JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 99/99

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN	**LIFE OF JAMAICA LIMITED**	**APPELLANT**
A N D	**GLENFORD PLUMMER**	**RESPONDENT**

Michael Hylton, Q.C. and Hilary Reid, instructed by Myers, Fletcher & Gordon, for the appellant

Raphael Codlin for the respondent

November 15, 16, 1999 and May 24 2000

BINGHAM, J.A.:

This appeal is against an order of Ellis, J., made on August 11, 1999, as here set out:

> (1) That Life of Jamaica Ltd. pay over to Raphael Codlin & Co. for stamping the Letters of Administration, the sum of $17,030.00 from the proceeds of policy No. 4001 1672, which said proceeds are being held by Life of Jamaica Ltd. on behalf of the estate of ROY CLINTON PLUMMER.
>
> (2) That within ten (10) days after the presentation of the stamped Letters of Administration to Life of Jamaica Ltd. that the said sum be paid over to the Attorneys at law for the Administrator

herein, Glenford Plummer, in accordance with authority dated November 2, 1998.

(3) That the costs of this application be paid by the said Life of Jamaica Ltd.

(4) Liberty to apply."

Before the submissions by learned counsel for the respondent were completed, the matter was resolved by counsel withdrawing his opposition to the arguments advanced in favour of the appellant.

The record was accordingly endorsed: "Appeal allowed. Judgment of the court below set aside. Costs to the appellant in a sum to be endorsed on counsel's brief."

The judgment which now follows is intended not only to set out the reasons for the order made as to the disposition of the appeal, but is by way of an attempt to provide some future guidance to the profession and other bodies faced with similar problems to that raised in this matter.

The Facts

The facts and circumstances leading up to the order made by Ellis, J., and the subsequent appeal are as follows.

Before his death on December 22, 1994, the deceased Roy Clinton Plummer who died intestate took out a life insurance policy No. 4001 1672 with the appellant company for the benefit of his estate. His son Glenford Plummer, the respondent in this matter, applied for a grant of Letters of Administration in the Supreme Court. While this application was being processed and before the formal grant was obtained, the respondent, through his attorney-at-law, wrote to the appellant company requesting the

release of $17,030 from the proceeds of the policy of insurance. The sum being requested by the respondent's attorney-at-law was to cover the stamping of the Letters of Administration. It is common ground and not a matter in dispute that the stamping of the original Letters of Administration was a precondition before it was sealed and signed by the Registrar of the Supreme Court.

Four grounds of appeal were filed on behalf of the appellant company. Of these, ground 4 was not argued. Grounds 1 to 3 read as follows:

> "1. The Learned Trial Judge erred in making an Order on an 'Originating Summons' which was not properly before the Court and pursuant to a procedure which was plainly defective.
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> 2 The Learned Trial Judge erred in holding that Letters of Administration had been granted in the Estate of Roy Clinton Plummer.
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> 3. Alternatively, the Learned Trial Judge erred in ordering the Appellant to pay over part of the proceeds of the policy of insurance when there had been no grant of Letters of Administration."

Grounds 1 and 2, the procedural grounds, may be considered together.

Ground 1

Learned counsel for the appellant submitted that what purported to have been an Originating Summons was in fact a summons taken out in an existing matter, Suit P. 1338 of 1998.

The summons was short-served, thus resulting in the appellant being unable to prepare an affidavit in response before the hearing of the matter.

