

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV: 2012-05167

BETWEEN

Anthony Jackson

Claimant

AND

James Seurajh

Defendant

Capital Insurance Company Limited

Co-Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. R. Chattergoon for the Claimant.

Mr. R. Khan for the Co-Defendant.

Ruling on preliminary submission

1. On the 25th December 2008 there was a motor vehicle collision between the vehicle driven by the Claimant and that driven by the Defendant. The claim in relation to this accident was commenced by Claim Form and Statement of Case filed on the 20th December 2012. At the time of filing, the Defendant was deceased, having died in the said collision.
2. The preliminary point raised by the Co-Defendant touches and concerns the validity of the claim as against the deceased Defendant. In his response, the Claimant has not only argued the point raised but has also proceeded to argue his application of the 5th March 2013 to appoint the Co-Defendant as the representative of the estate of the deceased Defendant for the purpose of the claim. However, the court specifically stayed the said application pending the determination of the preliminary point. The court will therefore not consider the said application at this stage.
3. The Co-Defendant submitted that the present action is a nullity *ab initio* and therefore ought to be struck out. In this regard it was contended that the failure of the Claimant to issue from the inception, the proceedings against the administrator of the estate of the Defendant renders the action a nullity which cannot be cured by subsequent substitution.
4. The Co-Defendant has relied on the case of **Dawson (Bradford) Ltd. and ors. v Dove and anr [1971] QB 331** in support of its contention for the principle that a writ issued against a person who is dead at the date of the issue of the writ, cannot be amended to substitute the executors as defendants as the court had no power under RSC Ord 15, r 6^a, and Ord 2, r 1^b, and Ord 20, r 5^c, to do so. The Co-Defendant further submitted that the **Dawson** case was accepted and applied in **Neesha Rooplal Goberdhan v Sookchan Harrilal and**

Motor One Insurance; Paul Rooplal v Sookchan Harrilal and Motor One Insurance Company Limited CV2010-02374, CV2010-02. In **Goberdhan** (*supra*) Pemberton J approved Dawson and held that the Claimants could not maintain a claim against a deceased person since he had died prior to filing. Pemberton J explained that at the date of filing there was no party to sue and the action ought to have been brought against the estate of the deceased.

5. Further, the Co-Defendant submitted that under Rule 21.7(4) it is clear that no step could be taken in an action against the estate of a dead party unless a person is appointed to represent the estate. The Co-Defendant draws a distinction between our Rules and Part 19.8(3)(b) of the English CPR which provides that “*a claim brought against a person who was in fact dead at its commencement will be treated as if it had been commenced against his or her estate*” in contending that in our jurisdiction a claimant could only initiate an action against a properly appointed legal personal representative.
6. The Claimant submitted that by virtue of s. 27(3)(b) of the **Supreme Court of Judicature Act Chap 4:01**, the claim was not a nullity and could be brought up to six months after the personal representative takes out representation. Further, the Claimant submitted that the Rule 21.7 supports the Act and confers on the court the power to grant the Claimant’s application to make the Co-Defendant the representative of the Defendant.
7. The Claimant also contended that the authorities relied upon by the Co-Defendant are not applicable as the facts are materially different from the present case.
8. The Claimant has argued in the alternative that if the court finds that the claim is a nullity, the court ought to correct any perceived error upon application and relied on the case of *Rooplal Gayah (trading as Gayah Transport Service) v Tractors & Machinery*

(Trinidad) Limited No. 548 of 1982 which concerned an application for an amendment. The principle emanating from that authority was that where no injustice would be done to the other party, the court should, save in cases where the error is fraudulent, correct the error.

9. Rule 21.7 CPR reads:

- “21.7
- (1) *Where in any proceedings it appears that a dead person was interested in the proceedings then, if the dead defendant has no personal representatives, the court may make an order appointing someone to represent his estate for the purpose of the proceedings.*
 - (2) *A person may be appointed as a representative if he*
 - (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 dead defendant'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 where 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 defendant's estate.”*

10. While Rule 21.7 provides for a representative to be appointed to represent a deceased's estate in proceedings, Rule 21.7(4) is clear that no step **other than** an application for an order to have a representative appointed may be made **until** the court has so appointed someone. Thus, the rule envisions that an application be made before the institution of proceedings against a deceased person. This however is not always the case and parties invariably find themselves in the position of having brought a claim against a dead person not knowing that the person is in fact deceased.

