[2012] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 128/2011

BETWEEN	**JAMAICA REDEVELOPMENT FOUNDATION, INC**	**APPELLANT**
AND	**MAX EUGENE LAMBIE (As Administrator of the Estate of Elaine Vivienne Tully, deceased)**	**RESPONDENT**

Written submissions received from Myers, Fletcher & Gordon, attorneys-at-law for the appellant

No submissions received from the respondent

17 April 2012

PROCEDURAL APPEAL
(Considered on paper pursuant to rule 2.4 (3) of the Court of Appeal Rules 2002)

IN CHAMBERS

MORRISON JA

Introduction

[1] This is an appeal against the following order made by McIntosh J on 8 July 2011:

"1. Marva Lambie and Lisa Lambie be appointed representatives in the Estate of Max Lambie for the purposes of these proceedings.

2. Case Management Conference to be on February 3, 2012 at 11:00 am for half an hour.

3. Leave to appeal refused."

[2] Leave to appeal having been refused by the learned judge, the appellant moved this court for leave, which was granted on 1 November 2011. The appellant duly filed notice of procedural appeal on 15 November 2011, accompanied by its written submissions and a bundle of supporting authorities, and these documents were served on the respondent on the same date. On 3 December 2011, no response having been received from the respondent, I directed the Registrar to advise the respondent's attorneys-at-law of my intention to deal with the matter on paper and that they should file written submissions in answer to the procedural appeal, no later than 19 December 2011. Despite confirmation of delivery of notice of these directions to the respondent's attorneys-at-law (on 7 December 2011), no submissions have been filed by them or by anyone else on the respondent's behalf.

Background

[3] The background to this matter can be shortly stated. Ms Elaine Vivienne Tully ('the deceased') died intestate on 18 June 2001, leaving no spouse, issue or parents. On 5 November 2002, the Supreme Court granted Letters of Administration in the deceased's estate to the respondent, who was her first cousin (his mother, Edith Lambie, who predeceased her, having been the aunt of the deceased). The deceased

was at the time of her death the sole proprietor of property originally registered at Volume 1256 Folio 383 of the Register Book of Titles. This property, which has since been subdivided, is now comprised in certificates of title registered at Volume 1324 Folios 107 through 117 of the Register Book of Titles and the appellant is the registered mortgagee, as successor to the original mortgagee, Workers' Savings and Loan Bank ('WSLB'), of the properties contained in the several certificates of title.

[4] In the Supreme Court action with which this appeal is concerned, the respondent alleged that the mortgages were fraudulently obtained by WSLB and are accordingly null and void as against the deceased's estate, while the appellant maintains that it is entitled to the benefit of the mortgages, as a bona fide purchaser for value of the debt and receivables of WSLB and as the registered proprietor of the mortgages.

[5] On 4 May 2010, while this claim was still pending, the respondent died, also intestate. By notice of application for court orders filed on 12 May 2011, Marva and Lisa Lambie, who are said to be the wife and daughter of the respondent respectively, made an application to the court to be "appointed representatives in the Estate Max Lambie". The application, which was purportedly made pursuant to Part 21 of the Civil Procedure Rules 2002 ('the CPR'), was made on the ground that, since the respondent's death, "the matter presently before the court could not continue and as a result it is necessary to appoint representative[s] of the Estate…in order for the matter proceed [sic] in court".

What the judge found

[6] This is the application that was granted by McIntosh J on 8 July 2011 and is the subject of this appeal. Although there are no written reasons from the learned judge himself for his order, a note of his reasons given orally, which was taken by counsel for the appellant indicates that the judge said the following:

> "I made the appointment so the matter can be dealt with since it has been pending since 2003. It has been stymied because of various applications by the defendant, who has shown no indication that it wants the matter tried.
>
> For the matter to be proceeded with there needs to be a claimant.
>
> The only relevant persons who can be appointed must be representatives of the party who was carrying on the matter on behalf of the deceased's estate.
>
> Further, this court views with horror the fact that this matter has been languishing in the courts since 2003 – it needs closure.
>
> At this point in time, with a case management conference set for February 2012, in all likelihood there won't be a trial before 2013. Even if there is a trial in 2012, the matter will have been before the court for at least 9 years."

