IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 111 of 2012

BETWEEN : **EREMASI BALEKABA as Next of Kin of RATU SIRELI TABETURAGA** Deceased of Naiserelagi Village, Ra.

Plaintiff

AND : **JAGDISH** of Saweni Back Road, Lautoka, Farmer.

1st Defendant

AND : **SHALENDRA NAIR** of Saweni Back Road, Lautoka, Bus Driver.

2nd Defendant

R U L I N G

INTRODUCTION

[1]. Whether the writ filed herein which indorses the father suing as "next of kin" of his intestate deceased child is valid, is the issue before me. It is so because the father in question did not have letters of administration at filing time. There is authority in **Ingall v Moran** (see below) that a writ filed by a claimant purportedly on behalf of an intestate's estate is null and void, and therefore incurable, if the claimant did not have letters of administration at the time of filing. On this authority, AK Lawyers seek to strike out the writ and statement of claim under Order 18 Rule 18 of the High Court Rules. The plaintiff's lawyers have not appeared to defend the writ[1].

[2]. The deceased child had died as a result of a motor vehicle accident on 25 May 2009, allegedly, due to the negligent driving of the first defendant of a vehicle owned by the 2nd defendant. If the claim is struck out now, the plaintiff will not be able to file a fresh claim as he will then be caught under the Limitation Act (Cap 35).

[3]. The cases cited to me all concern a plaintiff who sues, either as *"administrator"* or as *"intended administrator"* on behalf of the intestate's estate, but who had not obtained a grant of administration. Do these apply also to the plaintiff who has no grant but is suing as *"next of kin"* of a deceased?

[1] From an affidavit of service sworn by Tileshni Gounder, a copy of the summons and cover letter were faxed to Ravono & Raikaci Law on 07 August 2012 who then returned-fax the same on 16 August 2012 with their *"Service Accepted w/o Prejudice"* stamp endorsed. A copy of that return-fax is annexed to Gounder's affidavit.

LETTERS OF ADMINISTRATION IS THE AUTHORITY TO SUE AS "ADMINISTRATOR"

[4]. A person who claims on behalf of an intestate's estate must first obtain a grant of letters of administration before he can file proceedings. Otherwise, his writ and claim will be null and void, and that nullity will not be curable by amendment. This is so because an administrator derives his title to sue from the grant of letters of administration. Because of this, he cannot institute proceedings without grant.

[5]. In contrast, an executor derives her title to sue from the Last Will and Testament of the testator, rather than from the grant of probate. Courts have long recognised that the executor's entitlement to sue actually crystallizes upon the testator's death. In other words, she can sue even before probate is granted to her because all rights of action of the testator vests in her (executor) upon the testator's death. But it must be remembered that she cannot obtain a Court Order without grant because the Rules require her to prove her title-by probate, at the hearing, before a decree can even be considered[2].

[6]. Lord Parker in delivering the advice of the Judicial Committee in **Chetty v. Chetty [1916] 1 A.C. 603, 608**, explains the underlying rationale:

> 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. The personal property of the testator, including all rights of actions, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the Rules of the Court, he is allowed to prove his title. 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. The law on the point is well settled (my emphasis).

(see also **Ingall v Moran [1944] 1 AER 97; Millburn-Snell and others v Evans [2011] EWCA Civ 577; [2011] WLR (D) 179) [2012] 1 WLR 41**[3].

[7]. Luxmore L.J. in **Ingall v Moran** at page 167 to 169 said:

> It is…well established that an executor can institute an action before probate of his testator's will is granted, and that, so long as probate is granted before the hearing of

[2] And so, as is often the practice, the hearing of an executor's proceedings will be postponed to await the grant of probate.

[3] In **Millburn-Snell and Others v Evans [2011] EWCA Civ 577**, Lord Justice Rimer said that Ingall v Moran [1944] KB 160 established that a grant of administration did not retrospectively validate a writ.