11. The Claimant submitted that in **Dawson**, the six month limitation period had already expired [the English equivalent to our s. 27(3)(b)], and thus, **Dawson** ought to be distinguished from the present case since no personal representative has yet been appointed.

12. In **Dawson**, which was a claim in damages for negligence against the plaintiffs' landlord, the cause of action arose in December 1962. The landlord died in July 1967, allegedly unknown to the plaintiffs. Probate of the landlord's will was granted in October 1967 so that in April 1968 the six month limitation period for the institution of an action against the executors had expired. However, in December 1968, the plaintiffs issued a writ against the deceased landlord and subsequently in 1969 discovered that the landlord had in fact died prior to the filing of the writ. The plaintiffs' application for substitution of the executors was granted by the registrar but on appeal the court held that there was no power under the rules to substitute a representative after the action had been instituted. On appeal the court reasoned that the rule did not allow for substitution even if the plaintiffs believed the landlord to be deceased as it could not be said that the mistake was a mere misnomer.

13. The court is of the view that while the facts of **Dawson** may not be materially similar to the present case, the principle which emanates there from is instructive. In both **Dawson**

and the instant case an action was filed against a person who had died before proceedings were instituted. The distinguishing factor however, is that in this case the application is one for the appointment of a representative and not for substitution. Additionally, a LPR had been appointed in **Dawson** but there is no such appointment in the present case.

14. While a distinguishing factual feature of **Dawson** was that a personal representative had been appointed in that case, the court is of the view that that fact is material only in respect of the application which would have to be made, in the circumstances, that is, substitution (Part 19 of the CPR) or representative (Part 21 of the CPR). In **Dawson**, the application was for substitution of the personal representative because an executor had already been granted probate, there is no such personal representative in the present case. Thus, the Claimant attempts to distinguish the cases on the fact that the limitation period for bringing a claim against a personal representative had already expired in **Dawson**. The court agrees that this is a material distinguishing fact in Dawson which would have impacted on the outcome.

15. In **Goberdhan** the Claimants were injured in a collision with the First Defendant in February 2007 and claims were filed in June 2010 in respect of injuries sustained in the accident. The Claimants were informed in July 2010 that the First Defendant had in fact died in November 2009, a fact which was unknown to the Claimants at the time of filing.

16. The material similarity was that the action had been brought against a deceased person and the principle emanating was that the court had no power to appoint a representative after the matter had been instituted. Pemberton J in applying **Dawson** explained at page 5 of the judgment:

“The Claimants cannot maintain a claim against a deceased person, SH since he died prior to the filing of the action. In other words, at the date of filing there was no party to sue.”

17. This court has given much agonising thought and deliberation to the dicta set out in the **Goberdhan** case. In so doing this court has come to the conclusion that in some cases, a broader approach ought to be advocated so as to ensure that justice is done to all parties. In this respect, the court is of the opinion that in the circumstances of this case, the act of instituting the claim against the deceased is not fatal to the claim. While it is true that at the time of filing of the claim there was in fact no person to sue, the estate of the deceased continued to exist in respect of claims made by or against it. That no legal personal representative had been appointed, did not derogate from the fact that the legal estate continued to exist after death and was **capable** of being sued. (See section 27 (1) of the Supreme Court of Judicature Act Chap 4:01). This court therefore respectfully disagrees with the dicta in the **Goberdhan** case that there was no party to sue at the date of filing of the claim. The benefit of the estate, in the court's view, was live and subsisting at the time of the filing of the claim.

18. When viewed from this perspective therefore, the act of issuing a claim against the deceased without appointing a representative **in this case** can be seen in its proper context, that is, a procedural irregularity which does not affect the substantive rights of the parties. This is so despite the fact that the claim is the originating process and the foundation upon which the entire case is conducted.

