Ching Mun Fong (Deceased) & Anor

(程孟芳)

and

Hock Kim Thye (Machinery) Ltd & Ors

(福金泰機械有限公司)

[2025] HKCFI 1348

(Court of First Instance)

(Miscellaneous Proceedings No 2501 of 2024)

Deputy Judge Le Pichon in Chambers

14 March, 3 April 2025

Civil procedure — causes of action and parties — proceedings by and against estate — application by administrators of deceased's estate who had obtained grant of letters of administration in foreign jurisdiction with resealing application in Hong Kong being processed — application nullity for lack of grant of representation in Hong Kong — not saved by subsequent grant of resealing application — observations on application of rule in Ingall — Rules of the High Court (Cap.4A, Sub.Leg.) O.15 r.6A

Wills, probate and succession — administration of estates — proceedings by and against estate — application by administrators while resealing of foreign grant of letters of administration being processed — nullity — not saved by subsequent grant of resealing application

[High Court Ordinance (Cap.4) s.54; Limitation Ordinance (Cap.347) s.38(5); Rules of the High Court (Cap.4A, Sub.Leg.) O.15 r.6A]

民事訴訟程序 — 訴因及訴訟方 — 由遺產提出或針對遺產提出的法律程序 — 已在外國司法管轄權獲得遺產管理書的死者遺產管理人提出申請，而其在香港的再加蓋印章申請正在處理中 — 因未在香港獲得承辦的授予而申請無效 — 其後再加蓋印章申請的批予並未挽救該申請 — 有關於 Ingall 的規則的觀察 — 《高等法院規則》(第4A章，附屬法例) 第15號命令第6A條規則

遺囑、遺囑認證與遺產繼承 — 遺產管理 — 由遺產提出或針對遺產提出的法律程序 — 遺產管理人在外國遺產管理書再加蓋印章申請正在處理時提出的申請 — 無效 — 後續再加蓋印章申請的批予並未能夠挽救

[《高等法院條例》(第4章) 第54條; 《時效條例》(第347章) 第38(5)條; 《高等法院規則》(第4A章，附屬法例) 第15號命令第6A條規則]

X2 were the administrators of the estate of the Deceased (X1), who died on 11 November 2023. X2 obtained a grant of letters of administration in Singapore to the Deceased's estate on 24 January 2024. The Deceased's estate comprised, *inter alia*, a substantial portfolio of shares which she used to hold in R1 to R13 (the Companies), none of which was currently functional. Y was currently the sole director of R2 to R4 and R9 to R12, and one of the two directors of R1, R5, R6, and R13.

Xs took out an Originating summons (the OS) on 26 November 2024 against the Companies for orders under s.570 of the Companies Ordinance (Cap.622) (the CO) that an extraordinary general meeting be convened in each of the Companies for the purpose of passing various resolutions and for orders under ss.159 and 633 of the CO. The affirmation in support of the OS alleged suspected mismanagement and breaches of duties by Y in respect of the Companies. On the same date, Xs filed an *ex parte* summons (the Carry on Summons). At the time of the OS, X2's resealing application to a Hong Kong court was still being processed. Subsequently, Xs informed the present Court that the resealing application was granted on 5 March 2025 and, consequently, it was no longer necessary for Xs to pursue the Carry On Summons.

Four days prior to the present hearing of the OS, Y took out a summons to be joined as a party to the proceedings. The Court allowed Y to be joined as the Intervener for the purpose of submitting that the proceedings were incurably defective and should be struck out as a nullity, as X2 was suing as the administrators of the Deceased's estate at a time when they had not obtained any grant of representation in Hong Kong.