> the action, the action is well constituted, although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary only because it is the only method recognized by the rules of court by which the executor can prove the fact that he is the executor…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…It is true that a person who ultimately becomes an administrator may start proceedings in the Chancery Division for the protection of the intestate's estate, and can obtain in a proper case interim relief by the appointment of the receiver pendente grant, but in all such cases the person who institutes such proceedings has a beneficial interest in the intestate's estate, for he would not obtain a grant unless he had such an interest either as heir at law or as one of the next of kin or as a creditor. In such cases the well recognized practice in the Chancery Division is to endorse the writ in the first instance for the only relief then obtainable, namely, the appointment of a receiver pendente grant, and to apply to amend the writ after the grant has been obtained, if further relief is required, by adding a claim for administration of the estate with or without specific directions with regard to any special relief required.

(my emphasis)

IT IS THE COURT THAT GIVES THE AUTHORITY TO SUE AS ADMINISTRATOR

[8]. To reiterate, the grant of letters of administration is the only valid authority from which an administrator derives capacity and locus to sue on behalf of the estate. Having said that, it must then be noted that a grant of letters of administration is actually given by the High Court of Fiji (section 7 Succession, Probate and Administration Act (Cap 60).

[9]. In Fiji, grants of Letters of Administration are issued under the hand of the Chief Registrar of the High Court and the Seal of the High Court (see Notice LN 104/45 WEF 4 May 1945)[4]. Hence, there is every reason to say that it is the High Court of Fiji that grants that authority to sue in the capacity of an administrator and that the administrator acquires standing and locus by virtue of his being appointed so by the High Court of Fiji.

[10]. In **Williams, Mortimer & Sunnucks on Executors, Administrators and Probate**[5] at paragraphs 8-10, the learned authors reiterate the point thus:

> …an executor may perform most of the acts pertaining to his office, before probate. However, for an administrator, the general rule is that a party entitled to administration can do nothing as administrator before letters of administration are granted to him. This is because he derives his authority entirely from the

[4] see also Marie Chan's Annotated High Court Act as amended to 25 August 2010 at page 33.
[5] (London, Sweet & Maxwell 19th ed.) 2008 .

> appointment of the court… After his appointment, he has the same rights and liabilities and is accountable as if he were the executor

(my emphasis)

[11]. That the court is the appointing authority was explained by Scott LJ in **Ingall v Moran** at (164-165) as follows at (164-165):

> The cause of action arose, and was vested in the deceased lad, at the moment when he was injured, and the measure of his damages included fair compensation for such loss of expectation of life as was caused to him by the defendant's tort. That chose in action was his. To it the common law maxim **"Actio personalis moritur cum persona"** would have applied on his death but for the Act of 1934 which caused it to survive. If he had left a will, it would at the moment of his death automatically have vested in his executor. As he died intestate, it vested in the President of the Probate, Divorce and Admiralty Division, and remained in him until letters of administration were issued. Then - and not before - it would automatically pass from the President to the administrator. As the writ was issued on September 17, 1942, and there was no grant till November, it follows, necessarily, that at the time of writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ, falsely (although no doubt quite innocently) alleging that he issued it as administrator. It purported to launch a representative action under Or. III, r. 4 - an action in which he confessed, first, that he was not suing in his own right, and, secondly, that he had no right in that action to prosecute any claim except in his representative capacity.

PROCEEDINGS ON BEHALF OF AN INTESTATE'S ESTATE WITHOUT GRANT – AN IRREGULARITY

[12]. Following from the above, any proceeding commenced purportedly for and on behalf of an intestate's estate when no letters of administration had been granted by the High Court of Fiji, will be irregular because the court, which is the source of that authority from which the claimant is to derive capacity and locus, has not yet conferred that authority, by appointment, upon the claimant.

[13]. This seems to be the position taken by the Courts in Fiji[6] based on various English decisions (see **Chetty v. Chetty (1916) A.C. 603; Ingall v Moran** (supra) **Finnegan v. Cementation Co. Ltd**[7] **[1953] 1 Q.B. 688 CA;** see comments of Luxmoore and Scott LLJ below). But is that irregularity curable?