Service of an Originating Summons and Notice of Appointment is governed by sections 533A, 533B and 533C of the Judicature (Civil Procedure Code) Law, which read as follows:

> **"533A.** Service shall be effected by delivering a sealed copy of the originating summons to the party to whom it is addressed and the party so served shall, before he is heard, enter appearance at the office of the Registrar and give notice thereof. A party so served may appear at any time before the hearing of the summons. If he appears at any time after the time limited for appearance he shall not, unless the Court or a Judge shall otherwise order, be entitled to any further time for any purpose, even if he had appeared according to the summons.
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> **533B. (1)** The day and hour for attendance under an originating summons shall after appearance be fixed by notice, sealed with the seal of the Court.
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> **(2)** The notice... shall be served on the defendant or respondent by delivering a copy thereof at the address for service named in the memorandum of appearance of such defendant or respondent not less than 4 clear days before the return day.
>
> **533C.** Where a defendant or respondent to an originating summons fails to appear within the time limited, the plaintiff or applicant may apply to the Court or a Judge for an appointment for

> the hearing of such summons and upon a certificate that no appearance has been entered the Court or Judge shall appoint a time for the hearing of such summons upon such conditions (if any) as they or he shall think fit."

Although the date appointed for the hearing of the "Originating Summons" was August 11, 1999, service of both the "Originating Summons" and the Notice of Appointment was effected on August 9, 1999.

The matter was not properly before the court, in any event, in that the filing and service of the Notice of Appointment was in contravention of section 533B and section 533C of the Judicature (Civil Procedure Code) Law having been filed on the same day as the Originating Summons.

Ground 2

Learned counsel for the appellant submitted that the notice of the Registrar to file a Kalamazoo copy of the Letters of Administration and to stamp the Letters of Administration exhibited to the affidavit of Glenford Plummer filed in the suit does not amount to a grant of the Letters of Administration. In coming to a finding that on the evidence of the said notice a grant of Letters of Administration had been made, the learned trial judge was in error.

Learned counsel for the respondent, in response, submitted that any interested party to the estate of the deceased had a right to take out an originating summons under sections 531 to 533 of the Judicature (Civil Procedure Code) Law. The suit number in respect of the application for Letters of Administration was merely an identification mark and nothing turns

on it. The course taken by the respondent, in doing what was done, amounted to nothing more than an irregularity.

By not entering a conditional appearance and proceeding to appear and contest the matter, the appellants waived the irregularity. By not applying for an adjournment, the short-service of the summons was cured as the appellant came to court ready and willing to proceed with the hearing of the matter.

Having regard to the wording of sections 531 to 533 of the Judicature (Civil Procedure Code) Law and given the substance of the complaint raised before the learned judge, there was no basis for a resort to the reliefs available under sections 531 to 533 of the Code in seeking a determination of the matter in dispute.

These sections of the Code are intended to deal with problems arising in probate matters relating to the construction of Wills requiring the determination of difficult questions of construction such as the construction of a particular clause in a Will or other testamentary document. In this regard, section 532 of the Code is most instructive. It reads:

> "**532.** The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought, as creditor, devisee, legatee, next-of-kin or heir-at-law, of a deceased person, or as 'cestui que' trust under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons, returnable in Chambers, for such relief of the nature or kind following as may by the summons be specified, and as the

circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:

(a) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin, or heir-at-law, or '**cestui que**' trust;

(b) the ascertainment of any class of creditors, legatees, devisee, next-of-kin or others;

(c) the furnishing of any particular accounts by the executors or administrators, or trustees, and the vouching (when necessary) of such accounts;

(d) the payment into Court of any money in the hands of the executors or administrators, or trustees;

(e) directing the executors or administrators, or trustees, to do or abstain from doing any particular act in their character as such executors or administrators, or trustees;

(f) the approval of any sale, purchase, compromise, or other transaction;

(g) the determination of any question arising in the administration of the estate or trust."

As can be seen, the subject-matter of the referral to Ellis, J., did not fall within the category of such matters provided for within section 532. The section sets out an exhaustive list of the questions falling for a judge's determination to which resort by way of an originating summons may be made. For an example in which resort can be made to an application by

way of an originating summons see ***Re Estate Henry McGrath*** [1975] 13 J.L.R. 98.

The above case related to an originating summons taken out in the Supreme Court under section 532 of the Code for a determination by a judge of certain clauses in a home-made Will of a testator.