Held, dismissing the OS as a nullity, that:

(1) As a matter of substantive law, there was a clear distinction between the position of an executor who derived title under a will (which dated from death) and the position of an administrator of an intestate's estate (who derived title from the grant of letters of administration). When a person had died intestate, the common law position in *Ingall v Moran* was that proceedings commenced by a claimant on behalf of the estate were a nullity unless brought by an administrator who had been granted letters of administration. The doctrine of relation back did not apply and therefore the subsequent grant of administration did not retrospectively validate the

proceedings (*Ingall v Moran* [1944] KB 160, *Mohan Jogie v Angela Sealy* [2022] UKPC 32 applied). (See paras.28–31.)

(2) Section 35(8) of the Limitation Ordinance (Cap.347) did not allow administrators to start actions before obtaining a grant. It was a very limited carving out from the common law rule that administrators had no title until grant and did not give the court general power to allow an amendment to alter the capacity in which the claimant was bringing a claim. The fact that the resealing application had been granted could not assist Xs, as resealing only operated from the date of receipt (*Re Estate of Luk Kim Ying* [2008] 5 HKLRD 743, *Millburn-Snell v Evans* [2012] 1 WLR 41, *Wong Lai Mei v Kwong Pak Leung* [2015] 1 HKLRD 888, *Lam Sik Ying v Lam Sik Shi* [2020] HKCA 659, *Perpetual Trust Ltd v Kobe Investments Ltd* [2022] HKCFI 2762, *Jennison v Jennison* [2023] Ch 225 applied). (See paras.32–37.)

(3) The Court rejected the submission that an expansive reading should be given to O.15 r.6A[*1] of the Rules of the High Court (Cap.4A, Sub.Leg.), such that s.54[*2] of the High Court Ordinance (Cap.4) empowered the Rules Committee[*3] to formulate rules of procedure which would abolish the rule in *Ingall* altogether. The common law rule could be defended to ensure that an action was brought by an appropriate claimant and to abolish it would be a radical step. It was a matter for the legislature to pass the necessary legislation should it decide to do so. The exercise of delegated powers to make rules of procedure was not the appropriate route to achieve that result (*Millburn-Snell v Evans* [2012] 1 WLR 41, *Mohan Jogie v Angela Sealy* [2022] UKPC 32 applied; *Ingall v Moran* [1944] KB 160, *Wong Lai Mei v Kwong Pak Leung* [2015] 1 HKLRD 888, *Tsang (Deceased) v Bancka Ltd* [2017] 5 HKLRD 562 considered). (See paras.38–50.)

(4) Even if the Court was wrong in reaching its conclusion, the OS remained a nullity because of the absence of a prior carry on order. (See para.51.)

Application

This was an application by the deceased and her administrators against 13 companies for orders under ss.159, 570 and 633 of the Companies Ordinance (Cap.622).

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*1 Order 15 r.6A(3) and (4)(a) of the Rules of the High Court (Cap.4A, Sub.Leg) are set out at para.25 of the present judgment.

*2 Section 54(1) of the High Court Ordinance (Cap.4) is set out at para.42 of the present judgment.

*3 Constituted under s.55 of the High Court Ordinance (Cap.4).

Mr Jose Maurellet SC and Mr Brian Fan, instructed by Kenneth Sit, for the 1st and 2nd applicants.
Mr Michael Yin and Mr Jeff Chan, instructed by Haldanes, for the intervener (Joined as the 14th respondent).
1st to 13th respondents, in person, absent.

Legislation mentioned in the judgment
Civil Procedure Rules 1998 [United Kingdom] r.17.4(4)
Companies Ordinance (Cap.622) ss.159, 570, 633
High Court Ordinance (Cap.4) ss.54, 54(1), 55A
Limitation Act 1980 [United Kingdom] s.35(7)
Limitation Ordinance (Cap.347) s.35(8)
Rules of the High Court (Cap.4A, Sub.Leg.) O.15 r.6A, 6A(3), (4)(a)

