DOUGLAS STUART JAMIESON v DOMINION INSURANCE LTD (HBC0132 of 09L)

HIGH COURT — CIVIL JURISDICTION

TUILEVUKA M

20 January 2012

Succession — administration of estates — sealing of probate — purported appointment as Special Administrator — appointment by court in Hawaii — whether plaintiff had locus to institute proceedings — whether special letters of administration resealed in Fiji — cure defect — insurance indemnity claim for motor vehicle — Succession, Probate and Administration Act s 45.

The plaintiff claimed insurance indemnity from the defendants for a motor vehicle that had been written off after it was stolen and damaged. The vehicle had belonged to the deceased, and the plaintiff claimed that he was the executor and trustee of the estate. Since the deceased did not leave a will, the defendants applied to strike out the statement of claim. The plaintiff applied to amend the statement of claim, alleging that he had been appointed Special Administrator over the deceased's estate by the Circuit Court of Hawaii.

Held –

(1) Whilst a plaintiff suing as intended administrator may indeed violate Ingall v Moran where no letters of administration have in fact been granted to them, the resulting irregularity is not necessarily fatal and may either be cured by amendment or overlooked if the plaintiff in fact has also pleaded s 10 of the Compensation to Relatives Act. In the present case, the deceased was not killed by an accident and the plaintiff was not pursuing a claim under the Compensation to Relatives Act. The writ and statement of claim issued for the plaintiff violate the Ingall v Moran principles.

Ingall v Moran [1944] KB 160; *Railala v Yuen Yin Hum* [2001] FJHC 44 Hbc0528D.1992s (13 July 2001); *Tanuku, v A-G* [2000] FJHC 13 Hbc0134d.95s (26 January 2000), followed.

(2) In the absence of any evidence that the Chief Registrar has in fact resealed in Fiji the Special Letters of Administration granted to the plaintiff in Hawaii, the plaintiff does not have locus to institute or to continue these proceedings.

Application for amendment refused. Order in terms on the defendant's application to strike out.

P Naidu for the Plaintiff.

AK Lawyers for the Defendant.

[1] Tuilevuka M. Douglas Stuart Jamieson (the plaintiff) filed a Writ of Summons and Statement of Claim on 04 August 2009. He claims that he is the executor and trustee of the estate of the late Gregory Stuart Jamieson late of Nadi. Gregory Jamieson died on 25 April 2009. He was the proprietor of a 2002 model Nissan Terrano Wagon registration number EA 819. According to the statement of claim, Gregory Jamieson purchased the vehicle from Carpenters Motors in Nadi for the cash sum of $83,500 (Eighty Three Thousand and Five Hundred Dollars) on 23 January 2003. Upon purchase, Gregory Jamieson obtained a comprehensive insurance cover on the vehicle with Dominion Insurance Limited. This cover expired on 23 January 2004.

[2] According to the statement of claim, DIL agreed to extend/renew the cover from 24 January 2004 to 24 January 2005 upon Gregory Jamieson paying a renewal premium in the sum of $2,546.75. The statement of claim also alleges

that the said renewal premium was duly paid on 11 February 2004 by Gregory Jamieson. This alleged payment is denied by DIL in paragraph 5 of the statement of defence. According to the Statement of Claim, the vehicle in question was actually stolen in the early hours of 14 February 2004 at around 3.00 am. The Police located the vehicle at around 5.30 am on the same day. It had been abandoned at a rural location just outside Nadi Town. The vehicle was allegedly in such a damaged condition - so much so that it was simply uneconomical to repair it. The particulars of the damages alleged are itemized in paragraph 13 of the statement of claim. Douglas Jamieson seeks indemnity from DIL.

[3] DIL's position is pleaded in paragraphs 8 and 9 of the statement of defence.

> **8. Further and/or in the alternative the policy of insurance to the plaintiff had a condition precedent that all premiums must be paid within 30 days of inception or renewal of any cover unless alternative credit terms have been agreed in writing and that any premium received after the premium payment condition has expired will only be accepted on the basis that the company has no liability for any losses which may have occurred prior to the payment of the premium. The defendant will rely on the full terms of the policy at the trial hereof.**
>
> **9. That in breach of the premium payment condition of the policy the plaintiff failed to pay the premium to the defendant in accordance with the policy conditions and is not entitled to indemnify the defendant in respect of the claimed loss.**

[4] The matter had proceeded along its normal course when it emerged at discovery stage that Gregory Jamieson did not leave a Will. This discovery prompted DIL's solicitors - AK Lawyers – to question the following:

> (i) Douglas Jamieson's locus to commence the action in his purported capacity as **"executor and trustee of the estate of Gregory Stuart Jamieson"**.
>
> (ii) whether or not the action was properly constituted.

[5] AK Lawyers has – accordingly – filed an application to strike out the statement of claim on the ground that it discloses no reasonable cause of action, is an abuse of process and is scandalous, vexatious and frivolous. Meanwhile, Douglas Jamieson has also filed an application to amend the statement of claim. He claims that he is the brother of the deceased and the uncle of the two issues of the deceased who are both minors. He also alleges that he was appointed Special Administrator (Letters of Administration with Limited Powers) over Gregory Jamieson's estate for three years **with effect from 03 August 2009**. The appointment was made by the Circuit Court of the Second State of Hawaii.

