

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2018/0004

BETWEEN:

DAPHNE FRETT

Appellant

and

**[1] REESO MADURO
[2] REGISTRAR OF LANDS**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mde. Gertel Thom
The Hon. Mde. E. Ann Henry, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Lavonna Burrows for the Appellant
Mr. Leroy Jones for the First Respondent
Ms. Maya Barry for the Second Respondent

2018: November 2;
2020: May 25.

Interlocutory appeal — Application to strike out amended claim — Preliminary issue — Whether notice of appeal filed out of time — Locus standi — Whether appellant has standing to bring claim on behalf of estate of decedent where no grant of letters of administration made in her favour — Rule in Ingall v Moran — Special circumstances principle exception — Whether special circumstances exist which enable appellant to bring proceedings without grant of letters of administration

The appellant, Daphne Frett (“Ms. Frett”) commenced a claim in the High Court against Mr. Resso Maduro (“Mr. Maduro”) and the Registrar of Lands. Ms. Frett’s claim sought declaratory relief in respect of several transfers of lands which had been owned by her late father, Mr. Malcolm Kenneth Maduro (“the Decedent”) during his lifetime. The essence of Ms. Frett’s claim was that the transfers were invalid because of the Decedent’s legal incapacity to effect such transfers. She contended that the transfers were effected as a result of undue influence or fraud on the part of Mr. Maduro and as a consequence, the

Decedent's estate owned nothing at the time of his death, and she and other siblings were deprived of the inheritance which they expected to receive. The claim against the Registrar of Lands was essentially that the instruments effecting the transfers were not properly executed by the proprietors of the lands transferred and as a result, the Registrar was negligent in carrying out its statutory duties.

At the time of filing the claim, Ms. Frett had made application for a grant of letters of administration in the estate of the Decedent. In the claim as originally filed, she purported to claim as executrix of the estate of the Decedent. However, as she had not yet been appointed as personal representative of the Decedent when the claim was filed, she subsequently amended the claim. In the amended claim, Ms. Frett claimed in her personal capacity as a beneficiary under the estate of the Decedent as no grant was made to her up to that date.

Subsequently, Mr. Maduro made an application for the amended claim to be struck out on the basis that the claim was an abuse of the process of the court and that Ms. Frett did not have the requisite standing to bring the proceedings. The learned judge struck out Ms. Frett's claim "with prejudice" on the sole basis that she did not have a grant of probate or letters of administration in the estate of the Decedent before commencing the claim.

Being dissatisfied with the decision of the learned judge, Ms. Frett appealed. Mr. Maduro, in written submissions filed for the substantive appeal, raised the preliminary issue of whether Ms. Frett had filed her notice of appeal out of time. The substantive issue which arises for this Court's determination is, however, whether the learned judge properly exercised her discretion in striking out Ms. Frett's claim.

Held: dismissing the appeal save for varying the order of the court below to remove the words "with prejudice"; and ordering that Ms. Frett pay the respondents' costs in this appeal, to be assessed if not agreed within 21 days of the date of this judgment, that:

1. Having regard to rules 3.2(2) and (3) of the **Civil Procedure Rules 2000**, and to the evidence of the date of filing of the notice of appeal, there is no doubt that Ms. Frett filed the notice of appeal within the required time.

Rules 3.2(2) and 3 of the **Civil Procedure Rules 2000** applied; **R (Dinjan Hysaj) v Secretary of State for the Home Department; Fathollahipour v Aliabadibenisi; May v Robinson** [2015] WLR 2472 considered; **Samuels v Mount St. John's Medical Center Board and Anor** ANUHCv2011/0785 (delivered 21st November 2013, unreported) considered.

2. The general rule, as applied in the Territory of the Virgin Islands, is that proceedings may not be commenced by a party for the benefit of an intestate estate if that party does not have a grant of letters of administration. However, a party may commence proceedings without a grant if special circumstances exist. To engage the special circumstances principle, the subject of the claim must be an asset in the estate at the date of the Decedent's death and there must be a person appointed as trustee of the estate whose conduct or inaction is depleting the

assets in the estate. In this case, although the learned judge failed to consider the special circumstances principle, it is clear that the lands which were the subject of the claim were never held in the estate of the Decedent, and that Mr. Maduro was not appointed as the trustee of the estate. Further, at the time of the alleged wrongdoing, the Decedent was alive. There are therefore no special circumstances which entitle Ms. Frett, without a grant of letters of administration, to bring proceedings on behalf of the estate of the Decedent. Accordingly, there is no basis for this Court to interfere with the exercise of the learned judge's discretion in striking out Ms. Frett's claim.