Cases cited in the judgment
Burns v Campbell [1952] 1 KB 15, [1951] 2 All ER 965
Estate of Luk Kim Ying, Re [2008] 5 HKLRD 743
Ingall v Moran [1944] KB 160, [1944] 1 All ER 97
Jennison v Jennison [2022] EWCA Civ 1682, [2023] Ch 225, [2023] 2 WLR 1017
Jogie (Mohan) v Sealy (Angela) [2022] UKPC 32
Lam Sik Ying v Lam Sik Shi [2020] HKCA 659, [2020] HKEC 2323
Millburn-Snell v Evans [2011] EWCA Civ 577, [2012] 1 WLR 41, [2011] CP Rep 37
Perpetual Trust Ltd v Kobe Investments Ltd [2022] HKCFI 2762, [2022] HKEC 3739
Tsang (Deceased) v Bancka Ltd [2017] 5 HKLRD 562, [2017] 6 HKC 87
Wong Lai Mei v Kwong Pak Leung [2015] 1 HKLRD 888, [2015] 2 HKC 470

Other material mentioned in the judgment
Hong Kong Civil Procedure 2025 (Vol.1), paras.15/6A/2, 15/6A/3

DECISION

Deputy Judge Le Pichon

1. Before the Court are:

(1) an originating summons filed on 26 November 2024 (OS) by Ching Mun Fong (程孟芳) (also known as Ching Fook Fook (程福福), deceased (the "Deceased" or "1st applicant") and Tay Gak Yong and Tay Fengyi, the administrators of the estate of Ching Mun Fong (程孟芳) also known as Ching Fook Fook

(程福福), deceased (the 2nd applicant) against 13 companies ("R1" to "R13") (collectively, the "Companies") for orders under s.570 of the Companies Ordinance (Cap.622) (CO) that EGM be convened in each of the Companies for the purpose of passing the "Proposed Resolutions" annexed to the OS, and for orders under ss.159 and 633 of the CO;

(2) an *ex parte* summons also filed on 26 November 2024 (the Carry On Summons); and

(3) a summons to amend the OS filed on 12 December 2024 (the Amendment Summons)

(Collectively, the "Summonses").

2. The 2nd applicant are the grandchildren and the administrators of the estate of the Deceased (who died on 11 November 2023). They obtained a grant of letters of administration in Singapore (the Singapore Grant) to the estate of the Deceased on 24 January 2024.

3. The Deceased's estate comprises *inter alia* a substantial portfolio of shares which she used to hold in the Companies, none of which is currently functional:

(a) The general meeting as well as the board of R2–R4 and R9–R12 are now dysfunctional, there being no living member in any of these Companies, nor do they have a quorate board.

(b) The remaining respondents (R1, R5–8 and R13) have no living members either, although 2 directors sit on each of their boards.

4. At the time of the OS, a resealing application the 2nd applicant made to the Hong Kong Court was still being processed.

5. By letter dated 10 March 2025, the applicants' solicitors informed the Court that the resealing application was granted on 5 March 2025 and, consequently, it was no longer necessary for the applicants to pursue the Carry On Summons and Amendment Summons for the reasons explained in para.9(3) of the Applicants' Submissions.

6. The OS is supported by the 1st affirmation of the 2nd applicant filed on 26 November 2024 (Tay 1st).

Relevant background

7. The Deceased and her late husband (Grandfather) (who predeceased her) acquired 13 Hong Kong incorporated companies (ie the Companies) as part of their business ventures. Many of the Companies held landed properties in Hong Kong. Four of them

have since ceased business and are now dormant (R2, R4, R9 and R12).

8. The Deceased and Grandfather remained registered members of all the Companies. The share register of the Companies has not been updated despite their demise.

9. Mr Yiu Ka Kui (Mr Yiu) who is the Deceased's nephew is currently the sole director of R2–R4 and R9–R12 and one of 2 directors of R1, R5, R6 and R13, the other being Madam Cheung Yung Man (Madam Cheung).

