THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2003/0444

BETWEEN:

HEIRS OF CAMSELLE ST. CATHERINE
(Represented by Agatha Jules)

Claimants

and

[1] DARIUS ST. CATHERINE
[2] ST. ROSE ST. CATHERINE
[3] REGINA ST. CATHERINE
[4] SEMEPHER ST. CATHERINE
[5] PATRICK SMITH

Defendants

Appearances:

Lydia Faisal and Bernick Faisal for the Claimants
Esther Greene-Ernest for the First to Fourth Defendants
Dexter Theodore, QC and Barbara Vargas for the Fifth Defendant

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2017 : March 1;
2017 : March 24.

DECISION

[1] **SMITH J**: This interminable case began in 2003. Over the subsequent ten years, seven High Court Judges dealt with different aspects of it making various orders. It eventually ended up before the Court of Appeal in **Patrick Smith v Heirs of Camselle St. Catherine and others.**[1] At the

[1] [2015] ECSCJ No. 13

heart of the case is a Deed of Sale executed by the first four Defendants ("the four Defendants") transferring property ("the property") to the fifth defendant, Mr. Patrick Smith. The authority of the four Defendants to act as vendors was apparently derived from a Declaration of Succession declaring that the four Defendants were the lawful children and heirs of Camselle St. Catherine (the deceased) who was, at the time of his death, the owner of the land from which the property was extracted.

[2] As the case proceeded, it was established that of the four Defendants only the third defendant, Regina St. Catherine, was a child and lawful heir of the deceased. She herself died before the filing of the case.[2] The deceased, Camselle St. Catherine, had three other children who were also his lawful heirs and the parents of the first, second and fourth Defendants (grandchildren of the deceased).

[3] As Michel JA who wrote the judgment of the Court of Appeal in **Patrick Smith v Heirs of Camselle St. Catherine and others** put it: "*This case started life on 28th May 2003 by means of a fixed date claim filed by Agatha Jules (representing the Heirs of Camselle St. Catherine) against the four declarants to the declaration of succession, seeking an improbation of the declaration of succession and of any deed of sale arising therefrom*." I do not propose to regurgitate the whole history of the proceedings up to this point as it was set out with succinct and enviable clarity by the Court of Appeal. I will therefore only state the relevant background events relevant to the determination of the matter that is before me.

[4] On 10th March 2004 Edwards J made an order improbating the Declaration of Succession and an order improbating the Deed of Sale. Eight years later, in October 2008, the fifth Defendant (who had not up to that point been a party to the case, nor had been served with any court documents) was given leave by Cottle J to file a defence, thereby being joined as the fifth Defendant in the case. The fifth Defendant then filed a defence and counterclaim to the claim and an ancillary claim against the four Defendants.

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[2] The case against her was discontinued by notice of discontinuance filed on 5th February 2004.

[5] This triggered an application by the Claimants for a declaration that, since the order of Edwards J had not been set aside on appeal, Cottle J had no jurisdiction to do so and allow the fifth Defendant to be joined in the claim which had already been determined. Georges J who heard that application agreed that since Edwards J's order had not been set aside on appeal, her order stood and the matter was *res judicata*. The fifth Defendant appealed the decision of Georges J to the Court of Appeal.

[6] The findings of the Court of Appeal relevant to this trial before me are as follows. Firstly, the four Defendants are estopped by the doctrine of *res judicata* from re-litigating the issues determined by Edward J's order of 10th March 2004.[3] Secondly, the order made by Edwards J on 10th March 2004 is not binding on the fifth Defendant such as to prevent him from having the court revisit an issue which directly affects his interest and on which he has not been heard by the court.[4] Thirdly, that portion of Cottle J's order permitting the fifth Defendant to be joined as a party to the claim and giving him leave to file and serve a defence is valid.[5]

[7] The Court of Appeal concluded its judgment by ordering and directing that the substantive claim between the fifth Defendant and the Claimant (and the fifth Defendant's claim ancillary claim against the other four Defendants) be set down for trial in the High Court before a different Judge from any of those who has previously sat on this case in the High Court.[6]

