[2016] JMCA Civ 47

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 17/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN ADMINISTRATOR-GENERAL FOR JAMAICA APPELLANT

AND GLEN MUIR RESPONDENT

Miss Kedia Delahaye and Miss Elise Campbell for the appellant

Raphael Codlin and Miss Annishka Biggs instructed by Raphael Codlin & Co for the respondent

21 September and 14 October 2016

MORRISON P

[1] This is an appeal from two orders made by Bertram Morrison J (the judge) on 12 May 2014 and 26 September 2014 respectively. For convenience, I will refer to these orders as 'the first order' and 'the second order'.

[2] Both orders were concerned with a parcel of land situated in the parish of Saint Elizabeth (the property). The property is registered at Volume 1330 Folio 727 of the

Register Book of Titles in the name of the late Mr Lumsden Ledgister (Mr Ledgister), who died on 3 February 2013. By the first order, the respondent was declared to be the owner of the property. The Registrar of Titles was ordered to cancel the certificate of title registered at Volume 1330 Folio 727 in Mr Ledgister's name and to issue a new certificate of title to the property in the name of the respondent. Among other things, the court also ordered that (i) the appellant (the Administrator-General) should be served with all documents in the suit; (ii) the sale of the property from Mr Ledgister to the respondent should be completed by the Administrator-General; and (iii) that the Administrator-General should have a right to apply to the court.

[3] By the second order, the judge refused the Administrator-General's application to vary or set aside the first order. Instead, the judge appointed her, "pursuant to Part 21.7 of the Civil Procedure Rule [sic] to apply for Letters of Administration in Estate Lumsden Ledgister, Deceased". The judge also refused the Administrator-General's application for permission to appeal against this order.

[4] On 6 February 2015, this court, differently constituted[1], granted the Administrator-General permission to appeal against both orders.[2] And, on 21 September 2016, after hearing submissions from counsel for the parties, the court announced that, for reasons to be given in due course, it would make the following orders:

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[1] Panton P, Dukharan JA and Sinclair-Haynes JA (Ag) (as she then was)
[2] **Administrator-General for Jamaica v Glen Muir** [2015] JMCA App 6

1. The appeal against the order of Bertram Morrison J made on 26 September 2014 is allowed and the orders made by the learned judge on that date are set aside.

2. The previous order made by Bertram Morrison J on 12 May 2014 is also set aside.

3. The amended counter-notice of appeal dated 11 March 2015 is dismissed.

4. There will be no order as to the costs of the appeal or the cross-appeal.

[5] Before stating my reasons for concurring in the making of these orders, I must give a brief background to the matter. On 17 January 2013, the respondent filed an action against Mr Ledgister in the Supreme Court[3]. In his claim form, the respondent sought specific performance of an agreement allegedly made between the parties, whereby Mr Ledgister would sell and he would purchase the property. Curiously, neither the claim form nor the particulars of claim filed on the respondent's behalf disclosed the consideration for the sale; but the particulars of claim averred that the total sale price had been paid and that the respondent had been let into possession of the property "in or around 2002". Exhibited to the particulars of claim were several receipts purportedly signed by Mr Ledgister evidencing payment by the respondent of various sums on account of the purchase price and related costs.

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[3] Claim No 2013 HCV 00295

[6] On 18 January 2013, the day after the action was filed, one Mr Dalton Giles, a district constable engaged on behalf of the respondent as process server, located Mr Ledgister at the premises of Island Radiology, Lot 18 Caledonia Mall, Mandeville. In his affidavit of service sworn to on 24 January 2013, Mr Giles gave the following account of what then took place:

> "5. That I was directed to a gentleman lying on a stretcher who was accompanied by a female. I enquired of the female as to her relationship with Mr. Ledgister. She told me that she was Mrs. Ledgister, the wife of Lumsden Ledgister and confirmed that the gentleman was Mr. Ledgister but that he was unable to speak.
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> 6. That I advised her that I had some court documents to serve on Mr. Ledgister and she agreed to accept service of the documents on his behalf. That in the presence of Lumsden Ledgister I handed the said documents to her and she accepted them."

[7] As I have already indicated, Mr Ledgister died on 3 February 2013. Just short of a year later, on 3 January 2014, Mr Muir filed a without notice application for court orders, purportedly against Mr Ledgister. In it, the respondent claimed a declaration that he was the owner of the property, and consequential orders empowering (i) the Registrar of the Supreme Court to sign all necessary documents to vest the property in him; and (ii) the Registrar of Titles to cancel the certificate of title and to issue a new certificate in his name. In his affidavit in support of the application, in which he provided details of the agreement allegedly entered into between himself and Mr Ledgister with respect to the property, the respondent confirmed that he was aware of the fact that Mr Ledgister was dead.