Ingall v Moran [1944] KB 160 applied; **Haastrap v Okorie and others** [2015] EWHC 1581 (Ch) applied; **Roberts v Gill & Co. and Anor** [2010] 2 WLR 1227 applied; **Hayim and Anor v Citibank N.A. and Anor** [1987] 1 AC 730 considered; **Michel Dufour et al v Helenair Corporation et al** (1996) 52 WIR 188 followed; **Kingsley Bowman v Hansraj Matadial** Saint Vincent and the Grenadines High Court Civil Appeal No. 7 of 1996 (delivered 16th September 1996, unreported)

3. The learned judge ought not to have dismissed Ms. Frett's claim "with prejudice". If Ms. Frett's application for letters of administration were to be granted in her favour, the dismissal of her claim "with prejudice" would preclude her from bringing a fresh claim and would not be fair in all the circumstances.

JUDGMENT

- [1] **HENRY JA [AG.]**: This is an appeal against the decision of the learned judge to strike out the claim brought by the appellant pursuant to an application made by the first respondent.

Background

- [2] Daphne Frett ("Ms. Frett") is the appellant and the first respondent, Reeso Maduro ("Mr. Maduro"), is her brother. Some time prior to 14th December 2016, Ms. Frett commenced a claim in the High Court against Mr. Maduro and the second respondent ("the Registrar of Lands") by fixed date claim form. Ms. Frett's claim sought declaratory relief in respect of certain transfers of lands which had been owned by her father, Mr. Malcolm Kenneth Maduro ("the Decedent") during his lifetime, and which transfers had been effected between 1997 and 1999. The Decedent, who is the father of both Ms. Frett and Mr. Maduro, died on 6th November 2004.

- [3] The essence of Ms. Frett's claim was that the transfers were invalid because of the Decedent's legal incapacity to effect such transfers, as a result of him suffering from amyotrophic lateral sclerosis (ALS) disease, as at the dates of transfers. She also contended that the transfers were effected as a result of Mr. Maduro's undue influence over the Decedent or they were a direct result of fraud on the part of Mr. Maduro. Ms. Frett further contended that, in consequence of the alleged wrongdoing by Mr. Maduro, the estate of the Decedent owned nothing at the time of his death on 6th November 2004. Her complaint is that she and other siblings have been deprived of an inheritance which they expected to receive on the death of their father.
- [4] The essence of the claim against the Registrar of Lands was that the instruments effecting the transfers were not properly executed by the proprietors of the lands transferred and that, as a result, the Registrar of Lands was negligent in carrying out its statutory duties.
- [5] The fixed date claim form was supported by affidavits sworn by Ms. Frett and two other deponents, Mr. Nizbett Maduro and Mr. Vanburn Maduro, also sons of the Decedent. These affidavits set out, in some detail, the allegations which were made against Mr. Maduro, in relation to the lands of the Decedent. The evidence put by Ms. Frett before the court below was that all of the acts which are now impugned by her took place prior to the death of the Decedent. There is no evidence from either respondent which counters that evidence.
- [6] In the claim as originally filed, Ms. Frett had purported to claim as executrix of the estate of the Decedent. However, as she had not yet been appointed as personal representative of the estate when the claim was filed, the claim was subsequently amended by her.
- [7] In the amended claim filed on 14th December 2016, Ms. Frett claimed in her personal capacity as a beneficiary under the estate of the Decedent because no

grant was made to her up to that date. Indeed, no grant was made in favour of Ms. Frett up to the date of the hearing of the appeal.