19. How is the court then to treat with such a procedural misstep which appears to be in contravention of Rule 21.7(4). The court has considered the dicta set out in the case of **Rooplal Gayah (trading as Gayah Transport Service) v Tractors & Machinery (Trinidad) Limited** No. 548 of 1982 **which** concerned an **amendment** to a statement of

claim to include facts which came to the Claimant's knowledge before the trial under the provisions of the Rules of the Supreme Court 1975 (the old rules). The plaintiff claimed for damages for breach of warranty, damages for breach of contract arising out of an oral agreement for the sale by the defendant to the plaintiff of a compressor and for damages for negligence in the carrying out of repairs to the compressor. The application to amend was made shortly after the new information came to the knowledge of the Attorneys for the plaintiff and it was submitted that the proposed amendment would not introduce a new cause of action and that the defence of limitation would not arise.

20. Master Ralf Doyle in **Rooplal Gayah** relying on the case of **Crooper v Smith (1884) 26 Ch.D. 700 at page 710** stated:

“... it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. Order XXVIII. rule 1, of the Rules of 1883, which follows previous legislation on the subject, says that, "All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.”

21. Master Doyle reasoned that the proposed amendments were so closely connected to what was originally pleaded that it amplified the plaintiff's claim rather than introduced a new cause of action.

22. This court is of the view that although the application before the Master was an application to amend, the principles espoused therein remains good law and are in fact embodied in reincarnated form within the rationale and spirit of our Civil Proceedings Rules. The overriding objective of the CPR mandates the courts *inter alia* to ensure that so far as is practicable, the parties are on an equal footing, that expense is saved, and that cases are dealt with expeditiously. These are principles and objectives to which the court must adhere and strive when interpreting the meaning of any rule or exercising a discretion given to it by a rule.

23. It is in this context that the court must consider the meaning of rule 21.7 (4) which reads;

“Until the court has appointed someone to represent the dead defendant'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.”

24. The court notes firstly that nowhere is the word "proceedings" defined. It may well be therefore that the rule recognises proceedings as being wider in scope than the word "claim" as both words are used from time to time but do not appear to be used interchangeably. To that end, it appears to this court that "proceedings" encompasses matters arising both prior and subsequent to the filing of the claim. But Rule 21.7 (4) ought not to be read in isolation. The rule derives its context from Rule 21.7 (1) which sets out the power of the court to appoint a representative where it appears that a dead person was interested in any proceedings. This in the court's view admits of a circumstance in which it is not known that a deceased, (*whether he died before or after*

the commencement of the proceedings) had an interest in those proceedings and it is during the course of those proceedings (*whether instituted before the claim is filed or by way of the filing of the claim itself*) that such recognition is made. It is upon such recognition that the stay imposed by rule 21.7 (4) comes into operation. **(Rule 21.9 (5) refers to 21.7 (4) as a stay).**

25. Therefore, in the court's view, rule 21.7 (4) operates to stay all further proceedings upon recognition of the interest of the deceased. In this way the provisions of the CPR acknowledge that there are circumstances in which a claim would be instituted without knowledge that the Defendant is in fact deceased and recognizes that in those circumstances there must be a stay of further proceedings until adequate arrangements are made for a representative to be appointed. The Rules therefore identify three broad categories. The first is when a claim is instituted and the defendant dies thereafter in which case the proceedings are stayed [rule 21.9 (5)] and an application for **substitution** is made (rule 19.5). The second is when it is known prior to the beginning of any proceedings that a deceased person has an interest in those proceedings. In that case there is also a stay of any proceedings (which in this case means for practical purposes that a claim cannot be filed) by virtue of rule 21.7 (4) and the claimant applies for an order that a **representative** be appointed [rule 21.7 (1)]. The third is when any proceedings (whether a claim or otherwise) are begun and it becomes apparent during the process that a named party in fact died prior to the filing of the claim. In those circumstances, the claim is stayed by virtue of rule 21.7 (4) until a representative is appointed.

26. The present case falls to be considered within the third category of circumstances highlighted above. In this case it is not that the claim was filed and it was subsequently discovered that the Defendant was deceased. It would have been known that the Defendant was deceased *ab initio*. In fact the death of the Defendant is pleaded and forms the basis of the claim. If the "discovery" of death was the focal consideration, this court would have no hesitation in finding that the claim is a nullity as against the Defendant.