10. The Deceased left surviving her one daughter who is in her 80s and is the mother of the 2nd applicant.

11. When Grandfather and the Deceased relocated to Singapore, they passed the management of the Companies in Hong Kong to a number of staff in Hong Kong including Mr Yiu. When Grandfather resigned as director of the Companies on 20 May 1983, Mr Yiu was appointed a director alongside the Deceased.

12. The Deceased was the sole executrix and beneficiary of Grandfather's estate who died on 27 May 1993. She ceased to be a director of the Companies as from 4 April 2016, when she was declared a mentally incapacitated person by the Singapore Court, leaving Mr Yiu as the sole director.

13. Tay 1st filed in support of the OS contains a section headed: "*C6. Suspected Mismanagement and Breaches of Duties by Yiu*". There followed numerous allegations of misconduct, misappropriations of the assets of the Companies and wrongdoing by Mr Yiu.

14. On 1 July 2023, Mr Yiu appointed Madam Cheung to be an additional director of R1, R5–R8 and R13. The validity of those appointments is disputed by the 2nd applicant who caused demand letters to be sent to Mr Yiu and Madam Cheung in September 2024, *inter alia*, requesting the Companies to register the 2nd applicant as shareholders to the shares of the Deceased and asking them to resign as directors.

15. There was no substantive reply to those letters.

16. After the 2nd applicant made the resealing application on 25 November 2024, Mr Yiu entered a caveat to the Deceased's estate on 18 December 2024 and was served with a warning on 15 January 2025. As Mr Yiu took no further steps, the caveat ceased to have effect.

The Joinder Summons

17. Four days prior to this hearing, on 10 March 2025, Mr Yiu took out a summons dated (Joinder Summons) to be joined as R14.

18. Understandably, Mr Maurellet SC and Mr Brian Fan, counsel for the 1st and 2nd applicants, took issue with the inordinate

delay of the Joinder Summons when the OS had been served on all the Companies on 27 November 2024. Moreover, Mr Yiu had known since September 2024 when he received demand letters from the 2nd applicant's solicitors that the 2nd applicant did so in their capacity as administrators of the Deceased's estate. It now transpires that one of the matters raised by Mr Yiu is the suggestion that the Deceased made a will. Hence, it was said that the joinder application could and should have been made much earlier.

19. Mr Michael Yin and Mr Jeff Chan, counsel for Mr Yiu, explained that as a matter of record those instructing him were not the original solicitors representing the Intervener at the time the 2nd applicant made the resealing application in November 2024. His instructing solicitors took over barely 2 weeks before the present hearing.

20. The Companies are not before the Court because, on the applicants' case, the Companies are dysfunctional and so the Companies are not in position to appoint anyone to enter into the record as solicitors for the Companies.

21. Mr Yiu is a director of the Companies who are the respondents to the OS and so was aware of the proceedings. Mr Yin's instructions were that those previously advising Mr Yiu were of the view that as these proceedings are a nullity, he could simply let them run their course. Mr Yin took a different view and considered that the better course is to join in the proceedings to apprise the Court of the defects rather than having to challenge any order made on the basis that it is a nullity.

22. Mr Michael Yin lodged written submissions of the Joinder Summons. The substantive point made in the Joinder Summons is that these proceedings are incurably defective and should be struck out as a nullity: the 2nd applicant was suing as the administrators of the Deceased's estate at a time when they had not obtained any grant of representation in Hong Kong, rendering the OS a nullity (the nullity point). While the skeleton submissions raised a number of other issues, it is the nullity point that really matters.

23. Having read the written submissions lodged in support of the Joinder Summons, I considered it necessary to hear and determine the nullity point. In those circumstances, it was clear that unless Mr Yiu is joined as a party, there would be no one to address the Court on the fundamental defects in the OS. Hence, I allowed Mr Yiu (hereafter referred to as the "Intervener") to be joined as R14 for that purpose only.

The Intervener's case

24. Apart from the OS, the Intervener also opposes the Carry On Summons and the Amendment Summons which are subsumed under the nullity point.