[8] It is against this background that the judge made the first order on 12 May 2014. On 10 June 2014, the Administrator-General, having been served a few days before with the papers in the action pursuant to the judge's direction, filed an application to vary or set aside the first order. The application was made pursuant to rule 11.16(1) of the Civil Procedure Rules 2002 (CPR), which provides that "[a] respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again". As required by rule 11.18(2), the application was made within 14 days of the date of service of the first order on the Administrator-General.

[9] In an affidavit sworn to on 10 June 2014 in support of the application, the Administrator-General, Mrs Lona Millicent Brown, pointed out the following:

> "9. The said Order in fact has the effect of granting the Claim without more and without a trial on its merits and/or by Default.
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> 10. That we have not been served with an Application for a Personal Representative to be appointed in the estate of Lumsden Legister [sic]. That his death occurred shortly after the Claim was filed (approximately three weeks) and that to the best of our knowledge information and belief an application for substitution of the Defendant was not made to the court. That the Suit ought not to continue against a deceased person without more. That the knowledge of the grave illness of the Defendant was known or ought to have been known one day after the filing of the said Claim. I refer to the Affidavit of Service of Dalton Giles at paragraph 3.
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> 11. That the Defendant's wife is alive or was alive at the material time and she would have been the fit and proper person to undertake representation as she

would have or ought to have knowledge of the alleged sale to the defendant. I refer to the Affidavit of Dalton Giles at paragraph5.

12. That we will state we are not the fit and proper party to represent the deceased/Defendant in this matter pursuant to CPR Rules 21.7 (2) (a). That we are not administering the estate of the deceased Lumsden Legister [sic] and have no knowledge of the sale and/or funds to conduct the transfer of same. That in addition we have no funds to effect the said Transfer and/or pay any incidentals to the Transfer of the said Property."

[10] Nevertheless, the judge dismissed the application and, as I have already indicated, proceeded to make the second order. As in the case of the first order, the judge gave no reasons in writing.

[11] Following on from this court's grant of permission to appeal, the Administrator-General filed the following grounds of appeal:

"a. That the learned Judge erred in law by proceeding to hear a claim against a deceased Defendant, where no personal representative was previously appointed and/or no Grant of Administration issued in the Deceased Defendant's Estate.

b. That the learned Judge erred in law by proceeding on an action in personam where there existed no person in law, natural or artificial, against whom the claim could proceed and against whom and [sic] order could be made.

c. That the learned Judge erred in law in hearing the Claim without the Claimant first making a preliminary application for a representative party to stand in the place of the Deceased Defendant.

d. That the learned Judge erred in law in directing the Administrator General for Jamaica to complete a sale, declared to exist on an irregular order.

e. That the learned Judge erred in law in finding that the subsequent granting of an Order pursuant to Part 21.7 of the Civil Procedure Rule for the Administrator-General for Jamaica to apply for Letters of Administration in Estate Lumsden Ledgister, Deceased, could cure the defect of the previous Order issued on the 12th day of May 2014.

f. That the learned Judge erred in law in denying the application of the Administrator-General for Jamaica to have the Order issued on the 12th day of May, 2014 set aside."

[12] Miss Delahaye, for the Administrator-General, put the case in a number of ways. First, she questioned whether, in the light of Mr Giles' account of the circumstances in which the claim form and the particulars of claim were handed to Mr Ledgister's wife, there had been any proper service in this case. In this regard, we were referred to rule 5.1 of the CPR, which states the general rule "that a claim form must be served personally on each defendant"; and to rule 5.13, which provides for alternative methods of service, none of which were utilised in this case. Second, Miss Delahaye referred us to rule 21.7 of the CPR, which governs proceedings against the estate of a deceased person and which, she submitted, had been ignored by the respondent in this case, thus rendering the first order bad on its face. And third, Miss Delahaye submitted in the alternative that, no acknowledgment of service having been filed on behalf of Mr Ledgister, the respondent ought to have applied for default judgment to be entered in accordance with rule 12.1 of the CPR. I will refer in a moment to a couple of the

authorities to which we were very helpfully referred by Miss Delahaye in support of her submissions.