[6] see **Josaia Nainoka v Ba, Tavua Drainage Board & Ratu Etuate Ratu HBC 237 of 1978; Tanuku v A-G. [2000] FJHC 13; HBC0134d.95s (26 January 2000); Railala v Yuen Yin Hum [2001] FJHC 44; Hbc0528D.1992s (13 July 2001).**

[7] where a writ was set aside on application because the administratrix who initiated the claim had a grant in Ireland but not for the purpose of the English proceedings. See also **Jamieson v Dominion Insurance Ltd [2012] FJHC 15; HBC132.2009 (20 January 2012)**.

IS THAT IRREGULARITY CURABLE?

[14]. The English Court of Appeal, recently, in the case of **Millburn-Snell and Others v. Evans [2012] 1 WLR 41**, reaffirmed the position in **Ingall** that any writ issued purportedly for and on behalf of an intestate's estate without grant is an incurable nullity. Lord Neuberger MR (at paragraph 16) said:

> I regard it as clear law, at least since **Ingall**, that an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity. That principle was recognised and applied by this court in **Hilton v. Sutton Steam Laundry [1946] KB 65** (per Lord Greene MR, at 71) and **Burns v. Campbell [1952] 1 KB 15** (per Denning LJ, at 17, and Hodson LJ, at 18). In **Finnegan v. Cementation Co. Ltd [1953] 1 QB 688, Jenkins LJ… at 700**….

[15]. The reasons why the irregularity is considered a nullity and why the nullity is considered incurable are not clear to me at this time. It appears though from the cases that the only way by which the nullity could be cured is if the **doctrine of relation back** was so applied to remedy the irregularity. However, the Courts have never applied the doctrine to remedial effect.

[16]. The doctrine has long been applied by English Courts to enable them to relate a grant of administration back to the time of death to prevent injury to the estate[8]. But, as stated, although "retroactivity" is at the very heart of the application of the doctrine, the courts have never applied it to validate a pre-grant court action commenced by the (subsequent) grantee purportedly as administrator[9].

[17]. Suffice it to say that, as such, the courts have been unwavering in the view that the irregularity is an incurable nullity. Hence, neither the writ nor the statement of claim can be amended to convert the action into a valid action by, for example, changing the capacity in which the plaintiff is

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[8] Luxmoore LJ describes the origin of the doctrine, in equity, in **Ingall v Moran** at 169 which allows the Chancery to appoint a receiver pendent grant:

> It is true that a person who ultimately becomes an administrator may start proceedings in the Chancery Division for the protection of an intestate's estate, and can obtain in a proper case interim relief by the appointment of a receiver pendent grant, but in all such cases the person who institutes such proceedings has a beneficial interest in the intestate's estate, for he would not obtain a grant unless he had such an interest either as heir at law or as one of the next of kin or as creditor. In such cases the well recognised practice in the Chancery Division is to endorse the writ in the first instance for the only relief then obtainable, namely, the appointment of a receiver pendente grant, and to apply to amend the writ after the grant has been obtained, if further relief is required, by adding a claim for administration of the estate with or without specific directions with regard to any special relief required.

[9] Luxmoore LJ, at 169, explains this:

> I have no doubt that the plaintiff's action was incompetent at the date when the writ was issued, and that the doctrine of the relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been obtained cannot be invoked so as to render an action competent which was incompetent when the writ was issued. In my judgement, the learned judge was wrong in coming to the contrary conclusion.

(my emphasis)

indorsed on the writ. Scott LJ expresses the following sentiments in **Ingall** at (164-165):

> Such an action was, in my opinion, incapable of conversion by amendment into a valid action - just as much so as if he had issued a personal writ claiming to be lawfully possessed of the estate of the deceased and had subsequently asked leave to amend by substituting a representative claim. It is true that when he got his title by the grant of administration he prima facie became entitled to sue, and could then have issued a new writ, but that was all. An application by him to treat the original writ of September 17 as retrospectively valid from that date would have been refused by the court, not only because it might prejudice existing rights of defence, but because it would not be permissible under the Rules of the Supreme Court or the Judicature Acts. 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]. The Australian High Court[10] and the High Court of Ireland[11] have both expressed similar views.