- [8] On 19th December 2016, Mr. Maduro applied to the court for the amended claim to be struck out pursuant to Part 26 of the **Civil Procedure Rules 2000** ("CPR") on the ground, essentially, that the claim was an abuse of the process of the court. Mr. Maduro contended in his application that the proceedings were "inappropriate and very much premature", and that Ms. Frett did not have the requisite standing to bring the proceedings.
- [9] On 27th January 2017, Mr. Maduro filed a defence to the claim. The defence was a bare denial of the matters pleaded in the amended fixed date claim form together with an assertion that Ms. Frett had no standing to bring the action and that the claim brought by her was "premature and inappropriate". No defence was filed by the Registrar of Lands. At the hearing, to which reference will be made hereafter, the court dismissed Ms. Frett's claim "with prejudice".
- [10] Leave to appeal was granted to Ms. Frett by the order of the Court of Appeal dated 31st July 2018 and she was directed to file the notice of appeal within 21 days of the date of the order. An order staying the order of the court below was also granted on 31st July 2018 and was expressed to continue until the determination of the appeal. Ms. Frett filed the notice of appeal on 22nd August 2018.

Preliminary issue raised by Mr. Maduro

- [11] Mr. Maduro, in written submissions filed for the substantive appeal, urged on this Court that Ms. Frett had filed her notice of appeal out of time when she filed the notice on 22nd August 2018.
- [12] Learned counsel on behalf of Mr. Maduro, Mr. Leroy Jones, referred to the order of the Court dated 31st July 2018 and relied on the authorities of **R (Dinjan Hysaj) v Secretary of State for the Home Department; Fathollahipour v Aliabadibenisi;**

May v Robinson¹ and Samuels v Mount St. John's Medical Center Board and Anor² to urge that by reason of her failure to file the notice of appeal within the stipulated time: (i) Ms. Frett had lost the right to pursue the appeal; and (ii) this Court had no discretion to extend the time for filing the notice.

[13] In reply to this point, learned counsel on behalf of Ms. Frett, Ms. Lavonna Burrows, relied on CPR 3.2(2) and (3) and submitted that the time for filing of the notice of appeal expired on 22nd August 2018 and that the affidavit of service filed on 5th September 2018, a stamped copy of which was provided to this Court, evidenced that the notice was filed on 22nd August 2018.

[14] I am satisfied, having due regard to CPR 3.2(2) and (3), and considering the evidence of the date of filing of the notice, that Ms. Frett complied with the order of the Court dated 31st July 2018 when she filed the notice of appeal on 22nd August 2018.

[15] Accordingly, I conclude that Mr. Maduro's preliminary point is without merit.

The Substantive Appeal

[16] The sole substantive issue in this appeal may be expressed thus, that is to say, whether the court below properly exercised its discretion in striking out Ms. Frett's claim at the stage at which the proceedings had reached.

[17] The strike out application came on for hearing in the High Court on 1st June 2018. The matter was canvassed *in extenso* in the court below and the court made an order striking out the claim "with prejudice", with no order made as to costs and made a further order directing the removal of the caveat from the lands which were the subjects of the underlying claim. As noted above, this latter order was stayed by the Court of Appeal by the order granting leave to appeal on 31st July 2018.

¹ [2015] WLR 2472.

² ANUHCV2011/0785 (delivered 21st November 2013, unreported).

[18] No formal written reasons for the decision were provided by the court when the order was made to strike out the claim. However, the transcript of the proceedings was filed in the record of appeal. It is on the basis of the statements of the court as recorded in the transcript that Ms. Frett has framed the grounds of appeal and that the appeal was argued.

The Proceedings and Decision in the Court Below

[19] When the application for the striking out of the claim came on for hearing, counsel for Mr. Maduro argued that the proceedings were a nullity because they were commenced by Ms. Frett when no grant of letters of administration had been made in her favour. Learned counsel, Ms. Maya Barry, on behalf of the Registrar of Lands likewise argued that the proceedings were a nullity.

[20] On the other hand, Ms. Burrows urged on the Court that there were special circumstances which would ground Ms. Frett's entitlement to bring the proceedings notwithstanding that she did not have a grant of letters of administration.

[21] In the court below (as in this Court), Ms. Burrows urged that **Ingall v Moran**,³ which prohibited the commencement of proceedings before the issuance of a grant of probate or letters of administration, did not apply in the Territory of the Virgin Islands. Ms. Burrows further urged that, even if **Ingall** applied, there were special circumstances which would take the case out of the rule in **Ingall v Moran** and would make it permissible for the claim to be advanced, despite that there was no grant of probate or letters of administration.

[22] In advancing that argument, Ms. Burrows relied on the judgment in the case of **Haastrap v Okorie and others**⁴ in which the learned master referred to the

³ [1944] KB 160.