[13] The response to these submissions was in the main carried by Miss Biggs for the respondent, with occasional assistance from Mr Codlin. First, it was submitted that there had been proper service on Mr Ledgister and that in this regard, Mr Giles' affidavit of service should be taken at face value. In particular, Miss Biggs referred us to rule 5.3 of the CPR, to make the point that "[a] claim form is served personally on an individual by handing it to or leaving it with the person to be served". Next, it was submitted that the orders made by the judge were within the powers granted to him by the provisions of the Administrator-General's Act (the Act), in particular sections 12, 22, 23 and 44. Then, as regards Miss Delahaye's alternative contention that the respondent ought to have applied for default judgment, Miss Biggs told us that, in his application for the first order, the respondent had been concerned to bring to the court's attention the fact that Mr Ledgister had died. In these circumstances, the respondent had deemed it improper to apply for default judgment against him.

[14] The principal issues which arise on this appeal appear to me to be whether, Mr Ledgister having died on 3 February 2013, it was appropriate for (i) the respondent to have filed a without notice application for an order against him on 3 January 2014; and, (ii) for the judge to have granted the first order on 12 May 2014.

[15] There is, of course, no question that, as section 2(1) the Law Reform (Miscellaneous Provisions) Act provides, "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". So in this case, upon the death of Mr Ledgister on 3 February 2013, the respondent's subsisting action against him survived against his estate. But, as Arden LJ observed in **Piggott v Aulton, Deceased**[4], "[t]he natural personality of the deceased came to an end on his death". In these circumstances, as Lord Diplock explained in **In re Amirteymour, deceased**[5], albeit in a somewhat different context –

> "...there must be in existence some person, natural or artificial and recognised by law, as a defendant against whom steps in the action can be taken. If and so long as there is no such person the action, though it may not abate, cannot be continued, as, for example, where a sole defendant to a subsisting action dies and no executor or administrator has yet been appointed against whom an order to continue the proceedings can be obtained under Ord. 15, r. 7."

[16] Accordingly, rule 21.7 of the CPR provides as follows:

> "(1) Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.
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> (2) A person may be appointed as a representative if that person –

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[4] [2003] EWCA Civ 24, para 21
[5] [1979] 1 WLR 63, 66

(a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and

(b) has no interest adverse to that of the estate of the deceased person.

(3) The court may make such an order on or without an application.

(4) Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.

(5) A decision in proceedings in which the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate."

[17] I should also mention rule 21.8, which provides that:

"(1) Where a party to proceedings dies, the court may give directions to enable the proceedings to be carried on.

(2) An order under this rule may be made with or without an application."

[18] Rule 21.7(4) makes it explicitly clear that, upon the respondent becoming aware of Mr Ledgister's death, no further step in the proceedings ought to have been taken by him, other than to apply for an order appointing someone to represent Mr Ledgister's estate for the purposes of the proceedings. On the face of the matter, it would seem to follow from this that the respondent's without notice application for the first order, in

which he quite properly disclosed the fact of Mr Ledgister's death the previous year, was wholly misconceived and ought not to have been granted by the judge. Instead, what ought to have been done, it seems to me, is that an application should have been made for an order appointing a suitable person - such as, perhaps, Mr Ledgister's widow, if indeed he had one[6] - to conduct the proceedings on behalf of the estate. Alternatively, if for any reason there was any uncertainty about the proper course to be taken in the light of Mr Ledgister's death, then it would also have been clearly open to the respondent to seek directions from the court pursuant to rule 28.1. In any event, it would also have been up to the judge to make such order as he considered appropriate in all the circumstances.

[19] But I naturally cannot lose sight of Mr Codlin's submission, urged with some force, that all of this must give way in a proper case to the provisions of the Act, in particular section 12. That section provides as follows:

> "The Administrator-General shall be entitled to, and it shall be his duty to apply for, letters of administration to the estate of all persons who shall die intestate without leaving a widower, widow, brother, sister, or any lineal ancestor or descendant, or leaving any such relative if no such relative shall take out letters of administration within three months, or within such longer or shorter time as the Court to which application for administration is made, or the Judge thereof may direct; and also to the estates of all persons who shall die leaving a will but leaving no executor, or no executor will act, if no such relative as aforesaid of such deceased shall, within the time aforesaid, take out letters of administration

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[6] Among the papers produced by the respondent is the death certificate of Lumsden Neil Ruben Legister, who died on 3 February 2013 and is described as a bachelor.

> to his estate. The Administrator-General shall be entitled to such letters of administration in all cases in which, if this Act had not been passed, letters of administration to the estates of such persons might have been granted to any administrator:
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> Provided that this section shall not apply to the estates of deceased persons for the administration of whose estates provision is made by law, nor to estates where the total value of the personal property does not exceed five thousand dollars, but it shall be lawful to appoint the Administrator-General, with his consent, administrator of any estate, notwithstanding that the total value of the personal property does not exceed five thousand dollars."