[19]. Hence, the only option for a claimant for an intestate's estate who obtains, subsequent to filing proceedings, a grant of letters of administration, is to file fresh proper proceedings. This will not be a problem if the claim is still within the Limitations Act.

THE IRREGULARITY IS CURABLE IF PLAINTIFF PLEADS SECTION 10 OF COMPENSATION TO RELATIVES ACT

[20]. In Fiji, **Ingall v Moran** will only apply if a claimant was only suing as *"administrator"* or as *"intended administrator"* before grant. But if, in addition to suing in that capacity, he was suing also (or pleading) as a

[10] In Australia, Taylor J echoed the same sentiments in the Australian High Court case of **Minister of State for the Interior v R T Co Pty Ltd [1962] HCA 29; (1962) 107 CLR 1 (19 June 1962)**.

> To my mind principle and authority admit of only one answer to the problem; it is incumbent upon the plaintiff to establish the existence of his cause of action as at the date of his writ and the failure or success of his action will not depend upon whether the trial takes place promptly or happens to be delayed until after he has entered into possession. It seems to me that the problem is analogous to that which has arisen in cases where a plaintiff has, before actual grant of administration, commenced proceedings as an administrator. Notwithstanding that upon grant the administrator's title relates back to the death of the deceased whom he represents it has been consistently held that this element of retroactivity is incapable of sustaining a writ issued before grant (**Chetty v. Chetty (1916) 1 AC 603**, at p 608; **Ingall v. Moran (1944) 1 KB 160**; **Hilton v. Sutton Steam Laundry (1946) 1 KB 65**; and **Finnegan v. Cementation Co. Ltd. (1953) 1 QB 688)**. (at p7)

[11] McKechnie J of the High Court of Ireland in **Finnegan v Richards [2007] IEHC 134** described the doctrine as follows:

> In a further attempt (that is as well as s. 13 of the Succession Act, 1965) to overcome the potential harmful consequences for the estate of a deceased person, which result from a deferral of an administrator's title until the date of grant, the courts have developed a rule known as the **doctrine of "Relation Back** ". This doctrine means that for limited purposes, a grant of administration will relate back to the date of death of the deceased person. See *Thorpe v. Smallwood* [1843] 5 M. and GR 760. The primary purpose of this rule is to protect the estate in the intervening period between death and the obtaining of a grant. B. Parke identified in *Foster v. Bates* [1843] 12 M. and W 266, at 233, what the justification for the rule was, namely that he the administrator, "may have recovery against the wrong doer who has ceased or converted the goods of an intestate after his death, in an action of trespass or trover". Furthermore such an administrator may also sue for breaches of covenant occurring in the intervening period. See *Long v. Burgess* [1950] 1 KB 115. This rule however is not all embracing and does not on its face include the circumstances presenting in *Ingall v. Moran* [1944] 1 K.B. 160. Therefore as previously stated, actions commenced prior to the obtaining of a grant will not benefit from this rule even though the plaintiff subsequently obtains Letters of Administration. To date the doctrine has been thus so limited.

dependent under section 10 of the Compensation to Relatives Act, then the irregularity is curable. That was the position taken by Madam Justice Shameem in **Tanuku v A-G, [2000] FJHC 13; HBC0134d.95s (26 January 2000)** [12].

[21]. It is important to note that the Compensation to Relatives Act, by section 5, provides that an action under the Act had to be brought in the name of the administrator or executor. However, if the administrator or executor does not commence an action within six months of the death, the Act then, by section 10, gives authority to certain categories of "*relatives"* to bring an action. This enables a parent or a child (amongst other relatives) to file an action under the Act without grant.