25. Order 15 r.6A(3) and (4)(a) provide as follows:

> (3) An action purporting to have been commenced by or against a person shall be treated, if he was dead at its commencement and the cause of action survives, as having been commenced by his estate or against it in accordance with paragraph (1) as the case may be, whether or not a grant of probate or administration was made before its commencement.
>
> (4) In any such action as is referred to in paragraph (1) or (3)—
>
> (a) the plaintiff shall, and the defendant, the personal representatives of the deceased or any person interested in the deceased's estate may, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made, for an order that the personal representative of the deceased be made a party of the proceedings, and in either case for an order that the proceedings be carried on by or against the person so appointed or, as the case may be, by or against the personal representative, as if he had been substituted for the estate;
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> …

26. Mr Yin submits that the carry on order has to be obtained before service of the originating process, citing the annotation in *Hong Kong Civil Procedure 2025* at para.15/6A/3 in support:

> It cannot be sufficiently stressed that the only way to proceed with an action brought by or against the estate of a deceased person where no grant of probate or administration has been made or the action is brought by or against a deceased person which is required to be so treated is to apply, within the period of the validity of the writ for service, for an order to carry on under para.4 (a). In the absence of such an order, the service of the writ on solicitors nominated by the insurance company dealing with the plaintiff's claim and their acknowledgement of service are wholly invalid and are nullities, which cannot be cured under O.2 r.1 since there are no proceedings which could be validated …

27. The carry on order under para.4(a) in effect constitutes the person, an administrator *ad litem* for the purposes proceedings. Without that prior order, service of the originating process is a nullity. That is exactly what had occurred in the present case.

28. As a matter of substantive law, there is a clear distinction between the position of an executor who derives title under a will (which dates from death) and the position of an administrator of an intestate's estate (who derives title from the grant of letters of administration). That distinction is important for ascertaining in whom the assets of a deceased's estate is vested at a particular point in time.

29. The Privy Council in *Mohan Jogie v Angela Sealy* [2022] UKPC 32 recently affirmed that distinction. That case concerned the validity of a purported notice to renew a statutory tenancy served by an administrator before grant. It was held to be invalid.

30. The following extracts from the judgments of Lord Burrows (at [68]–[69]) and Lord Leggatt (at [124]) explain the legal position on relation back:

> [68] Having examined the relevant common law and civil procedure rules, I can summarise the legal position on relation back in respect of the nullity of proceedings in the following points:
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> (i) Where a person has died intestate … in England and Wales, the common law position is that proceedings commenced by a claimant on behalf of the estate are a nullity unless brought by an administrator who has been granted letters of administration (subject to, for example, a grant of administration *ad litem* having been made). Relation back does not apply and, therefore, the subsequent grant of administration does not retrospectively validate the proceedings. This was the common law rule established in *Ingall* although, in the context of the expiry of a limitation period, that decision itself has been removed in England and Wales by legislative reform (in section 35(7) of the Limitation Act 1980 and CPR rule 17.4(4)).
>
> (ii) *Millburn-Snell*[1] shows that, outside the confines of that legislative reform, the common law position remains as it was in *Ingall*. …
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> …

1 *Millburn-Snell v Evans* [2012] 1 WLR 41.

> (iv) It would be a radical step for the Board now to depart from *Ingall* and *Millburn-Snell* which represents the well-established common law … Certainly … in general, the common law rule can be defended.
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> …
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> [69] I therefore conclude that, applying the common law, the proceedings in this case are a nullity …
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> …
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> [124] … As Ms Sealy had not yet been appointed as an administrator when this action was begun, she had no power at that time to act as her mother's personal representative. Any act done by her, including the commencement of proceedings, which involved a purported exercise of such a power was therefore a nullity. When she afterwards obtained a grant of administration, she became her mother's personal representative and in that capacity acquired title to her mother's property which 'related back' to the date of death. Ms Sealy then became able to commence proceedings in her capacity as an administrator in respect of any cause of action which had accrued to the estate as a result of matters that occurred before the grant. Her appointment did not and could not, however, retrospectively validate an act — the commencement of the proceedings — supposedly done as her mother's personal representative but which was a nullity because Ms Sealy had no power to act in that capacity when the act was done.