[20] Mr Codlin also relies on section 23 of the Act, which empowers the Supreme Court to authorise the Administrator-General to take possession of the property of any estate of which she is or is likely to become entitled to administration, where "the property of such estate is likely to be damaged or diminished for want of a proper person to take charge thereof, before letters of administration or letters testamentary can be taken out, or while it is doubtful who will apply for and obtain letters of administration or letters testamentary ..."; section 23A(2), which provides that where the Administrator-General is under a duty to apply for letters of administration, she may collect relevant assets, obtain advances from, and otherwise deal with, them; section 32, which imposes a duty on the Administrator-General to apply for letters of administration, "[i]n all cases in which the consent of the Administrator-General is not required"; section 44, which makes it lawful for the Supreme Court "to make any general orders respecting any application to the Supreme Court, or to the Judge thereof, under this Act"; and section 46, which provides that estates "...which the

Administrator-General is entitled to administer, or to have vested in him, shall not be administered by the Supreme Court, unless it is proved to the satisfaction of the Court that such estate or trust cannot be properly administered by the Administrator-General ..."

[21] Reliance was also placed on section 155 of the Registration of Titles Act, which permits the Registrar of Titles to make an instrument vesting title to registered land in a purchaser, upon production of sufficient evidence that the land has been sold by the registered proprietor; the whole of the purchase money has been paid; the purchaser has entered into possession with the acquiescence of the registered proprietor; and that the land cannot be transferred to the purchaser because, among other reasons, the registered proprietor is dead. On the basis of this section, it was submitted that the respondent was also entitled to the first order.

[22] In my view, notwithstanding the energy with which these contentions were advanced on behalf of the respondent, they cannot avail him on this appeal. In the first place, this is not a case about the administration of Mr Ledgister's estate. It is an ordinary civil claim in which, the defendant having died after the filing of the claim, the real question is what steps were required, as a matter of civil procedure, to permit the respondent to pursue his claim. In the light of the clear answer given to this question by the provisions of the CPR, I can see no basis for invoking the extensive powers given to the Administrator-General by the Act for use in the very different circumstances which would arise if she was involved in the administration of an intestate estate. But in

the second place, and in any event, there was absolutely no material placed before the judge, on either application, to enable him to make a proper determination whether any of the circumstances referred to in the various sections of the Act relied on by the respondent had arisen.

[23] As for the submission based on the provisions of section 155 of the Registration of Titles Act, it suffices to say, I think, that this is not a case of an application to the Registrar of Titles under that section. Therefore, it seems to me that, as Sinclair-Haynes JA (Ag) (as she then was) pointed out in her judgment on the application for permission to appeal in this matter[7], the respondent chose "to invoke the jurisdiction of the Supreme Court and must comply with the procedural framework".

[24] In the light of my clear conclusion on the issue which I have been discussing, I will not dwell on Miss Delahaye's further submission, that is, that the proper course for the respondent to have adopted in this case, no acknowledgment of service having been filed within the requisite period after service of the claim, was to apply for entry of judgment in default, pursuant to rule 12.4 of the CPR. On this point, I am rather inclined to think that the explanation given by Miss Biggs was a reasonable one: it would clearly have smacked of insincerity for the respondent to have applied for default judgment, in circumstances where it was known to him that Mr Ledgister had died a mere matter of 16 days after the claim was purportedly served on him.

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[7] [2015] JMCA App 6, para [16]

[25] And this brings me, lastly, to the question of service of the claim. Based on Mr Giles' affidavit, I have entertained serious doubts as to whether it can be said that there was any proper service on Mr Ledgister at all. For, not only is it clear that the documents were handed to the person who told the process server that she was his wife, and not to him, it is also open to question whether Mr Ledgister was at that time in any position to appreciate the significance of what was happening. However, I now think that, since there is no necessity to decide this issue for the purposes of the appeal, it might be best not to express a concluded view on it. In the light of the court's decision to allow the appeal, it is clear that, in the event that the respondent wishes to pursue the claim, the matter will have to return to the Supreme Court for determination. In those proceedings, the question of service will obviously be a live issue and so it seems to me that, in those circumstances, it would be best to leave the matter to be dealt with in that context.

[26] These are my reasons for concurring in the decision of the court set out at paragraph [4] above.

F WILLIAMS JA

[27] I have read in draft the reasons for judgment of the learned President and I agree that they adequately reflect the reasons for our decision.

EDWARDS JA (AG)

[28] I agree and have nothing further to add.