[22]. Hence, in **Tanuku**[13], Shameem J would cite **Chetty v Chetty** (supra) and **Ingall** (supra) and conclude that the writ would not have been valid if the plaintiff was only suing as *"intended administrator"*. However, because the plaintiff was clearly a beneficiary in the son's estate according to the relevant laws of intestacy applicable in Fiji[14] and was also pleading section 10, the writ was still curable by amendment under the various Rules of Order 20 of the High Court Rules (see footnote 12), provided the plaintiff applied for it. It is important to note here that in **Tanuku**, Shameem J did strike out the case, not because of **Ingall**, but because the plaintiff had not bothered to appear to seek leave to amend, and had been rather dilatory in the proceedings[15].

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[12] Shameem J said as follows:

> The deceased's father is undoubtedly a beneficiary of his son's estate by virtue of section 6(1)(e) of the Succession, Probate and Administration Act Cap. 60. However, the writ itself is not issued by him as beneficiary of the estate, the reference to the writ being brought on behalf of the beneficiaries, is contained in paragraph 19 of the writ of summons.
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> Order 6 Rule 3 of the High Court Rules provides:
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> **"Before a writ is issued it must be indorsed -**
>
> **(a) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues."**
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> The **Supreme Court Practice** (1997) at page 46, Para 6/3/1 states that this rule -
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> **".... requires the representative capacity, if any, of the plaintiff and the defendant to be indorsed on the writ before it is issued. It is the indorsement on the writ and not the statement in the title which is mere description (Bowler -v- John Mowhem & Co. (1954) 1 WLR 1445."**
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> In this case, the indorsement on the writ, at paragraph 1 states clearly:
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> **"The Plaintiff is the intended administrator and is suing on behalf of his son's estate, deceased who was born on the 17th day of March 1986."**
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> Can this defect be rectified by amendment? Order 20 Rule 1 states that amendment without leave may not be effected in relation to an amendment which consists of an alteration of the capacity in which a party to the action sues or is sued. Order 20 Rule 5 allows for amendment with leave "to alter the capacity in which a party sues ... if the new capacity is one which that party had at the date of commencement of the proceedings or has since acquired." The discretion to allow amendment exists even after the limitation period has expired (Order 20 Rule 5(2)).
>
> No application for amendment has been made. Plaintiff's counsel did not appear at the hearing of this application. It is not known whether the Plaintiff is now administrator, or whether, he wishes to proceed under section 10 of the Compensation to Relatives Act. The last sign of activity from the Plaintiff was July 1995.
>
> In the circumstances I find that the writ filed by the Plaintiff as "intended administrator" of his son's estate is invalid. In the absence of any application for amendment even after the Order 18 Rule 18 summons was served on counsel on 11th January 2000, I allow the Defendant's application to strike out the statement of claim.

[13] In **Tanuku**, the plaintiff had sued also as *"intended administrator"* of his deceased son's estate as indorsed on the writ. Although not indorsed on the writ, he did plead also section 10 of the Compensation to Relatives Act[13]. Madam Justice Shameem observed that this suggested he was bringing the action also as a dependent. The Office of the Attorney General applied to strike out the claim under Order 18 Rule 18 of the High Court Rules 1988.

[14] Section 6(1)(e) of the Succession, Probate & Administration Act (Cap 60).

[15] Shameem J said:

[23]. In **Josaia Nainoka v Ba, Tavua Drainage Board & Ratu Etuate Ratu HBC 237 of 1978**, Mr. Justice Dyke of the Supreme Court of Fiji[16] followed **Ingall**. The plaintiff in **Nainoka** had filed his writ[17] as *intended administrator* when he had not obtained letters of administration. However, rather than pleading section 10, the plaintiff was pleading section 5 (see paragraph [21] above). Dyke J observed as follows:

> .....not only did the plaintiff have no locus standii but the whole action was null and void and could not be cured by a subsequent grant of letters of administration.
> The plaintiff has now applied for leave to amend his statement of claim, just six days before the action was due to be heard. What he now seeks to do is to amend the statement of claim so that he brings the action as the father of the deceased under the Compensation to Relatives Act.
> Even under this Act by section 5 the action should be brought by and in the name of the administrator of the estate, and he was not the administrator when the writ was filed. Nor does the proposed amended writ purport to be brought by the administrator in the name of the administrator, though it does set out that the plaintiff is the administrator[18].
> Clearly what the plaintiff hopes to do by the amendment is to avoid the provisions of section 8 of the Act which provides that the action must be commenced within 3 years of the death and by his amendment he hopes to backdate it to 10/9/78 and also to avoid the decision in Ingall's case that the writ is void ab initio.
> But even if he avoided those pitfalls he would still be caught by section 9 of the Act which provides that in every action under the Act the plaintiff of the record must deliver to the defendant of his solicitor together with the statement of claim full particulars of all the persons on behalf of whom the action is brought and the nature of their claims. This has been held to be a mandatory provision. He did not do that in on 10/08/78 and it is too late to do it now and still expect the amendment to be backdated.
> So I am afraid he is caught in both ways and there if no merit in the application to amend. It would be a wasted effort.
> The application is dismissed with costs to be taxed if not agreed.

[24]. Mr. Justice Fatiaki endorsed the same view in **Railala v Yuen Yin Hum [2001] FJHC 44; Hbc0528D.1992s (13 July 2001).** He recognised that section 10 created a statutory right and cause of action in favour of "dependants" who are close relatives of the deceased[19]. The benefit of that

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> Can this defect be rectified by amendment? Order 20 Rule 1 states that amendment without leave may not be effected in relation to an amendment which consists of an alteration of the capacity in which a party to the action sues or is sued. Order 20 Rule 5 allows for amendment with leave "to alter the capacity in which a party sues ... if the new capacity is one which that party had at the date of commencement of the proceedings or has since acquired." The discretion to allow amendment exists even after the limitation period has expired (Order 20 Rule 5(2)).
> No application for amendment has been made. Plaintiff's counsel did not appear at the hearing of this application. It is not known whether the Plaintiff is now administrator, or whether, he wishes to proceed under section 10 of the Compensation to Relatives Act. The last sign of activity from the Plaintiff was July 1995.
> In the circumstances I find that the writ filed by the Plaintiff as "intended administrator" of his son's estate is invalid. In the absence of any application for amendment even after the Order 18 Rule 18 summons was served on counsel on 11th January 2000, I allow the Defendant's application to strike out the statement of claim.

[16] (as the High Court was then called)
[17] whose daughter was killed after being a hit by a car.
[18] This observation by Dyke J is probably wrong in law. Section 5 must be read together with section 10 of the Act. As Fatiaki J opines correctly in **Railala v Yuen Yin Hum [2001] FJHC 44; Hbc0528D.1992s (13 July 2001)**, a view which Shameem J shares, the benefit of a right of action under section 10 to specified relatives under the Compensation to Relatives Act does not form part of the estate. And therefore, an action under that Act need not be brought by and in the name of the administrator of the estate as per section 10 (see footnote below).
[19] Counsel for the plaintiff, on the other hand, submits that no one has been or could possibly be misled by the form and capacity in which the plaintiff has pleaded his claim which is clearly sanctioned by **Section 10** of the Compensation to Relatives Act (Cap.29) which provides (inter alia):

right of action does not form part of the estate. This thus entitles the personal representative of the deceased who may not necessarily hold letters of administration, to sue as trustee for dependants.

[25]. However, Fatiaki J, at some point, appeared to distinguish **Ingall** on the ground that the case concerned a plaintiff who, while he did not yet hold letters of administration, had sued as *"administrator"* whereas in the case before him, the plaintiff was suing as *"intended administrator*".

> Needless to say the capacity in which the plaintiff sued in Ingall v. Moran (op.cit) was that of *`administrator of his deceased son's estate'* which is materially different from the capacity in which the plaintiff is suing in the present case as *`intended administrator'* suing *`.....on behalf of the estate of* (his) *deceased daughter ..... for the benefit of the relatives ..... under the* Compensation to Relatives Act *Cap.29'*. The former capacity assumes the grant or existence of Letters of Administration whereas the latter plainly does not.