The grounds of appeal

[7] By its notice of procedural appeal filed on 15 November 2011, the appellant challenges this order on a number of grounds (13 in all), which are very helpfully summarised in its written submissions in support of the appeal as follows:

> "(a) **Section 2 of the Law Reform (Miscellaneous Provisions) Act**

The claim below survives only for the benefit of Elaine Tully's estate, not the estate of Max Lambie.

(b) **There is no Chain of Representation**
There is no Chain of representation for administrators. Marva and Lisa Lambie cannot be placed in Max Lambie's shoes.

(c) **Sections 4 & 5 of the Intestate's Estates and Property Charges Act**
The only proper beneficiaries of Elaine Tully's estate are those who qualify under sections 4 and 5 and neither Marva nor Lisa Lambie are so qualified to benefit.

(d) **Procedural Misapplication**
Part 21 of the CPR is inapplicable to the instant case. The requirements of Part 21 of the CPR are, in any event, not met in this case. Alternatively, there was insufficient evidence before the court to enable it to properly assess whether or not it did apply. Rules 19.3 and 68.61 are the rules applicable to this case. None of the requirements under those rules is met in this case.

(e) **The Administrator-General's Act**
The order exceeds the court's proper jurisdiction and contravenes sections 12 and 46 of this Act."

Issue (a) – for whose benefit did the deceased's cause of action survive?

[8] On this issue, I was referred by counsel for the appellant to section 2 of the Law Reform (Miscellaneous Provisions) Act, which provides, so far as is relevant, that "on the death of any person…all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate". It follows from the plain language of the section that, as counsel submitted, the effect of its operation in the instant case is that the cause of action in respect of which the action in the court below was brought by the respondent was one that survived for the benefit of the

deceased's estate (that is, the late Ms Tully's estate), and not for the general benefit of anyone claiming an interest, or indeed for the benefit of the estate of the respondent, as administrator of her estate.

[9] In this regard, as the decision at first instance of Karl Harrison J, as he then was, in ***Stephens v Raymond*** (Suit No. C.L. S139/1994, judgment delivered 14 July 2000), (to which I was also referred by the appellant) confirms, any claim brought for the benefit of the estate of an intestate deceased person must be brought by a duly appointed representative of the estate (even where, as in that case, the claimant would have been entitled to obtain a grant of letters of administration). On the face of it, therefore, it does not appear that either the respondent's wife or daughter, who the judge by his order appointed to carry on the action in this case, was in fact qualified for such an appointment.

Issue (b) – does the principle of the chain of representation apply?

[10] It is a well known principle of the law of succession that the executor of a sole or last surviving executor of the testator's estate becomes the executor of the testator in the event of the original executor dying without having completed administration of the testator's estate. This is the principle of the chain of representation (see, for example, ***Swoffer v Swoffer*** [1896] P. 131). (And see further, rule 68.48(1) of the CPR, which provides that an application for a grant of probate may be made by [the 'second executor'] in relation to any estate that was being handled by [the 'first executor'] where the principle of the chain of representation is applicable".) It is, however,

equally well settled that there is no chain of representation in relation to administrators of an intestate's estate, even where the administrator himself dies testate. The reason for the distinction was explained by Blackstone (in a passage quoted in Parry on Succession, 5th edn, at page 183), as follows:

> "The power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom the deceased has responded no trust at all; and, therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh of the goods of the deceased not administered by the former executor or administrator."

[11] In the instant case, the deceased having died intestate, the principle therefore has no application and what will be required to complete administration of her estate is a fresh grant of administration in respect of the unadministered portion.

Issue (c) – are Marva and Lisa Lambie eligible for appointment as administrators of the deceased's estate?