[8] On the 13th February 2017, the trial commenced before this court. Mr. Theodore QC, Counsel for the fifth Defendant, took two preliminary objections which I shall refer to as the *locus standi* point and the improbation point. The essence of the objections is that: (a) since the representative of the Claimants, Agatha Jules, did not obtain Letters of Administration the claim is improperly constituted; and (b), since the improbation of the Deed of Sale was done without the executing notaries being parties to the case, it is a nullity. Counsel for the Claimant, Ms. Faisal, who had no notice of the preliminary objections, naturally asked for time to make written submissions in

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[3] Paragraph 38 of the judgment.
[4] Paragraph 48 of the judgment.
[5] Paragraph 51 of the judgment.
[6] Paragraph 56 of the judgment.

response. On 1st March 2017, the trial continued with Ms. Faisal presenting her response to the preliminary objections and Mr. Theodore making a short reply. On that date, I reserved judgment.

The Improbation Point

[9] The fifth Defendant's argument is that a deed may not be improbated unless the notary who made it is named as a party to the litigation. The Court was referred to the fairly recent Eastern Caribbean Supreme Court decision of **Desir and Another v Alcide**[7] in which the Court of Appeal held at paragraph 44 that:

> "…the law of St. Lucia is that a deed may not be improbated unless the notaries who made it are named as parties to the litigation. It is a pity that this law was not shown to the learned trial judge instead of being left to be raised for the first time on appeal."

[10] The Claimants made a couple of points in rebuttal. First, it was argued that there is no statutory requirement for a party seeking improbation to join the notaries and that, before **Desir v Alcide,** it was not the usual practice in St. Lucia. That precise point was taken in **Desir v Alcide**. The Court of Appeal acknowledged that there was no such statutory requirement either in the **Civil Code** or the **Code of Civil Procedure of Saint Lucia** but, after examining authorities on the point from the Quebec Court of Appeal, nevertheless declared that it was the law of Saint Lucia.

[11] As an adjunct to that point, the Claimants contended that **Alcide v Desir** postdated the order of Edwards J improbating the deed in 2004. This argument cannot avail the Claimants in the face of that deeply embedded principle that any authoritative decision of the Courts stating what is the law operates retrospectively. The decision does not state what the law is from the date of the decision, it states what it has always been: **R v Governor of Brockhill Prison, ex parte Evans** (No 2).[8]

[12] Secondly, the Claimants contend that the fifth Defendant could have appealed the order of Edwards J to the Court of Appeal or he could have opposed it under **Article 381** of the **Code of Civil Procedure**. Not having done so, he forever lost the opportunity to appeal and ended up with an order made by Cottle J which has been deemed a nullity by the Court of Appeal. That,

[7] [2012] ECSCJ No. 285.
[8] [1998] 4 All ER 993.

however, is not a correct characterization of the Court of Appeal's decision. The Court of Appeal specifically stated that Cottle J had the jurisdiction to make "the permission and leave order" and its validity was not affected by the invalidity of the "setting aside order". In other words, Cottle J was correct in granting the fifth Defendant permission to be joined as a defendant and leave to file a defence, the trial of which this Court has been directed to hear *de novo,* as it were, between the Claimant and the fifth Defendant.

[13] At the outset of this trial, the improbation point was taken. At the moment at which the point is taken, the notary who executed the deed is not named in the claim as he must be under the law of Saint Lucia as declared by the Court of Appeal. I am therefore unable, at this juncture, to proceed with a consideration of whether the Deed of Sale should be improbated unless and until the executing notary has been named in the claim. The fifth Defendant's preliminary objection on this point is upheld.

The Locus Standi Point

[14] The fifth Defendant contends that Agatha Jules has no locus standi to represent the Claimants since she is not the holder of a grant of Letters of Administration in respect of the estate of Camselle St. Catherine and that neither has any order been made by any Court granting her permission to act. The Court was referred to **Article 586 (2)** of the **Civil Code of St. Lucia** which provides that:

> "Where a person dies an intestate, his moveable and immovable property, until administration is granted in respect thereof, shall vest in the Chief Justice and Puisne Judges severally."