31. In *Ingall v Moran* [1944] KB 160, the claimant's son died in a road accident caused by the defendant's negligence. The claimant commenced an action against the defendant under the Law Reform (Miscellaneous Provisions) Act 1934. The applicable limitation period was one year and although the claimant brought the claim within that time, it began before the grant of letters of administration. The English Court of Appeal held that the proceedings were a nullity because when the writ was issued, the claimant had not been granted letters of administration and the doctrine of relation back could not be used to cure the nullity.

32. *Ingall* (applied in several English Court of Appeal cases) was considered "a blot on the administration of justice". The Law Reform Committee recommended that if a party acquired a new capacity, a court could allow an amendment to alter the capacity of that party after the expiry of a limitation period. That

recommendation was enacted in s.35(7) of the Limitation Act 1980.[2] Section 35(8) of the Limitation Ordinance (Cap.347) (LO) mirrors the UK legislation.

33. Lord Burrows considered it very important to clarify that this legislative reform applies only in the extreme situation where the limitation period has expired. It does not give the court general power to allow an amendment to alter the capacity in which the claimant is bringing a claim.[3] *Ingall* was no longer good law to the extent that CPR r.17.4(4) empowered a court to allow the amendment of the statement of case, altering the capacity of the claimant after the grant of administration, despite the expiry of the limitation period. Lord Burrows referred to subsequent judicial confusion as to whether *Ingall* had been swept away and confirmed that CPR r.17.4(4) did not remove *Ingall* altogether.[4]

34. The Intervener submits that a similar approach is applicable to s.35(8) of the LO which is a very limited carving out from the common law rule that administrators have no title until grant. It does not open the way to allow administrators to start actions before obtaining a grant. I respectfully agree.

35. Relevant Hong Kong authorities cited include the Court of Appeal (the CA) in *Lam Sik Ying v Lam Sik Shi & Anor* [2020] HKCA 659 which applied the line of authorities commencing with the judgment of Poon J (as he then was) in *Re the Estate of Luk Kim Ying* [2008] 5 HKLRD 743 (at [22][5]).

36. That case cited the English Court of Appeal's decision in *Millburn-Snell v Evans* [2012] 1 WLR 41 (at [16]) and applied the principle in *Ingall*. It was followed in *Wong Lai Mei v Kwong Pak Leung* [2015] 1 HKLRD 888 (at [23]), and more recently in *Perpetual Trust Ltd (as Administrator of the Estate of Alexander Gavin Brown) v Kobe Investments Ltd* [2022] HKCFI 2762.

37. The fact that the Hong Kong Court has granted the resealing application cannot assist the applicants. In *Jennison v Jennison* [2023] Ch 225, the English Court of Appeal considered the position of a personal representative commencing the proceedings before resealing a foreign grant.[6] It held that:

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2 The relevant UK rules of court are now to be found in CPR r.17.4(4).

3 At [46].

4 At [47] and [54].

5 "… In the absence of the grant, a purported beneficiary … does not have the locus to sue on behalf of the estate … unless and until that person is granted the letters of administration: [*Ingall*]. Any action commenced by such a party purportedly on behalf of the estate must be struck out."

6 The claimant, the executrix under the will of the deceased obtained a grant in New South Wales where the deceased was domiciled. Subsequently, purporting to act as the personal representative of the deceased's estate, the claimant brought proceedings in England and Wales seeking relief in respect of breaches of trust committed by the defendants in connection with land in England.