[6] The Affidavit filed in support of the application to strike out does not annex any copy of the said Letters of Special Administration that was purportedly granted to Stuart Jamieson. I was particularly interested in this document to confirm that Stuart Jamieson was already appointed Special Administrator at the time he filed the Writ of Summons and Statement of Claim.

[7] But even if I was to accept that Gregory Jamieson was indeed appointed as Special Administrator by the Circuit Court of the Second State of Hawaii for a term of three years effective from 03 August 2009 – and that he did file the Writ of Summons and Statement of Claim in Fiji on 04 August 2009, there is no evidence that the Special Letters of Administration has in fact been resealed in Fiji pursuant to **s 45** of the **Succession, Probate and Administration Act (Cap 60)**. This is the issue raised in the affidavit in opposition filed on behalf of DIL.

[8] In his affidavit in reply filed on 06 June 2011, Krishneel Kunal Kumar, a Law Clerk employed at Pillai Naidu & Associates, deposes at paragraph 4 that **"we are in the process of resealing the Probate"**.

[9] Section 45 of the **Succession, Probate and Administration Act (Cap 60)**states as follows:

> *Probate, etc., may be sealed*
>
> **45.-(1) When any probate or administration heretofore or hereafter granted by any court of competent jurisdiction, in any country or territory of the Commonwealth, is produced to and a copy thereof deposited with the Registrar by any person being the executor or administrator, whether original or by representation or by any person duly authorized by power of attorney in that behalf, duly executed by such executor or administrator, such probate or administration may be sealed with the seal of the court.**
>
> **(2) When so sealed, such probate or administration shall have the like force, effect and operation in Fiji and every executor and administrator thereunder shall perform the same duties and be subject to the same liabilities, as if such probate or administration had been originally granted by the court.**
>
> (3) The court may require any such administrator or attorney of an administrator, to give security for the due administration of the estate in respect of matters or claims in Fiji.

[10] Subsections 1 and 2 of s 45 clearly state that a probate or letter of administration granted by any court of competent jurisdiction **"in any country or territory of the Commonwealth"**shall have no effect in Fiji unless they have been duly resealed by the Chief Registrar of the High Court of Fiji. It would appear to follow then that any probate or letter of administration granted in any country outside of Fiji cannot be relied on by the grantee as the foundation of his or her locus to institute legal proceedings in Fiji. Rather, what will give the grantee locus is the resealing in Fiji of that probate or letter of administration by the Chief Registrar.

[11] Lord Justice Scott in *Ingall v Moran* [1944] KB 160 at 164 stated as follows:-

> **It is true that when he got his title by the grant of administration he prima facie became entitled to sue, and could then have issued a new writ, but that was all. An application by him to treat the original writ of September 17 as retrospectively valid from that date would have been refused by the court, not only because it might prejudice existing rights of defence, but because it would not be permissible under the Rules of the Supreme Court or the Judicature Acts. The old writ was, in truth, incurably a nullity. It was born dead and could not be revived.**

Then at page 165, Scott LJ continued as follows:

> **If that conclusion is right it follows equally that the statement of claim was not delivered in any action recognized by the Rules of the Supreme Court, and all subsequent proceedings in the supposed action, including the judgment of the learned county court judge, were likewise nugatory, for, if the action and the pleadings were bad, there was no valid action before the learned judge to try and it is our duty to say so.**

[12] In *Tanuku v A-G* [2000] FJHC 13; Hbc0134d.95s (26 January 2000), Madam Justice Shameem referring to the above passage, said as follows:

> It is clear since the decisions of the Privy Council and the Court of Appeal in *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603 and *Ingall v Moran* [1944] 1 All ER 97 respectively, that an administrator can only institute an action after he gets his grant of letters of administration.

[13] Shameem J also recognized that s 10 of the Compensation to Relatives Act is an exception to the above rule. Under s 10, a dependent may institute proceedings for the benefit of all dependents where no executor or administrator of the deceased person's estate has been appointed or where the appointed executor or administrator has been more or less been rather dilatory in not having instituted proceedings. Section 10 was also discussed by Mr Justice Fatiaki in *Railala v Yuen Yin Hum* [2001] FJHC 44; Hbc0528D.1992s (13 July 2001).