[15] The court was also referred to **Article 608** of the **Civil Code** which provides that:

> "Whenever any person dies an intestate and the persons entitled as heirs have renounced their interest in the succession, or whenever the heirs or the executors of the will of any deceased person are absent from Saint Lucia and not represented therein, or whenever from any cause a succession is without a representative for 12 months after the death of the person, the succession of such deceased person shall, notwithstanding anything in any other law contained, vest in the Administrator General who shall administer the same …The Court or a Judge may nevertheless on petition of a person interested appoint an administrator in the place of the Administrator General."

[16] Reliance was placed on these two separate articles in the **Civil Code** as well as on **Article 609** to make the point that Agatha Jules could not simply purport to represent the Heirs of Camselle St. Catherine in recovering property for the estate of the deceased without having first obtained Letters of Administration or an order of the Court or a Judge appointing her as an Administrator. In other words, there were statutory prerequisites that could not be ignored.

[17] The fulcrum of the fifth Defendant's arguments on locus standi was, however, the case of ***Ingall v Moran.***[9] In that case, a father sued in a representative capacity of administrator to his son's estate for damages in respect of his son's death in a motor accident by reason of the Defendant's negligence. The trial judge awarded judgment in his favour. On appeal it was argued that the action was never properly constituted since Letters of Administration had not been granted until after the writ had issued. Scott LJ held that:

> "It is true that when he got his title by the grant of letters of administration he prima facie became entitled to sue, and could then have issued a new writ …The old writ was in truth, incurably a nullity. It was born dead and could not be revived. 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."

[18] Luxmore LJ, in his judgment contrasted the position of an executor who can institute an action before probate of his testator's will is granted:

> "The reason is plain. The executor derives his legal title to sue from his testator's will… An administrator is, of course, in a different position, for his title to sue depends solely on the grant of administration…there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ."

[9] [1944] K.B. 160

[19] **Ingall v Moran** was later applied by Thom J in **George Leopold Crichton v Lena Holder**[10] and by Blenman J in **In the Matter of the Registered Land Act Cap 374 of the Laws of Antigua and Barbuda Revised Edition 1992 and another v Victor Wilkins**.[11] In both claims, it was held that Claimants who had not been granted Letters of Administration could not properly maintain claims on behalf of an estate. The principle was applied in **Shirley Joseph v Everad Burgin**[12] where Mitchell J held that "*Without a Grant of Letters of Administration to the estate of her mother, she had no right to bring an action to recover property of her mother's mother*."

[20] Counsel for the Claimant, Ms. Faisal, deployed a number of arguments against the locus standi point each of which I shall carefully analyze in turn.

[21] The first argument is that the fifth Defendant could have challenged the Caimants' standing (a) when he joined the claim as a defendant; (b) before Cottle J in June 2008 when he applied to be joined or; (c) before the Court of Appeal on appeal from the order of Georges J; consequently, such "exorbitant" delay constitutes laches and delay. Put another way, the Claimants say that the fifth Defendant has not challenged the Claimants' status in his pleadings, but rather acquiesced in the Claimants' authority to bring the claim.

[22] I do not see how this argument can avail the Claimants. It is clear that the fifth Defendant could not have taken the point when he was at the threshold applying for leave to be joined. A party first has to be given leave to join in a claim before it can raise any points it might be holding in reserve.

[23] In any event, even if the point could have been taken before Cottle J or the Court of Appeal, **George Leopold Crichton v Lena Holder** and **Michele Stephenson and another v Lambert James-Soomer; David Black v Lamber James-Soomer**[13] are good authority for the proposition that the issue of locus standi though not pleaded may be taken at any stage of the trial, raised even after the liability of a defendant has been determined at trial and can be raised for the first time on appeal. The Court of Appeal having confirmed his right to be joined and having ordered the trial of

[10] [2006] ECSCJ No. 306
[11] [2009] ECSCJ No. 175
[12] [2000] ECSCJ No. 302
[13] [2004] ECSCJ No. 308

the substantive claim, he has taken the point right at the start of the trial which he is entitled to do. The laches and acquiescence argument therefore fails.

