

JONES and SIMONI v. SIMONI and OTHERS

SUPREME COURT (Harwood, A.J.): April 12th, 1995

Succession—probate and letters of administration—resealing of foreign grant—cancellation—under Supreme Court Act 1981, s.121(3) Registrar may cancel resealing of grant—Supreme Court Ordinance, s.12 gives Supreme Court probate jurisdiction of English High Court under 1981 Act, ss. 19(2) and 25

Succession—probate and letters of administration—resealing of foreign grant—cancellation—under Supreme Court Ordinance, s.15 and Supreme Court Rules, r.8(1), English Non-Contentious Probate Rules govern procedure in Supreme Court—Registrar may cancel resealing in exceptional circumstances under r.41

The applicants applied for a declaration that the Registrar had power to cancel the resealing of a grant of letters of administration by the Supreme Court.

The administrators of an estate were granted letters of administration with will annexed in the English High Court, and the grant was resealed in the Gibraltar Supreme Court in respect of the deceased's assets in Gibraltar. In the meantime, the first applicant, a beneficiary under the deceased's will, had filed a number of *caveats* against the resealing of the grant in Gibraltar and requested the Registrar to call in and cancel the resealed grant under s.121(3) of the Supreme Court Act 1981. The respondents challenged the power of the Registrar to do so.

The applicants submitted that (a) under s.12 of the Supreme Court Ordinance, the provisions of the English Supreme Court Act 1981, s.121(3) applied to the Supreme Court of Gibraltar, since (i) s.12 vested in the Supreme Court all jurisdiction and powers capable of being exercised by the English High Court from time to time and not only those enumerated in the English Law (Application) Ordinance, (ii) as s.15 of the Supreme Court Ordinance governed the sources of civil procedure to be applied in the Supreme Court, it was clear that the scope of s.12 was wider than this, and (iii) ss. 36–38 of the Interpretation and General Clauses Ordinance had no bearing on the jurisdiction of the Supreme Court and did not restrict the meaning of s.12 so as to preclude the application of s.121(3) to the Registrar; (b) consequently, the Registrar had power to cancel the resealing of a grant of letters of administration if satisfied that the application was by an interested party; and (c) the procedure to be followed by the Registrar was that contained in r.41 of the Non-Contentious Probate Rules 1987, a rule made under s.127 of the Supreme Court Act 1981, and applied to Gibraltar by s.2(5) of the

Colonial Probates Act 1892 and Colonial Probates Act Application Order 1965.

The respondents submitted in reply that (a) the relevant powers and jurisdiction of the English High Court were not vested in the Supreme Court of Gibraltar by the Supreme Court Ordinance, s.12 since (i) the English legislation to be applied in Gibraltar was limited to that listed in the English Law (Application) Ordinance, (ii) unless s.12 applied solely to matters of practice and procedure and not to jurisdiction, the Supreme Court Ordinance itself would be otiose and the substantive laws of Gibraltar would be uncertain, and (iii) ss. 36–38 of the Interpretation and General Clauses Ordinance, which governed the construction of legislation to be applied in Gibraltar, provided that s.12 of the Supreme Court Ordinance should be interpreted narrowly; (b) consequently, s.121(3) of the English Supreme Court Act 1981, under which the resealing of a grant of letters of administration could be cancelled by the English High Court, did not apply to the Registrar of the Supreme Court of Gibraltar; and (c) since the probate jurisdiction of the Supreme Court was not that of the English High Court, the procedure laid down by the Non-Contentious Probate Rules 1987 did not apply in Gibraltar.

Held, making the declaration sought:

(1) The Registrar of the Supreme Court had power to cancel the resealing of the grant of letters of administration under the Supreme Court Act 1981, s.121(3), since the Supreme Court Ordinance, s.12 conferred on him the relevant probate powers vested in the English High Court under the Supreme Court Act 1981, ss. 19(2) and 25. The scope of s.12 was not restricted either by the English Law (Application) Ordinance or by ss. 36–38 of the Interpretation and General Clauses Ordinance and was not confined to procedural matters, which were governed by s.15 (page 49, lines 1–42).

(2) Under the Supreme Court Ordinance, s.15 and r.8(1) of the Supreme Court Rules, since there was no provision under Gibraltar law for the procedure to be followed by the Registrar in cancelling the resealing of a grant, the English Non-Contentious Probate Rules, 1987 applied to Gibraltar. The Rules, which were made under s.127 of the Supreme Court Act 1981 were, in any event, specifically applied to Gibraltar by the Colonial Probates Act 1892, s.2(5) and Colonial Probates Act Application Order 1965. Rule 41 allowed the Registrar to amend or revoke the grant of letters of administration (or, in this case, cancel the realing) in exceptional circumstances (page 49, line 43 – page 50, line 27).