- **A person appointed as an administrator elsewhere than in the UK is not entitled to bring proceedings in that capacity in England and Wales until the letters of administration have been resealed or further letters of administration have been granted in the jurisdiction ([24]).**
- **Resealing does not have retrospective effect and operates *in futuro*, only from the date of receipt ([30]).**
- **The striking out application failed on the facts because the claimant's foreign grant was based on will and the claimant derived her title to claim from the will, not from the resealing of the grant ([31]).**
- **The bringing of a claim on behalf of the estate by a person who, at the time, lacks standing to represent it is not a mere "error of procedure", but renders the proceedings a nullity. They are, in the circumstances, "a dead thing into which no life could be infused"[7] and "born dead and incapable of being revived"[8] ([60]).**

38. Turning to sub-r.(3) of r.6A, the Intervener submits that the action of commencement had to be done by a person and cannot be done by the deceased. The commentary at para.15/6A/2 reads as follows:

> On a plain reading of s. 55A of the High Court Ordinance (Cap. 4) and RHC O. 15 r. 6A so far as the provision applies to the plaintiff, Paragraph (3) contemplates an action purporting to have been commenced by "*a person*" (meaning being named as a living person in the title of the action) and "*if he was dead*" (meaning the fact of death was unascertained at the commencement of the action, probably through inadvertence or lack of knowledge), the action is preserved and not treated as a nullity …
>
> It is therefore doubtful whether RHC O. 15 r.6A (3) intends to sanction the practice of naming "*ABC, deceased*" as the plaintiff as though a deceased person has the capacity to give instructions to commence an action. This seems illogical (see *Clay v Oxford* (1866) LR 2 Exch. 54 and *Tetlow v Orela Limited* [1920] Ch. 24)

39. In response to the nullity point, Mr Maurellet SC relies on the mechanism identified by Harris J in *Tsang Hoi Wah Ava Deceased & Anor v Bancka Ltd* [2017] 5 HKLRD 562[9] at [5]–[6]. After setting out O.15 r.6A(3) and (4)(a) Harris J stated as follows:

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7 *Per* Hodson LJ in *Burns v Campbell* [1952] 1 KB 15.

8 *Per* Rimer LJ in *Millburn-Snell v Evans* (*supra*).

9 In that case, Harris J allowed a husband of a deceased member to commence proceedings to seek an order under s.570 of the CO, in circumstances where the husband had yet to take any steps to apply for a grant of letters of administration, in circumstances where the

> [5] … Although the wording of these rules is not entirely apposite, in my view, it is on a fair reading of sub-rule (3) clear that these provisions apply to circumstances such as the present where after a person has died, it is necessary for proceedings to be commenced before either Letters of Administration or a Grant of Probate has been obtained.
>
> [6] What that means in practice for the application of this sort is that the originating summons should be headed, as in the present case, with two applicants: the first being the person who is making the application on behalf of himself or herself and any other person interested in the estate … An order then needs to be made appointing the 2nd applicant to represent the deceased's estate in the proceedings thus allowing the proceedings to be progressed and a substantive order sought.

40. The applicants also rely on the following extract from the decision of Recorder Jason Pow SC in the *Wong Lai Mei* case at [22]:

> [22] … I disagree with the observation of the learned editor of *Hong Kong Civil Procedure 2015* at para.15/6A/2. The learned editor suggested that the application of O.15 r.6A(3) should be confined to cases where the naming of a person (who was at that time already dead) as plaintiff was due to inadvertence or lack of knowledge. The basis of the learned editor's view was the common law principle of action *personalis moritur cum persona*. With respect, I do not see any basis for restricting the application of O.15 r.6A(3) in that way. The wordings of the rule certainly do not admit of such restrictive interpretation. So long as an action "purports to have been commenced by a person" (that person being dead at the commencement), it 'shall be treated … as having been commenced by his estate …' Order 15 r.6A was enacted pursuant to s.55A of the High Court Ordinance (Cap.4) which was intended to rid of unnecessary technicalities and to facilitate the commencement of proceedings in respect of the estates of deceased persons. The old common law principle represents no obstacle to a purposive and liberal interpretation of the rule.