[26]. However, the distinction made above was not decisive in Fatiaki J's ruling. I say that because, on my reading of **Tanuku**, Fatiaki J eventually allowed the plaintiff to amend his writ, not because he was qualifying **Ingall v Moran**, but because of section 10. Like **Josaia Nainoka** and **Tanuku**, **Railala**, also concerned a father who was suing in the capacity of *"intended administrator"* but who had yet to obtain a grant, and who had also pleaded section 10, though he was not indorsed in that capacity on the writ. True, in **Railala**, Fatiaki J did voice support for the Privy Council's approach in **Austin v. Hart** (1983) 2 ALL E.R. 341 and **Marsh v. Marsh** (1945) A.C. 271 at 284.

> More recently, in **Austin v. Hart** *(1983) 2 ALL E.R. 341* the **Privy Council** said of an identically worded section to our **Section 10(2)** above, at **p.343**:
>
> > *`The benefit of the right of action does not form part of the estate of the deceased or devolve under the provisions of his will. The* (Compensation for Injuries) *ordinance provides machinery for the action to be brought by personal representatives of the deceased as trustees for the dependant or, in certain circumstances, for one or more of the dependants themselves to bring the action as trustee or trustees for all of the dependants.'*
>
> Furthermore the Court in allowing the action in the case to continue despite the possibility that it had been irregularly instituted before the expiration of the 6 months time limit contained in the section said, at pp.344/345:
>
> > *`.....if a premature action is irregular and the irregularity is of a kind, which, as in the instant case, was cured without amendment by the mere lapse of time and which causes*

`Where in any of the cases provided for by this Act it happens that there is no administrator of the deceased person , ... then such action may be brought by and in the name or names of all or of 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 the ..... administrator.'

In this regard, Section 3 of the Act creates the right to maintain an action against and to recover damages from any tortfeasor who causes death by his wrongful act, neglect or default and, Section 4 vests the same for the benefit of specified dependants who are close relatives of the deceased such as, in this case, the plaintiff who is a ***`parent'*** of the deceased.

In **Seward v. The Vera Cruz** *(1884) 10 App. Cas 59* the **Earl of Selbourne L.C.** pointed out that the **U.K.** equivalent of our **Sections 3 & 4**, created a new statutory cause of action *`..... given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive him, but to his wife and children, no doubt suing in point of form in the name of the executor'*.

no prejudice to the defendant, there is no reason for the Court to insist that the irregularity nullifies and invalidates the whole proceedings. The modern approach is to treat an irregularity as a nullifying factor only if it causes substantial injustice: see: Marsh v. Marsh *(1945) A.C. 271* at 284.'

Similarly in the present case, the plaintiff could have instituted the proceedings in his own name as a trustee for the dependants for whose benefit the cause of action was created by statute, and the fact that the action was instituted in his capacity as ***`intended administrator'***, is, at most, an irregularity, which caused no injustice at all to the defendant.

[27]. In **Austin v. Hart**[20] (supra), the Privy Council in allowing the appeal from the Court of Appeal, had expressed the view that:

"(t)he **modern approach** is to treat an irregularity as a nullifying factor only if it causes substantial injustice… The premature issue of the writ in the present case did not cause injustice at all".

.....

In **Ingall v. Moran [1944] KB 160, 169** Luxmoore L.J. could not help 'feeling some regret'. In **Hilton v. Sutton Steam Laundry [1946] KB 65,** 73 Lord Green M.R., was not 'averse to discovering any proper distinction which would enable this unfortunate slip to be corrected'. In **Finnegan v. Cementation Co Ltd. [1953] 1 QB 688, 699** Singleton L.J. lamented 'that these technicalities are a blot on the administration of the law, and everyone except the successful party dislikes them'. Accepting, without approving, the decisions of the Court of Appeal which have been cited, their Lordships see no reason to encourage any extension of their ambit. In the present case the plaintiffs were entitled to sue in the capacities named in the writ, they were entitled at the date of the writ to sue unless the executor or administrator intervened within six months of the death, no such intervention took place and the plaintiffs without needing or seeking any amendment are entitled to proceed with the action which they launched". (my emphasis)