[24] Next, it is argued that Agatha Jules is the executrix named in the Last Will and Testament of her aunt Regina St. Catherine (the third Defendant) and "by this fact she is also entitled to bring the claim alone or together with the others." I think **Ingall v Moran** provides clear authority that Agatha Jules could, if she wished, institute a claim as executrix of the will of Regina St Catherine, before obtaining a grant of probate. But I cannot see how being the executrix of Regina St. Catherine automatically, without more, entitles Agatha Jules (one of seventeen heirs) to institute and maintain a claim on behalf of the Heirs of Camselle St. Catherine in the face of clear authority that Letters of Administration must first be obtained. The fact that the other sixteen heirs of the Camselle St. Catherine provided Agatha Jules with Powers of Attorney to represent them regarding their interest in the property and to obtain Letters of Administration in the estate of the four deceased children of Camselle St. Catherine does not fulfill the requirement that Letters of Administration must first be obtained in order to properly constitute the claim. No authorities have been put before the Court that powers of attorney are sufficient for that purpose.

[25] The Claimants argue that the fifth Defendant is wrong to assert that even if Agatha Jules became appointed as Administrator at a later date, such an appointment would not relate back to the commencement of proceedings. The Claimants cite **Halsbury's Laws of England**[14] that "*the courts have adopted the doctrine that on the grant being made the administrator's title relates back to the time of death*". There is no question that once Letters of Administration are granted, the Administrator's title relates back to cover matters that occurred from the time of the Deceased's death to the date of grant. That would be true for and apply to Agatha Jules or whoever obtains a grant of Letters of Administration in the estate of Camselle St. Catherine. What **Halsbury** does not say and could not say is that the grant of Letters of Administration relates back so as to cure a claim that was issued in the name of a claimant who had not been granted Letters of Administration.

[14] Fourth Edition Reissue, Volume 17 (2) para: 35, 36, 37.

[26] The Claimants point out that **Ingall v Moran** was brought under the **Law Reform (Miscellaneous Provisions) Act 1934** of the United Kingdom which is similar in effect to **Article 609** of the **Civil Code** which provides for claims in tort and for damages where the cause of action was subsisting at the date of death of the Deceased. The contention is that **Article 609** does not apply to the facts of this case since the cause of action (improbation of deed) was not a cause of action subsisting at the time of death of the deceased in 1950. The further point is made that the case is brought by the heirs of Camselle St. Catherine who do not claim to be administrators of his estate and claim no damages under **Article 609**. The Claimants sought and have already obtained the cancellation of the documents which they allege were fraudulently crafted to deprive the estate of land whenever it is administered.

[27] It is true that **Ingall v Moran** was brought under the **Law Reform (Miscellaneous Provisions) Act** of 1934 the provisions of which are similar to **Article 609** of the **Civil Code**. It is also true that the Heirs of Camselle St. Catherine have indeed already obtained improbation of the deeds of succession and sale. It may even be true that there has been no interference with the assets of the estate which in fact have been preserved. Howsoever true all of this may be, it does not negate the principle that Letters of Administration must first be obtained by a Claimant who wishes to maintain a claim on behalf of an intestate.

[28] In the absence of authorities to the contrary, I consider that principle to be one of general application regardless of what the cause of action may be. I do not think it matters that the Claimants do not call themselves administrators, were not interested in being appointed as administrators and were motivated by the just cause of quickly addressing a perceived fraud. This Court has been directed to hear the claim as between the Claimants and the fifth Defendant for the first time. The locus standi point has been taken. It is my duty to apply the law regardless of the proper motives of the Claimants or the long history of the claim.

[29] Ms. Faisal then argued that **Ingall v Moran** itself cites situations where administration suits or suits relating to the administration of estates are brought in the absence of letters of administration. She relied on the following statement from Goddard LJ:

> "All these cases show that actions brought by persons who would be beneficiaries in the administration are not defeated, either where the person entitled to obtain letters is the plaintiff or where such person is the defendant, because a grant has not been made at the date of the writ. The action is brought to protect the estate… The cases mentioned in Daniell are not an exception to this rule of law. They are cases in which letters were not necessary for a plaintiff to establish his title to sue or in which the absence of letters did not afford a defence to the defendant."

[30] On a close reading of **Ingall v Moran**, reliance on the above statement from Lord Goddard is misplaced as it is taken out of context. Lord Goddard was apparently examining a line of authorities that held that though an administrator could not sue at law before a grant of Letters of Administration, he could do so in equity and that, if there were a conflict between law and equity, the latter must prevail. But then Lord Goddard went on to state:

> "…it is unnecessary to go through the many cases cited in argument because, in my opinion, it is the plain duty of this court to follow Chetty v Chetty (4), and that is conclusive on this point.