However Rule 21.7 (1) makes no reference to the discovery of the death of the deceased by the Claimant. In the court's view the rule makes it clear that it is for the court to appreciate that a deceased person has an interest in the proceedings at which point the court can of its own motion, appoint a representative [Rule 21.7 (3)]. Ordinarily, a court would be in a position to so do only if it is brought to the court's attention by one of the parties. In this case, it is only upon the perusal of the claim as filed that it would have appeared to any court that the Defendant is deceased. So that the test as set out by the rule when given its ordinary meaning would be the appearance *to the court* that a dead person has an interest and has no legal personal representative. This in the court's view is wholly consistent with the power given to the court by Rule 21.7 (3) to make an order of representation *ex proprio motu*.

27. For these reasons the court does **not** agree with the submissions of the Co-Defendant that the failure of the Claimant to make the necessary application prior to the institution of the claim is fatal to and invalidates the claim despite the naming of the deceased as a party as opposed to that of the representative of his estate.

28. By way of comparison, the English CPR recognises explicitly that there may be instances where a person who is in fact deceased may have been sued without knowledge of the death at the time of the filing of the claim. See Civil Procedure Volume 1 page 501, rubric 19.8. As a consequence the English CPR provides at **Part 19.8(3)(b)** that "*A claim brought against a person who was in fact dead at its commencement will be treated as if it had been commenced against his or her estate*".

29. Attorney for the Co-Defendant submits that the difference highlighted in the English CPR demonstrates that our rules are fundamentally different in content. That there is no corresponding provision, he submits, necessarily means that once an action is commenced against a deceased person the action is a nullity. Further, Attorney argues

that in the English jurisdiction a claimant can properly institute a claim against an estate whereas in this jurisdiction it is only permissible to institute a claim against a representative of the estate and not the estate itself. This court does not agree that the difference highlighted by the English CPR means of necessity that our position lies in opposition to that of the English. The court must be wary of shutting out litigants on the basis of misnomers or purely technical errors. The essence of the claim in this case and in like cases, lies against the estate. Any judgment obtained will be executed against the assets of the estate. For practical purposes however, the estate not having personality, there must be a person who acts on behalf of the estate. That person is its representative. The distinction therefore between the estate and the representative in the present case is one without a substantive difference.

30. In arriving at its decision, the court also had regard to the overriding objective and its application in relation to other material factors. Firstly, there are two related claims in which the deceased Defendant's son has been appointed representative. These claims subsist and are yet to be tried. To dismiss the present claim would be to place the Claimant in the position of having to either have an LPR appointed by way of grant or to pursue an application to have a representative appointed which said application is in any event before the court at present. The Claimant would then have to re-file a claim thereby delaying the trial of the other two matters as they all touch and concern the same facts. This will no doubt also result in increased costs to all of the litigants. This it appears to the court will be tantamount to a court sanctioned unnecessary increase in expense and wastage of time when the end result will more than likely be the continuation of the claim in any event.

31. Secondly, the court also considers that there shall be no prejudice to the Co-Defendant in making a decision to uphold the validity of the claim and so both parties shall be on equal footing. To the contrary, to do otherwise may well result in delay which redounds to the disadvantage of all parties at the end of the day. In short, the court will not, in these

circumstances, shirk from its duty to ensure that these matters are dealt with expeditiously in keeping with the overriding objective of the CPR.

32. For the avoidance of doubt, this court must not be thought to be suggesting that the Claimant is absolved from the responsibility of applying for someone to be appointed representative prior to commencement of the claim. This, the Claimant ought to have done. However, the court's decision on the validity of the claim ought not to be predicated upon the fault of the Claimant in failing to make such an application prior to the filing of the claim. In these circumstances a court can and this court intends to express its dissatisfaction with the misstep of the Claimant by way of a suitable order in relation to costs at the appropriate time.

33. In the circumstances the submissions made by the Co-Defendant are overruled and the court shall now proceed to hear parties on the issue of costs in relation to these arguments and shall also hear the parties in relation to the merits of the application of the Claimant of the 5th March 2013 to have the Co-Defendant appointed as representative of the Defendant for the purpose of the claim.

Dated this 4th day of June, 2013.

Ricky Rahim

Judge