDANT
AND	VIRTECH SYSTEMS LIMITED	2 <sup>ND</sup> DEFENDANT

Ms. Jacqueline Cummings for claimants

Mr. Jermaine Spence instructed by DunnCox for the defendants.

**Heard: 25<sup>th</sup> June 2008 and 5<sup>th</sup> June 2009**

**Campbell, J.**

(1) On the 20<sup>th</sup> March 2006, the claimants filed a Claim Form to recover the sum of \$1,742,960.16, being the principal and interest due under a Loan Agreement dated 11<sup>th</sup> May 2005, with interest on the said sum at the rate of 10% per month. The 1<sup>st</sup> defendant was being sued in his capacity as Executor of the estate of Paul Chin Loy, a party to the Loan Agreement. On the 22<sup>nd</sup> January 2007, the claimants filed an Ex-parte Notice of Application for Court Orders, relying primarily on the ground that the time within which the defendants should acknowledge service of the Claim Form had expired. The notice was accompanied by an affidavit of Robert Stephenson, dated 20<sup>th</sup> January 2007, which attested at para:

6. That the estate of Paul Chin Loy (deceased) was duly served with the claim form herein as it was served personally on Robert Barber.”

7. That Mr. Barber sought to renounce his executorship after being served herein.

Judgment was entered on the 14<sup>th</sup> August 2006, the 1<sup>st</sup> defendant not having filed a defence.

(2) On the 13<sup>th</sup> July 2007, Gayle, J. entered judgment against both defendants. Counsel for the claimants’ affidavit in support of the application, exhibited a letter dated 30<sup>th</sup> June 2006, from Mr. Rodrick Gordon, attorney-at-law, who was on the record for the Executor. Mr. Gordon’s letter stated that the 1<sup>st</sup> defendant had renounced his position as Executor. However, para 2 of the affidavit to which the letter was exhibited said,

“That the letter dated the 30<sup>th</sup> June 2006 from Rodrick CA, Gordon, Attorney-at-law, confirmed that his client Robert Barber is the executor of the estate of Paul Chin Loy (deceased). A copy of said letter is exhibited hereto marked ‘JC 1’ for identity.”

(3) The claimants have applied for sale of land belonging to the estate of the late Paul Chin Loy. The defendants have vigorously opposed the application and urged that the default judgment be set aside as being irregularly obtained. Mr. Spence argued that the deceased interest in the property amounted to one sixteenth share. That other parties who have an interest should be allowed to oppose the application. That the application was in conflict with the Rights of Spouse Act. Further, there was a failure to comply with CPR 8.2(1) which provided;

“A claim form may be issued and served without the Particulars of Claim or affidavit or other document required by rule 8.1(10) (b) (11) only if

- (a) The claimant has included in the Claim Form all the information required by rules 8.6, 8.7, 8.8, 8.9, 8.10; or
- (b) The court gives permission.

Service was effected without the Particulars of Claim, although there was non-compliance with the information requirement of 8(1) (10) b (11) and there was not the required permission from the court.

(4) Rule 8.7.3 requires that where a claim for interest is made, the particulars give the basis of the entitlement for interest. The defendant says that there was non-compliance with that requirement. Further, the claimant has a duty to set out their case as required by rule 8.9. This should include all the facts on which the claim relies. In the circumstances of this case, these would include the terms of the agreement, the terms of repayment, commencement date of the contract; CPR 8.9 (3) specifically provides for;

“The Claim Form or the Particulars of Claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.”

Such a document is the Loan Agreement. The claimant, not having included all the information required by 8.2(1) (a), would be required to show that he has the permission of the court to serve the Claim without the Particulars of Claim or a certificate of emergency. Mr. Spence has complained that so sparing is the information in the Claim Form, that he is unable to provide a requisite defence.

(5) It was argued that the court must set aside default judgment entered under Part 12 if the judgment was wrongly entered, because there was no compliance with rule 12.4. The claimant could not satisfy 12.4(a), because there was no service of the Particulars of Claim on the defendants.

The Property in question does not belong to the estate of the deceased, Paul Chin Loy, absolutely. All parties with an interest should therefore be notified and allowed to state their opposition. Counsel has maintained that the 1<sup>st</sup> defendant had been served personally. An affidavit of service purports to attest to the service on Mr. Barber. This service is the basis for the application of default judgment. The defendants contend that not only had Mr. Barber renounced his executorship before that date, but he had not obtained a grant of probate or intermeddled in the estate. In the absence of those features, Mr. Barber cannot be sued as an Executor.

(6) This principle was well illustrated in **Mohamidu Mohideen Hadjiar v Pitchey (1984) AC 437** where a claim was brought against the testator in respect of a note he had signed a few days before his death. One of seven Executors named had applied for probate, but had not taken the oath of office or proceed further with the application. A suit was filed against that Executor saying that he had proved the Will, and duly obtained probate. As is being alleged in this case, the defendant did not enter an appearance and a decree was entered that the plaintiff should recover. Their Lordships in the House of Lords, in overturning the Court of Appeal, held “A creditor of a deceased debtor cannot sue a person named as Executor in the Will of the deceased unless he has either administered, that is, intermeddled with the estate, or proved the Will.” And at page 443;

“It would certainly be a most dangerous doctrine to hold that creditors could tear an estate to pieces on going through the form of an action against a person who had neither intermeddled with the assets nor duly clothed himself with a representative character, so as to become responsible for his acts and defaults to the beneficiaries under the will.”

(7) Mr. Barber had not been granted probate, neither could it be said he had administered or intermeddled in the estate. Until he had done some ostensible act of administration, such as taking possession of the testator’s goods or disposing of them to others, he is deemed not to have accepted the office of Executor. The learned author of the Law of Succession - Testate and Intestate, Sixth Edition, by Sir David Hughes Parry, says at page 47;

“The normal method of signifying acceptance of the office (of executor) is to take the necessary steps to prove the will and to administer the estate. Once he has accepted the office by the performance of acts of administration, the executor cannot, in any ordinary case, and apart from the special circumstances under section 162 of the Judicature Act 1925, then refuse to prove the will.”

There is no evidence that Mr. Barber has performed any such acts of administration. It is therefore impermissible to institute actions against him, in respect of Paul Chin Loy’s estate. Such service that may have taken place is irregular, as he is not a defendant.

(8) The judgment entered on the 13<sup>th</sup> July 2007 is set aside, pursuant to CPR 13.2 (1) (A) for failure to comply with 12.4 (a). The claimant will file the necessary Particulars of Claim.

Cost to the defendants to be agreed or taxed.