[14] In **Tanuku**, Shameem J found that the writ issued by the plaintiff as **"intended administrator"** of his son's estate was invalid on the **Ingall v Moran** principles – nor is it sustainable under s 10 of the Compensation to Relatives Act because the Writ of Summons is not appropriately indorsed as such. This, even though the statement of claim included a pleading based on the Compensation to Relatives Act. It appears that Shameem J would have allowed an amendment to cure that defect. However, because the plaintiff's counsel did not bother – Shameem J held as follows:

> **In the absence of any application for amendment even after the Order 18 Rule 18 summons was served on counsel on 11th January 2000, I allow the Defendant's application to strike out the statement of claim.**

[15] In **Railala**, the plaintiff sued in a representative capacity as 'intended administrator' before the proper grant of Letters of Administration. Fatiaki J's approach is summarised in the following:

> In *Seward v Owner of the Vera Cruz The Vera Cruz* (1884) 10 App Cas 59 the **Earl of Selbourne LC** pointed out that the **UK** equivalent of our **Sections 3 & 4**, created a new statutory cause of action ***'..... given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive him, but to his wife and children, no doubt suing in point of form in the name of the executor'***.
>
> More recently, in *Austin v Hart* [1983] 2 All ER 341 the **Privy Council** said of an identically worded section to our **s 10(2)** above, at **343**:
>
> **'The benefit of the right of action does not form part of the estate of the deceased or devolve under the provisions of his will. The**(Compensation for Injuries) **ordinance provides machinery for the action to be brought by personal representatives of the deceased as trustees for the dependant or, in certain circumstances, for one or more of the dependants themselves to bring the action as trustee or trustees for all of the dependants.'**
>
> Furthermore the Court in allowing the action in the case to continue despite the possibility that it had been irregularly instituted before the expiration of the 6 months time limit contained in the **Section** said, at **344/345**:
>
> ***'.....if a premature action is irregular and the irregularity is of a kind, which, as in the instant case, was cured without amendment by the mere lapse of time and which causes no prejudice to the defendant, there is no reason for the Court to insist that the irregularity nullifies and invalidates the whole proceedings. The modern approach is to treat an irregularity as a nullifying factor only if it causes substantial injustice:*** *see*: *Marsh v Marsh* [1945] AC 271 at 284.'
>
> Similarly in the present case, the plaintiff could have instituted the proceedings in his own name as a trustee for the dependants for whose benefit the cause of action was created by statute, and the fact that the action was instituted in his capacity as ***'intended administrator'***, is, at most, an irregularity, which caused no injustice at all to the defendant.
>
> Needless to say the capacity in which the plaintiff sued in *Ingall v Moran* (op.cit) was that of ***'administrator of his deceased son's estate'*** which is materially different from the capacity in which the plaintiff is suing in the present case as ***'intended administrator'*** suing ***'.....on behalf of the estate of***(his) ***deceased daughter..... for the***

benefit of the relatives..... under the Compensation to Relatives Act Cap.29'. The former capacity assumes the grant or existence of **Letters of Administration** whereas the latter plainly does not.

Defence counsel counters, however that even if **s 10** could be invoked, nevertheless, the plaintiff is in breach of the mandatory requirements of **s 9** of the **Compensation to Relatives Act (Cap.29)** in failing to provide to the defendant with the **Statement of Claim**, ***'..... full particulars of the person or persons for whom and on whose behalf the action is brought.....'***

The undisputed affidavit evidence deposed by the plaintiff's son satisfies me however, that the plaintiff is the sole surviving parent of the deceased **Ulamila Takatu** who ***'died intestate leaving no husband or issue'***, and therefore, in law, the plaintiff is the sole beneficiary of the deceased's estate. As such, there has been no breach of **s 9**. Quite simply, there were no other entitled dependants of the deceased to be named.

For the foregoing reasons the defendant's summons dated **10th June 1999** is dismissed with costs which are summarily assessed at **$200.00**.

[16] Although slightly different in their results, Shameem J's and Fatiaki J's are in fact consistent with each other. Both recognize that whilst a plaintiff suing as intended administrator may indeed violate **Ingall v Moran** where no letters of administration has in fact being granted to them, the resulting irregularity is not necessarily fatal and may either be cured by amendment (as per Shameem J) or overlooked (as per Fatiaki J) if the plaintiff in fact has also pleaded s 10 of the Compensation to Relatives Act.

[17] In the case before me, what is at stake is an insurance indemnity claim for a motor vehicle that has been written off after it was stolen and damaged by the perpetrators. Gregory Jamieson was not killed by an accident and Douglas Jamieson is not pursuing a claim under the Compensation to Relatives Act[1]. The Writ and Statement of Claim issued for Douglas Jamieson violates the **Ingall v Moran** principles. In the absence of any evidence before me that the Chief Registrar has in fact resealed in Fiji the Special Letters of Administration granted to the plaintiff in Hawaii, the plaintiff does not have locus to institute or to continue these proceedingss.

[18] The proposed amendment cannot possibly cure the defect. The plaintiff will only have locus once the Chief Registrar reseals his Special Letters of Administration. But even that cannot apply retrospectively to regularize the defect. The plaintiff should just institute fresh proceedings once the Chief Registrar has resealed his Special Letters of Administration.

ORDERS

(i) The plaintiff's application for amendment is refused.
(ii) Order in Terms on the defendant's application to strike out.
(iii) Costs to the defendant which I summarily assess at $550-00 (five hundred and fifty dollars).

Application refused.

1. 1 The Long Title to the Compensation to Relatives Act states as follows: ***AN ACT RELATING TO THE PAYMENT OF COMPENSATION TO THE FAMILIES OF PERSONS KILLED NY ACCIDENTS.***