The jurisdiction for the grant or refusal of non-contentious applications for probate or Letters of Administration ordinarily falls for consideration by the Registrar of the Supreme Court. Section 5(1) of the Judicature (Supreme Court) Additional Powers of Registrar Act is instructive. The sub-section reads:

> "**5(1)** Where under the Act the Registrar is empowered to exercise jurisdiction in relation to any matter, but on such matter coming before him, he considers that it is desirable by reason either of the nature of the matter or of the importance of the principles involved or of the difficulty of the legal principles connected therewith or any other reason, whether similar to the foregoing or not so to do, he may refer the matter to a Judge."

In the light of the above provision, the proper course open to the respondent in the event of an issue arising in relation to the stamping of the document grounding the formal grant of the Letters of Administration was to request the Registrar of the Supreme Court, as the functionary responsible for such matters ,to refer the question to a judge of the Supreme Court for his determination. Such a course would also have resulted in the saving of costs as well as valuable judicial time.

Ground 3

Learned counsel for the appellant submitted that before paying out the proceeds of the insurance policy the appellant is entitled to insist upon a legal discharge. He relied for support on ***In re Haycock's Policy*** [1870] 1 Ch. D. 611 per Jessel, M.R. at 613.

He further submitted that the only person who can give a legal discharge to the appellant is the person in whom the chose in action in relation to the policy lies. Where an assured dies intestate, the person who obtains the Letters of Administration becomes the owner of the chose in action. His title is derived from the grant. He cited in support ***MacGillivray on Insurance Law***, 5th Edition, Volume 2, paragraph 1612.

Learned counsel for the respondent rested his argument on the reasons advanced by the learned judge for his order. He contended that the proceeds of the policy were trust funds in the appellant's "hands". As the beneficiary (respondent) was experiencing difficulty in obtaining the necessary funds required to stamp the original Letters of Administration, it was just and equitable that the appellant advance the sum of $17,030 required for stamping the document which was a pre-condition to the formal grant being made by the Registrar.

Counsel cited no authority in support of this proposition. Nor did the learned judge.

On an examination of the authorities relied on by learned Queen's Counsel for the appellant, it is clear that his contention is sound. Jessel, M.R., in ***In re Haycock's Policy*** (supra) had no difficulty in stating that "I have

always understood that an assurance office has a right to a legal discharge."

In ***MacGillivray on Insurance Law***, (supra) at paragraph 1612 the following passage appears:

> **"Title of administrators.**
>
> Before letters of administration are granted the next-of-kin or other person entitled to the grant has no title to act, and if he purports to do so his acts are a nullity as affecting the estate of the deceased. He cannot institute an action or grant a receipt or perform any other act of administration. After letters of administration have been granted the title of the administrator relates back to the date of the deceased's death so as to vest in him all property including choses in action as from that date, but the grant does not operate to validate *ex post facto* any act of administration by him so as to give validity to that which at the time was a nullity. In no circumstances therefore should an insurance office make any payment to or settle any claim with a next-of-kin or other person who may be entitled to but has not yet received letters of administration, unless such payment is expressly authorised by the terms of the policy." [Emphasis supplied].

The underlined words, in our view, completely determine the issue raised in this ground. The learned judge in making the order directing the appellant company to comply with the request of learned counsel for the respondent acted without any legal authority in so doing.

The appellant company was fully justified in insisting upon proper documentary proof of the respondent's title and thereby his authority to act in the intestacy on behalf of the deceased's estate. They were, therefore, entitled to demand proof by means of a production of the Letters of

Administration before parting with the proceeds or any part thereof of the insured's policy.

In conclusion, it is our view that there is merit in the arguments advanced by learned Queen's Counsel for the appellant on both procedural grounds as well as on the substantive ground of this appeal. Having regard to the course that the matter eventually took, however, we would merely wish to take this opportunity for commending counsel for the manner in which this matter was resolved.