[31] In **Chetty v Chetty**[15], Lord Parker in delivering the advice of the Judicial Committee had said:

> "It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate …and the consequence is that he can institute an action in the character of executor before he proves the will… An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant.

[32] Is this a case in which Letters of Administration are not necessary for the Claimants to establish their right to sue on behalf of the estate of Camselle St. Catherine? The Claimants say that since the claim is in fraud they are entitled to bring the claim with our without Letters of Administration. They rely on a statement in **Blackstone's Civil Practice, The Commentary 2016** [16], under the rubric "Derivative claim by beneficiaries" that:

> "While claims involving the assets of an estate or *inter vivos* trust are ordinarily brought by or against the personal representatives or trustee, in special circumstances it may be possible for beneficiaries to bring a representative claim. Typical examples of special

[15] [1916] 1 AC 603, 608.

[16] Page 274, para 14.43

> circumstances are fraud on the part of the trustees or collusion between the trustees and third parties, or the insolvency of the trustee, although the categories are not closed…"

[33] I do not think that derivative claims by beneficiaries against trustees apply to the circumstances of this case. I think that that reference in **Blackstone** reflects unique problems encountered by beneficiaries in complex trust structures that holds assets through special purpose vehicles and where those trust assets have been depleted. Derivative actions are exceptionally allowed to enable beneficiaries to proceed against third party wrongdoers in circumstances where there is no other legal avenue available. The exceptionality of its application is reflected in the statement in **Blackstone** that if there are such special circumstances:

> "it is necessary to name the trustees or personal representatives as defendants …the claimant's representative capacity has to be set out in the claim form … and the special circumstances have to be set out in the particulars of claim …"

[34] The Heirs of Camselle St. Catherine are entitled to obtain letters of administration to institute a claim for any perceived fraud. This avenue was entirely open to them. The circumstances are not such that without a derivative claim the Claimants would be left without a remedy in the face of a perpetrated fraud.

[35] The Claimants seek to distinguish **Delcine Thomas v Victor Wilkins** by saying that the facts in that case involved a claim for compensation in money while the Claimants in this case are not asking for any personal benefit except preservation of the estate. The Claimants argue that it is unclear whether the court's decision would have been different had there been no other issues save the issue of standing and that it must therefore be distinguished from the case at bar. I am in no doubt that where the issue of locus standi is successfully raised in a case, in circumstances such as these, that issue whether raised by itself or in conjunction with other issues, is sufficient to dispose of or halt the proceedings.

[36] The Claimants also sought to distinguish both **Michele Stephenson and another v Lambert James-Soomer** and **Shirley Joseph v Everad Burgin** on the ground that the claimants in those cases claimed damages and declarations that would bring some kind of personal benefit to those claimants, while in this case what is sought is not personal but rather a benefit to the property. The

Claimants' contention is that this claim is to preserve property which remains intact until administration. I cannot agree that that point of distinction is sufficient to take this case out of the principle of general applicability that Letters of Administration must first be obtained before the Claimants can maintain a claim on behalf of the estate.

Conclusion

[37] In fine, I am not persuaded by the Claimant's arguments and authorities, though deployed with admirable deftness and ingenuity by Ms. Faisal, that the fifth Defendant's *in limine* points ought to be dismissed. Although I have not recited the full history of the proceedings because it is not necessary for the disposition of this application, suffice it to say that I understand the serious issues and complexities that form the substratum of the substantive claim that remain unresolved as a result of this decision.

[38] Naturally, this causes the Court considerable anxiety compounded by the fact that the case has dragged on for fourteen years; the fact that it took the fifth Defendant four years after the improbation order had been made to apply to be joined when there was evidence that he knew of the order; the very serious allegations of fraud alleged against the fifth Defendant and other factors. Regrettably, the circumstance of this application is not one in which there exists any judicial discretion that may be exercised in favor of moving on to the hearing of the substantive issues. That is a matter of profound pity.

[39] I am therefore constrained to make the following orders:

(1) The fifth Defendant's preliminary objections are upheld.

(2) The claim against the fifth Defendant is dismissed.

(2) Each party is to bear his/her own costs.

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE