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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN :

ALEXANDRINE AUSTIN and  
DEBORAH AUSTIN, SHARLENE  
AUSTIN and RICHARD AUSTIN  
(infants by their mother  
and next friend MARIA  
LEZAMA)

Appellants

- and -

GENE HART

Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from a judgment of the Court of Appeal of Trinidad and Tobago (Corbin and Hassanali, JJ.A., Kelsick J.A. dissenting) dated 22nd July 1980 dismissing the Appellants' appeal from the judgment of Warner J., dated 25th July 1977 on the grounds that it was not competent for the Appellants, as dependants, to bring an action within six months of the death of the deceased within S.8 of the Compensation for Injuries Ordinance (chapter 5 No. 5).  
pp.26-31  
54-66  
& 31-54  
pp.16-23

2. The first Appellant is the mother of one Simon Austin, the said deceased and the other three Appellants are infant children of the deceased.  
pp. 2 & 4

3. On 3rd May 1974 the said Simon Austin was travelling as a passenger in a motor vehicle driven by the Respondent when the motor vehicle was involved in an accident whereby the said Simon Austin sustained injuries from which he died on 4th May 1974.  
p.5

4. By his last will, dated 12th September 1970, the said Simon Austin appointed Ramesh Maharaj and William Austin to be the joint executors of that will. Ramesh Maharaj renounced probate; William Austin was granted probate on  
p.11  
p.19  
11

28th May 1976

- pp.1-3  
pp.4-6
5. By a writ of summons issued on 2nd August 1974, within three months of the deceased's death, the Appellants brought an action against the Respondent, the second third and fourth Appellants suing by their mother and next friend Maria Lezama. By that action the Appellants claimed in their capacity as dependants of the said Simon Austin and for the benefit of themselves damages for negligence in respect of the accident which caused his death, under S.8 of the Compensation for Injuries Ordinance Ch. 5 No. 5. S.8 reads as follows: 10
- "8. (1) Every action in respect of injury resulting in death shall be for the benefit of the wife, husband, parent, and child, as the case may be, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased. 20
- (2) If there be no executor or administrator of the person deceased, or if although there be such executor or administrator no action shall, within six months after the death of such deceased person, have been brought by and in the name of his executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator." 30
- pp.6-8  
pp.9-11  
p.17 11.  
12-14
6. By his defence dated 28th October 1974 the Respondent denied negligence and damage. That defence was amended on 9th July 1975, pursuant to leave granted by Narine, J. to add the contention that the court had no jurisdiction to entertain the Appellants' claim or to enter any judgment thereon for the reason that the said Simon Austin had by his will appointed two executors, in one of whom, namely William Austin, the right to bring an action pursuant to S.8 of the Compensation for Injuries Ordinance was vested at all material times. 40
- pp.17  
11.15-24
7. The issue so raised was ordered on the direction of Braithwaite, J. given on 18th 50

February 1977 to be tried as a preliminary issue

8. At the trial of the preliminary issue the Respondent's contentions were as follows. There are only two situations in which a dependant is entitled to bring an action himself under section 8: (1) at any time when there is no executor or administrator, or (2) if there be an executor or administrator, where six months have passed since the death and no action has been brought by him. The word "executor" in section 8 means the person named as executor in the will whether or not such person has obtained probate of the will, and therefore William Austin was "executor" for the purposes of section 8 from the moment of the said Simon Austin's death. Since there was an executor and since six months had not elapsed since the death, neither of the two situations mentioned above existed at the time when the Appellants brought their action on 2nd August 1974, and therefore they were not competent to bring it with the result that it should be dismissed.

pp.12-13  
& 15-16

9. The Appellants contended that "executor" in section 8 above means an executor who has been granted probate. Reference was made to S.21 of the Wills and Probate Ordinance Ch.8 No.2.

pp.13-14

S.21 reads as follows:

"21. No will of any person deceased shall have any effect whatever, either in law or in equity, or shall pass any right, title or interest whatever, until the same has been duly proved in accordance with the provisions of this Ordinance."

They further contended that even if William Austin was executor for the purposes of S.8, their action could nevertheless proceed since in the event six months subsequently elapsed from the death without the executor having brought the action under S.8 in his own name on their behalf.

10. Warner, J. gave judgment for the Respondents with costs. The learned Judge held that the ordinary meaning of the word "executor" is the person named in the will of the deceased as executor, that the word "executor" in S.8(2) above is used in its ordinary meaning and that that meaning is not altered by S.21 above. He went on to hold that it was unnecessary to consider the question of the ordinary meaning of the word "executor" since the doctrine of relation back meant that there was an executor of the said

pp.16-23

pp.19  
11.31-33  
p.19  
11.33-37

p.19  
11.42-44

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p.21 11.1-4 p.21 11.4-8	Simon Austin on 2nd August 1974, and so the first situation in S.8(2) could not apply. By "relation back" in this context the learned Judge was apparently referring to the doctrine that an executor derives his title from the will and not from the grant of probate. He rejected the contention that the failure of the personal representative to bring an action within six months could validate the premature action by the dependants.	10
p.22 11.10-14	11. The Court of Appeal by a majority dismissed the Appellants' appeal with costs.	
pp.66-67	12. Corbin J.A. gave judgment in favour of the Respondent. The grounds for his decision were as follows:	
p.29 11.1-5	(i) S.21 above does not affect the appointment of an executor, but is solely intended to prescribe the time at which legal and equitable interests created under a will shall pass;	20
p.29 11.10-12	(ii) there is no warrant for attaching any unusual meaning to the word "executor" in S.8;	
p.29 11.24-36	(iii) the ordinary meaning of the word "executor" is as stated in 17 Halsbury's Laws 4th Ed para 702 and Strouds Judicial Dictionary 4th Ed at p.968.	
p.28 11.27-32	(iv) if there is an executor the competency of the dependants to bring an action arises only if the executor has failed to do so at the expiration of six months after the death;	30
p.28 11.33-36	(v) the Appellants were not competent to bring the action when they did as there was an executor appointed under the will of the deceased	
pp.54-66	13. Hassanali, J.A. gave judgment in favour of the Respondent.	40

The grounds for his decision were as follows:-

- (i) the primary meaning of "executor" is the person so appointed by a

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- testator in his will to carry out the provisions of the Will; p.58  
11.46-49
- (ii) S.21 will not support the contention that the word "executor" in S.8(2) must be confined in its meaning to an executor after probate of the will has been granted; p.61  
11.29-34
- 10 (iii) the word "executor" in S.8(2) must be given its primary meaning; p.61  
11.48-51
- (iv) therefore it was not competent for the Appellants to bring the action on 2nd August 1974; p.62  
11.5-7
- (v) since the dependants did not come within either of the situations in S.8(2) the action was not maintainable. p.63  
11.9-13
14. Kelsick, J.A. gave a dissenting judgment in favour of the Appellants. The basis of his decision was that as no proceedings were instituted by the executor within six months, there was "no violation" of S.8(2), and the dependants' action could proceed. Though not strictly necessary to his decision, he went on to express his opinion that S.21 which was enacted after S.8- pp.31-54
- 20
- (i) operates to make "executor who has proved the will" the ordinary and natural meaning of the word "executor", and p.48  
11.1-4
- 30 (ii) changes the meaning of the word "executor" in S.8(2) to "executor who has proved the will". p.51  
11.41-49

The learned Judge held consequently that there was no executor within the meaning of S.8(2) when these proceedings were commenced and the proceedings were valid. p.52  
11.9-13

15. The Respondent respectfully submits that this appeal should be dismissed and that the judgments of Corbin and Hassanali, JJ.A. are correct. It is respectfully submitted that the dependants' action under S.8 must be brought by and in the name of the executor or administrator. The dependants are only competent to bring the action in their own names if one of the two exceptions in S.8(2) applies.

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16. It is plain that the Appellants' action was commenced within six months of the death of Simon Austin. It is respectfully submitted that the Appellants could only bring themselves within the first exception in S.8(2) if William Austin was not executor when they brought their action and within the second exception in S.8(2) if William Austin was then executor but it was possible to argue that his failure to bring an action within six months of the death in some way validated their premature action. 10

17. The Respondent respectfully submits that there is no reason to give the word "executor" in S.8(2) other than its ordinary and natural meaning, as held by Corbin and Hassanali, JJ.A. Its ordinary meaning is said by Williams Mortimer and Sunnucks on Executors Administrators and Probate 16th Edition p.16 to be "the person appointed by the testator to execute the will". The Respondent respectfully submits that the term may be more precisely defined as "a person who has been, or is capable of being, granted probate". During the period between the death of Simon Austin and the grant of probate, William Austin was clearly capable of being granted probate and so would ordinarily be called an executor. 20

18. The Respondent respectfully submits that S.21 does not affect the meaning of the word "executor" in S.8 since: 30

- (1) S.21 does not on its true construction have any effect on the law relating to executors, as held by Corbin, J.A.;
- (2) alternatively, S.21 does not affect or alter the ordinary and natural meaning of the word "executor", particularly as S.21 was enacted after S.8.

19. The Respondent's primary submission is therefore that at the date on which the Appellants commenced their action William Austin was executor of Simon Austin's will within S.8(2) 40

20. The Respondent accordingly submits that if, as he contends, William Austin was executor within S.8(2) the Appellants' action was premature and invalid since neither the first nor the second exception in S.8(2) enabled them to bring an action in their own names. It is respectfully submitted that there is no warrant for saying that the expiry of six months from the death without action by the executor can in some way validate an 50

action by dependants who do not fall within either of the exceptions in S.8(2).

21. The Respondent respectfully submits that the judgments of the learned Judge and of the majority in the Court of Appeal are correct and ought to be affirmed and that this appeal ought to be dismissed with costs for the following (among other)

R E A S O N S

- 10 (1) BECAUSE S.8(1) of the Compensation for Injuries Ordinance Ch. 5 No. 5 requires that every action in respect of injury resulting in death shall be brought by and in the name of the executor or administrator of the person deceased:
- (2) BECAUSE the action brought by the Appellants on the 2nd August 1974 did not fall within either of the exceptions provided for in S.8(2) of the said Ordinance Ch. 5 No. 5.
- 20 (3) BECAUSE William Austin was executor of the Will of Simon Austin within the said S.8(2) at the time the Appellants commenced their action:
- (4) BECAUSE the Appellants brought the action in their own names before six months had elapsed from the death of Simon Austin:
- 30 (5) BECAUSE the Appellants brought the action in their own names when by the terms of the said S.8 they were not competent to do so:
- (6) BECAUSE the Appellants' action, being invalid when brought, is not affected or validated by reason of the fact that upon the expiry of six months from the date of Simon Austin's death an action had not been brought by or in the name of the executor, William Austin:
- 40 (7) BECAUSE of the other reasons given in the judgments of Warner, J. and Corbin and Hassanali, JJ.A.

STUART N. MCKINNON

MARK STRACHAN

IN THE JUDICIAL COMMITTEE OF THE  
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O N A P P E A L

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B E T W E E N :

ALEXANDRINE AUSTIN and  
DEBORAH AUSTIN,  
SHARLENE AUSTIN and  
RICHARD AUSTIN (infants  
by their mother and next  
friend MARIA LEZAMA) Appellants

- and -

GENE HART Respondent

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CASE FOR THE RESPONDENT

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