[28]. Notably, in **Austin,** the claimant was also entitled to sue as dependent under the Fatal Accident Ordinance of Trinidad and Tobago. With that in mind, one might argue that the application of the **"modern approach"** of balancing the irregularity against the justice of the case, should be thus limited to cases where an alternative viable basis of entitlement to sue is pleaded (e.g. the Fatal Accident Ordinance in **Austin**, or section 10 of the Compensation to Relatives Act in **Tanuku**). Hence, whether or not the Privy Council would have still applied the "modern approach" in **Austin** had the plaintiff not pleaded the Fatal Accident Ordinance, must remain a pending question.

[29]. Mr. Justice Kokaram of the High Court of Trinidad & Tobago in **Jaime Dolan v Rene Katwaroo**, **Claim No. CV2013-00267 (delivered 29**

[20] The Privy Council in **Alexandrine** had expressed the view that an irregularity is a nullifying factor only if it caused injustice to the other party. The case was an appeal from Trinidad and Tobago. Six months after the death of the intestate, his mother and children issued a writ claiming damages. The relevant legislation provided that such action had to be brought in the name of the executor. However, if no action is commenced within six months of the death, an action could be brought by authorised relatives which included parents and children. The executor did not file an action within the six month period. Over a year after the death, the defendant amended his defence to plead that the court had no jurisdiction to entertain the claim.
A trial judge upheld this. On appeal, the Court of Appeal held that the action was a nullity because the plaintiffs were not entitled to issue the writ.

May 2013)[21] appears to concur with the limited application of the so-called "modern approach":

> In **Austin**, Lord Templeman approved of the ratio of the **Ingall** line of cases that where there is no entitlement to sue at the date of commencement of the proceedings it is a nullity. In **Austin** there was an entitlement in the claimant to sue as a dependent under the Fatal Accident Ordinance and the issue of the premature issue of the writ was not a nullity but an irregularity. Where there is no prejudice caused to the defendant such an irregularity will not be treated as nullifying the whole proceedings.

[30]. Hence, on the above view, the irregularity resulting from having filed a writ purportedly for the estate, when no grant has been made, will not nullify the whole proceedings, if in fact an alternative basis of filing is also pleaded and where there is no prejudice caused to the defendant. This then reconciles **Tanuku**, **Nainoka** and **Railala**.

ABOUT THIS CASE

[31]. But having said all that, the case before me now is not an "administrator without grant" type of case. Rather, it is about a father suing as "next of kin" but who, it is assumed, has not yet obtained letters of administration.

[32]. The pleadings do not mention the word "estate" nor is the Compensation to Relatives Act mentioned anywhere therein.

[33]. I am of the view that the writ is an irregularity but is curable by amendment of both the writ (to properly reflect and indorse the capacity under section 10 of the Compensation to Relatives Act) and statement of claim (to plead the proper relief under the Act). The irregularity is not a nullity in the **Ingall v Moran** sense because the plaintiff is not purporting to be the administrator of the estate, which, if he was otherwise, would be incurable for reasons stated above. The High Court Rules, after all, under the various rules of Order 20 do allow a party to amend the writ to alter their capacity, upon leave of the Court (see **Tanuku**).

[21] See http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/kokaram/2013/cv_13_00267DD29may2013.pdf

CONCLUSION

[34]. For the above reasons, I dismiss the application to strike out. However, as the plaintiff has been rather dilatory in their prosecution of this case, I hereby issue a Notice to his Solicitor on record, under Order 25 Rule 9, to show cause why this matter should not be struck out.

[35]. The Order 25 Rule 9 Notice shall be returnable before me on **Thursday 31 October 2013 at 9.30 a.m**.

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Anare Tuilevuka

JUDGE

16 October 2013.