⁴ [2015] EWHC 1581 (Ch).

special circumstances principle and relied on the authoritative restatement of the principle by Lord Collins in the case of **Roberts v Gill & Co. and Anor**,⁵ which principle is set out in paragraph 37 of this judgment.

[23] Ms. Burrows urged that the case of **Haastrup v Okorie** was authority for the principle that legally entitled beneficiaries of an estate could, in a proper case, institute a claim in the absence of a grant of probate or letters of administration. She urged on this Court to find that the matters set out in Ms. Frett's claim met the threshold of being special circumstances which would permit her to proceed with her claim.

[24] The transcript of proceedings records three occasions on which the trial judge stated that the proceedings could not properly be commenced by Ms. Frett without having a grant of probate or letters of administration. The trial judge did not make any statement that suggested that any consideration was given to the special circumstances principle. Moreover, before this Court, neither counsel for the respondents could assist the Court in finding any reference by the trial judge to the special circumstances principle.

[25] What is apparent from the transcript is that the sole reason for the decision of the court below was that the claim was brought prematurely in that when the proceedings were commenced, Ms. Frett did not have a grant of probate or letters of administration of the Decedent's estate. The trial judge rested on the fact that Ms. Frett did not have a grant and used that as the reason for striking out the claim and took the matter no further.

[26] It was clear therefore that this was the ratio of the decision in the High Court and it is on that basis alone that the trial judge exercised the discretion to strike out the claim.

⁵ [2010] 2 WLR 1227.

The Role of the Court of Appeal on Appeals against the Exercise of Judicial Discretion

[27] The circumstances under which this Court will interfere with the exercise of judicial discretion by the Court below has been well established in a line of cases starting from **Michel Dufour et al v Helenair Corporation et al**⁶ and **Kingsley Bowman v Hansraj Matadial**,⁷ which principle has been consistently applied by this Court.

[28] The approach was succinctly articulated in **Bowman** by the learned Chief Justice Floissac as follows:

“Since the disputed order is the result of the exercise of a judicial discretion, the disputed order should not be discharged or otherwise interfered with unless the two preconditions postulated by the House of Lords in **G v G** (1985) 2 AER 225 are satisfied. Firstly, it must be shown that in making the disputed order, the learned judge erred in principle either by failing to take into account or by giving too little or too much weight to relevant factors and considerations or by taking into account or by being unduly influenced by irrelevant factors and considerations. Secondly, this Court must be satisfied that as a result of the error or degree of the error in principle, the disputed order exceeded the generous ambit within which reasonable disagreement is possible and for this reason may be said to be clearly or blatantly wrong.”

[29] It is with this cautionary approach in mind that I consider the law on striking out proceedings and the legal principles applicable to the case at bar.

The Law on Striking Out of Proceedings

[30] It is well established that on an application for striking out a statement of case, as noted in the case of **Citco Global Custody NV v Y2K Finance Inc.**,⁸ the Court must consider only the claim as pleaded and ought only to strike out “in clear and obvious cases where it can be seen on the face of it that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the Court”.

⁶ (1996) 52 WIR 188.

⁷ Saint Vincent and the Grenadines High Court Civil Appeal No. 7 of 1996 (delivered 16th September 1996, unreported) at p.10.

⁸ BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).

- [31] In the case of **Ian Peters v Robert George Spencer**,⁹ George-Creque JA expressed that the Court should approach applications to strike out statements of claim with caution and referred to the statement of principle in the case of **Bridgeman v McAlpine-Browne**¹⁰ that “...a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence”.
- [32] The Court in **Myrna Norde v Jacqueline Mannix (As personal representative of Henry Alford Mannix)**¹¹ repeated this tone of caution and counseled that the discretion to strike out should only be used in clear and obvious cases, all the “moreso where the ground for striking out is that the claim is an abuse of the process of the Court, which is an extremely serious allegation in light of the general right to access to justice”.
- [33] In this regard, I am reminded that Ms. Frett’s claim was struck out “with prejudice”.

