

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS MOTIONS NOS. 9 & 10/94

**BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.**

**In re ESTATE OF RODERICK FONG YEE, DECEASED
EXPARTE SAMUEL MITCHELL AND NOEL MCINTOSH**

**Enos Grant and Miss Allison Chung, instructed by
Clough, Long & Co., for the appellants**

May 22 and June 26, 1995

PATTERSON, J.A.:

Both Samuel Mitchell and Noel McIntosh, the appellants, applied by exparte originating summonses, couched in identical terms, for leave to file writs of summons against the estate of Roderick Fong Yee, deceased. Alternatively, each sought an order that Anita Fong Yee of 17 Dillsbury Avenue, Kingston 6 in the parish of St. Andrew, the widow of the said Roderick Fong Yee, deceased, be appointed to represent the estate for all purposes of the intended actions. Each deposed that he had worked with George Fong Yee, deceased, the father of Roderick Fong Yee, for a

number of years up to the time of his death in or about 1977. Thereafter, Roderick Fong Yee took over the business of his deceased father, and each appellant continued working for him up to the time of his death in or about October 1993. Since then, they have been turning up for work, but they have not had any work to do, nor have they been paid. Consequently, each is seeking to recover from the estate of Roderick Fong Yee vast sums which they say are owing for redundancy, vacation leave pay, and for pay in lieu of notice. They say they have been unable to discover the appointment of personal representatives of the deceased and their applications are aimed at the appointment by the court of a person to represent the estate or for an order that they proceed in the absence of any such representation.

The summonses came on for hearing before Cooke, J. on the 22nd June, 1994. Counsel for the appellants relied then, as he did before us, on the provision of section 124 of The Judicature (Civil Procedure Code) Law ("the Code") which reads:

"124. If in any cause, matter or other proceeding, it shall appear to the Court or a Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or Judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding, on such notice to such persons, if any, as the Court or Judge shall think fit, either specially or generally by public advertisement; and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter or proceeding."

Cooke, J. dismissed the summonses and expressed the view that the reliance placed on section 124 "was misconceived in that the cause matters or proceeding" to which

that section refers must have been subsisting at the time of the death of the deceased. Leave to appeal was refused.

Counsel applied to the court and was granted leave to appeal. He contended before us that section 124 of "the Code", on which his application was based, "sets out the jurisdiction and practice of the Court of Chancery which was taken over by the Supreme Court", and that under the provisions of that section the court may appoint a person to represent an estate where the cause of action survives the death of someone, and no personal representative has as yet been appointed. He buttressed his argument by reference to *Daniel's Chancery Practice* 1914 pages 155 & 156, and *Harrington v. The Assignees and Personal Representatives of Sarah Bytham, deceased* (1854) C.L.R. 1033, but I did not find much help there.

The provisions of section 124 of "the Code" may only be invoked when there is a valid proceeding before the court, and it is thought right that a person ought to be appointed to represent the interest of a deceased person in that proceeding. The wording of the section seems to make it quite clear, and the provision is not confined to cases where one of the parties to the proceeding has died and there is no legal personal representative to such party, but that it applies to all cases where the deceased person "was interested in the matter in question", whether or not he was a party to the proceeding at the time of his death.

There is no power under the provision of section 124 of "the Code" for the court or a judge to appoint a person as the legal personal representative of a deceased person, or any other person to represent the estate of such deceased person, for the purpose of instituting proceeding against the estate of such deceased person. It is the duty of the Administrator-General to apply for letters of administration to the estate

of all persons who die intestate having personal property valued over five thousand dollars if no relative takes out letters of administration within three months of the deceased's death, and also to the estate of all persons who die leaving a will but no executor is named therein or no executor will act (section 12 of the Administrator-General's Act). It is trite that administrators and executors may sue and be sued on behalf of or as representing the property or estate of which they are representatives (section 96 of "the Code"). Where it is contended that a cause of action survives against the estate of a deceased person, an application under section 124 of "the Code" is not the appropriate proceeding to constitute a personal representative for the purpose of making him a defendant. If the executors or administrators or, indeed, any person entitled to obtain a grant will not take the necessary steps to constitute themselves as the personal representatives of a deceased person, then an application may be made for a grant of administration to the Administrator-General or some other person, limited to defending the contemplated proceeding. It would be a special grant for the sole purpose specified in the limitation to the grant. (See *In the Goods of Knight* [1939] 3 All E.R. 928).

In the instant case, the appellants sought the appointment of a personal representative in an estate where no proceeding was before the court. Such an appointment is not within the scope of section 124 of "the Code". The learned judge

below came to a correct decision in dismissing both summonses. For these reasons we dismissed the appeal with costs to the respondents.

RATTRAY, P.:

I agree.

WOLFE, J.A.:

I agree.