[12] As I have already suggested, the respondent having died before completing administration of the deceased's estate, a fresh grant of administration to that portion of her estate will be required. The appellant submits that an application for such a grant would have to be made by someone entitled to do so by virtue of the provisions

of sections 4 and 5 of the Intestates' Estates and Property Charges Act ('the Act'), that is, a surviving spouse, child or children, parent or parents or "other eligible relatives" (which would include the intestate deceased's aunt) of the deceased.

[13] Given that there was no application before the judge below, and he made no order, pertaining to representation of the deceased's estate, this is an issue that does not arise strictly speaking on this application and I therefore think that it may well be best for me to refrain from expressing any view on it at this stage. This is especially so in the light of my clear conclusions on the first two issues, which may require the making of some further or other application to the court, for the purpose of securing appropriate representation for the continuation of the action in the court below for the benefit of the deceased's estate.

Issue (d) – does Part 21 of the CPR apply?

[14] The appellant submits that, although the application to the court below was purportedly made pursuant to Part 21 of the CPR, there is in fact no provision in that part of the rules that can apply in the instant case. Rule 21.1 states as follows:

> "21.1 (1) This rule applies to any proceedings, other than proceedings falling within rule 21.4, where 5 or more parsons have the same or a similar interest in the proceedings.
>
> (2) The court may appoint –
>
> (a) one or more of those persons; or
> (b) a body having a sufficient interest in the proceedings,

to represent all or some of the persons with the same or similar interest.

(3) A representative under this rule may either be a claimant or a defendant."

[15] It seems to me that, on the face of it, this rule can have no application in this case, there being no evidence that this is a case which five or more persons have "the same or a similar interest in the proceedings".

[16] More promising may be rule 21.4, which reads as follows:

"21.4 (1) This rule applies only to proceedings about-

(a) The estate of someone who is dead;

(b) property subject to a trust; or

(c) the construction of a written instrument.

(2) The court may appoint one or more persons to represent any person or class of persons (including an unborn person or persons) who is or may be interested in or affected by the proceedings (whether presently or for any future, contingent or unascertained interest) where –

(a) the person, or the class or some member of it, cannot be ascertained or cannot readily be ascertained;

(b) the person, or the class or some member of it, though ascertained cannot be found; or

(c) it is expedient to do so for any other reason.

(3) An application for an order to appoint a representative party under this rule may be made by -

(a) any party; or

(b) any person who wishes to be appointed as a representative party.

(4) A representative appointed under this rule may be either a claimant or a defendant.

(5) A decision of the court binds everyone whom a representative claimant or representative defendant represents."

[17] The appellant submitted that this rule was only applicable to proceedings "about" the estate of a deceased person, and not, as in this case, proceedings about the validity of mortgages brought by the estate of a deceased person. Further, this rule allows for the appointment of a representative, whereas in the instant case the deceased's estate was already represented by the respondent. I again agree with the appellant, essentially for the reasons submitted on its behalf. Rule 21.4 is concerned with the representation of persons who "cannot be ascertained or cannot readily be ascertained" (rule 21.4(2)(a)), which is far removed from the situation in the instant case.

[18] It is clear that, as the appellant also submitted, the application which ought to have been made upon the death of the named respondent in this case was for the substitution of someone else for him as personal representative, pursuant to rule 68.61 of the CPR. Had that been done, the substituted personal representative would then

have been in a position to make an application under rule 19.3 to be substituted as claimant in the pending action in the court below in place of the respondent.

Issue (e) – the effect of sections 12 and 46 of the Administrator-General's Act

[19] In the light of my clear conclusions on the other issues raised by this appeal, which are in fact sufficient to dispose of the appeal, I do not find it necessary to explore this issue and I therefore propose to express no view on it.

Conclusion

[20] In the result, this appeal must be allowed and the order made by McIntosh J on 8 July 2011 set aside. The costs of the appeal will be the appellant's, to be taxed, if not sooner agreed.