Court is satisfied that "it is probable that when the necessary procedural requirements have been satisfied" letters of administration will be obtained by that husband in respect of his late wife's estate.

41. Section 55A provides as follows:

> 55A. **Rules concerning commencement of proceedings in respect of estates of deceased persons**
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> The power to make rules of court under section 54 shall include power by any such rules to make provision—
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> …
>
> (b) for enabling proceedings purporting to have been commenced in the Court of First Instance by or against a person to be treated, if he was dead at their commencement, as having been commenced by or against, as the case may be, his estate whether or not a grant of probate or administration was made before their commencement;

42. Section 54(1) provides as follows:

> 54. **Rules of court**
>
> (1) The Rules Committee constituted under section 55 may make rules of court regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court in all causes and matters whatsoever in or with respect to which the High Court has jurisdiction (including the procedure and practice to be followed in the Registries of the High Court) and any matters incidental to or relating to that procedure or practice.

Disposition

43. What all this boils down is whether the view expressed in the commentary is correct or whether an expansive reading should be given to O.15 r.6A which would involve abolishing the common law rule in *Ingall* altogether.

44. The authority for the Rules Committee to make rules of procedure under s.55A stems from s.54. It is delegated authority. It is therefore necessary to consider the scope and purpose of s.54.

45. Mr Maurellet SC submits that it would be odd in the extreme if nothing could be done until and unless the resealing of foreign letters of grant.

46. The Intervener submits that there is a difference between the rules of procedure made by the Rules Committee and the substantive law such as the common law applied in *Ingall*. Implicit in the expansive reading is that s.54 empowered the Rules Committee to formulate rules of procedure that would alter the substantive law. In the present case, as earlier noted, it would abolish *Ingall* altogether.

47. In this regard, *Jogie* is instructive. Lord Burrows cited a passage from [41] of the judgment of Lord Neuberger MR in the *Millburn-Snell* case:

> Arguments such as that which the defendant successfully raised before the judge in this case are never very attractive, and one of the purposes of the CPR is to rid the law of unnecessary technical procedural rules which can operate as traps for litigants. However, whatever one's views of the value of the principle applied and approved in *Ingall v Moran* [1944] KB 160, it is a well-established principle, and, once one concludes that it has not been abrogated by CPR rule 19.8, it was the judge's duty to follow it, as it is the duty of this court, at least in the absence of any powerful contrary reason. The need for consistency, clarity and adherence to the established principles is much greater than the avoidance of a technical rule, particularly one which has a discernible purpose, namely to ensure that an action is brought by an appropriate claimant.

48. Lord Burrows then went on to say this:

> [52] One can elaborate further on what Lord Neuberger said by recognising that, contrary to what is sometimes thought, the common law rule can be defended at least as a general rule. This is because requiring the appropriate person (ie the administrator) to commence proceedings ensures orderly proceedings, avoids duplication, and means that the estate is represented by the most appropriate person.

49. Those passages show that the common law can be defended and to abolish it would be a "radical step".[10]

50. In my view, it is a matter for the legislature to pass the necessary legislation should it decide to abolish the *Ingall* rule altogether. The exercise of delegated powers to make rules of procedure is not the appropriate route to achieve that result.

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10 *Per* Lord Burrows in *Jogie* at [68(iv)] set out in [30] above.

51. Even if I were wrong in reaching this conclusion, the OS remains a nullity because of the absence of a prior carry on order.[11] Contrary to the applicants' submissions, it is not "an issue with service", it is "an issue of nullity".

52. Further, the Summonses are nullities for the reasons explained in *Jennison v Jennison* considered in [37] above.

53. For all the reasons set out above, these proceedings are nullities. Costs must follow the event.

54. I direct the parties to submit an agreed draft order for approval within 7 days after handing down of this decision.

Reported by Thomas Yeon

11 See [27] above.