Discussion

- [34] The general rule is that proceedings may not be commenced by a party for the benefit of an intestate estate when the party does not have a grant of letters of administration. The principle, as explained and applied in **Ingall v Moran**, is that whereas an executor derives his title to sue from the testator’s will, an administrator’s right depends on the grant of administration, without which both at common law and in equity, he may not commence an action on behalf of the estate.
- [35] The rule as articulated in **Ingall v Moran** has been applied in this jurisdiction and I am satisfied that it applies in the Territory of the Virgin Islands. That said, I am also satisfied that there is an exception to that rule where the party seeking to commence the action demonstrates that there are special circumstances as

⁹ ANUHCVP2009/0016 (delivered 22nd December 2009, unreported).

¹⁰ [2000] EWCA Civ 524.

¹¹ ANUHCVP2015/0034 (delivered 16th February 2017, unreported).

explained by Lord Collins in **Roberts v Gill** which would take it out of the general rule.

[36] In the case of **Roberts v Gill**, Lord Collins examined the authorities dating back to the eighteenth century and up to 1987, in the case of **Hayim and Anor v Citibank N.A. and Anor**¹² and articulated the circumstances under which a beneficiary who did not have a grant of letters of administration or probate would be permitted to bring an action in order to recover property or assets of an estate.

[37] The principle was expressed succinctly by Lord Collins in **Roberts v Gill** as follows:

"The Special Circumstances which were identified in the earliest authorities as justifying a beneficiary's action were fraud on the part of the Trustee, or collusion between the trustee and the third party, or the insolvency of the trustee, but it has always been clear that these are merely examples of special circumstances, and that the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy".

[38] In a proper case, the special circumstances principle would operate to mitigate the rigours of the **Ingall** rule so as to permit a beneficiary to bring proceedings notwithstanding that there was no grant of probate or letters of administration. This is also the principle deriving from the case of **Haastrup v Okorie**.

[39] What also seems clear from the line of cases is that the subject matter of the claim must be an asset in the estate at the date of the death of the Decedent. Additionally, the cases also show that there must be a person who has been appointed as trustee of the estate whose conduct or inaction is depleting the assets of the estate.

[40] Having regard to all the circumstances of this case, I am satisfied that this Court is in just as good a position as the court below to consider the pleadings and to make

¹² [1987] 1 AC 730.

a determination as to whether Ms. Frett's pleaded case sets out matters which may be considered to be special circumstances which would justify the bringing of the proceedings by her.

[41] Based on the transcript, it would appear that the learned judge failed to have regard to the special circumstances principle and to consider whether Ms. Frett's case as pleaded demonstrated the existence of special circumstances which would have placed it within an exception to the **Ingall** rule. I consider that, in this regard, the court fell into error.

[42] The court below ought properly to have considered Ms. Frett's submissions in relation to the effect of the special circumstances principle on the **Ingall** rule. Further, the court ought to have examined Ms. Frett's case, as pleaded, to determine whether special circumstances existed so as to enable her to commence proceedings without a grant of letters of administration in her favour.

[43] In the case at bar, as noted above, the lands which were the subject of the claim were never held in the estate. Moreover, no one has ever been appointed as the personal representative of the estate. Certainly, Mr. Maduro was not the trustee of the estate. Finally, at the time of the alleged wrongdoing, the Decedent was alive.

[44] I have therefore arrived at the conclusion, having carefully considered the pleadings, evidence and the helpful submissions of learned counsel, that Ms. Frett has not demonstrated that there are any special circumstances so as to entitle her, without a grant of letters of administration, to bring these proceedings.

[45] Notwithstanding my conclusion that Ms. Frett was not, in the circumstances entitled to bring the proceedings, I am not satisfied that it was appropriate for the court below to dismiss her claim "with prejudice". As noted before, simultaneously with the filing of this claim, Ms. Frett had made application to the court for a grant of letters of administration which application had not been heard up to the date of

the hearing of the appeal. Up to the said date, that application remained pending. If that application were to be heard and granted in favour of Ms. Frett, the dismissal of her claim “with prejudice” would operate to preclude her from bringing a fresh claim which would not be fair in all the circumstances.

- [46] For that reason, I would order that the order of the court below be varied to remove the words “with prejudice”.

Conclusion

- [47] I would therefore dismiss the appeal save for varying the order of the court below to remove the words “with prejudice” and order that Ms. Frett pay the respondents’ costs in this appeal, to be assessed if not agreed within 21 days of the date of this judgment.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

CHIEF REGISTRAR