Legislation construed:

Supreme Court Ordinance (1984 Edition), s.12: The relevant terms of this section are set out at page 48, lines 26–29.

s.15: The relevant terms of this section are set out at page 49, lines 13–18.

Supreme Court Rules (1984 Edition), r.8(1): The relevant terms of this sub-rule are set out at page 50, lines 13–17.

Colonial Probates Act 1892 (55 & 56 Vict., c.6), s.2(5):

“Rules of court may be made for regulating the procedure and practice, including fees and costs, in courts of the United Kingdom, on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which this Act applies”

Non-Contentious Probate Rules 1987 (S.I. 1987/2024), r.41:

“(1) Subject to paragraph (2) below, if a registrar is satisfied that a grant should be amended or revoked he may make an order accordingly.

(2) Except on the application or with the consent of the person to whom the grant was made, the power conferred in paragraph (1) above shall be exercised only in exceptional circumstances.”

Supreme Court Act 1981 (c.54), s.25(1):

“Subject to the provisions of Part V, the High Court shall, in accordance with section 19(2), have the following probate jurisdiction, that is to say all such jurisdiction in relation to probates and letters of administration as it had immediately before the commencement of this Act, and in particular all such contentious and non-contentious jurisdiction as it then had in relation to—

. . .
 (b) the grant, amendment or revocation of probates and letters of administration”

s.121(3): The relevant terms of this sub-section are set out at page 48, lines 18-22.

S.V. Catania for the applicants;
J.M.P. Nuñez for the respondents.

HARWOOD, A. J.: The first applicant and three of the respondents are beneficiaries under the will dated August 21st, 1987 of George Simoni (deceased). It would appear that in December 1992 an application was made to the Principal Registry of the Family Division of the High Court in England for the grant of letters of administration with the will annexed. On March 1st, 1993 a *caveat* was entered by the first applicant and on March 18th, the fourth respondent was notified. A *caveat* warning-off notice was served on her behalf but no response was forthcoming. On May 28th, 1993 letters of administration were granted. In July 1993 solicitors were instructed, on behalf of the estate, to obtain from the Supreme Court in Gibraltar the resealing of the grant because the deceased died possessed of certain assets here. This was granted on May 11th, 1994 and the first applicant’s solicitors were duly notified.

In the meantime, however, it appears that the first applicant’s solicitors had filed three *caveats* in Gibraltar against the resealing of the grant, and these had been entered on February 24th, August 18th, and December 2nd, 1993 in the *caveat* book kept at the registry. Correspondence between solicitors ensued, following which the Registrar was requested to call in and cancel the resealed grant of May 11th. The Registrar demurred on being informed that any such cancellation would be contested. That is the background to a neat point of law that has been argued before me as a preliminary point in a wider application, namely, does the Registrar in Gibraltar have power to cancel the resealing of the grant? It is a point concerning jurisdiction rather than one of practice or procedure, but I propose to deal with both aspects having regard to the wide-ranging submissions made by each counsel. 5 10

Mr. Catania submits that the probate jurisdiction of this court for the purposes of this case is to be found in s.121 of the Supreme Court Act 1981, which enables the High Court in England to cancel the resealing of a grant. Section 121(3) provides: 15

“Where it appears to the High Court that a grant resealed under the Colonial Probates Acts 1892 and 1927 ought not to have been resealed, the court may call in the relevant document and, if satisfied that the resealing would be cancelled at the instance of a party interested, may cancel the resealing.” 20

And, he says, this provision is to be applied in Gibraltar by virtue of s.12 of the Supreme Court Ordinance because since no other jurisdiction to cancel is actually conferred on this court by that or any other Ordinance (which it is not) this court shall, in addition, “possess and exercise all the jurisdiction, powers and authorities which are from time [*sic*] vested in and capable of being exercised by Her Majesty’s High Court of Justice in England.” 25

Mr. Nuñez argues that s.12 is of no avail for three reasons, namely: 30

(1) The section ought not to be so liberally construed as to widen the scope of the English statute law to be applied in Gibraltar beyond the specific provisions of those statutes enumerated in the English Law (Application) Ordinance;

(2) Section 12 has no application except as regards matters of practice and procedure, for otherwise that Ordinance would be purposeless and there would be no certainty as to what really are the substantive laws of Gibraltar; 35

(3) A narrow construction of the scope of that section is indicated by the wording of ss. 36, 37 and 38 of the Interpretation and General Clauses Ordinance. 40

He concludes that there is no statutory provision at all in existence conferring any jurisdiction on this court to order the cancellation of a resealed grant of probate and, in particular, that s.121(3) of the 1981 Act does not apply in Gibraltar. 45

In my judgment, s.12 of the Supreme Court Ordinance is crucial to the determination of the jurisdiction of this court. There seems to be no logical support for any of the reasons put forward by Mr. Nuñez. First, I consider that the very wording of s.12, in particular the expression “in addition to” and “from time” (undoubtedly a misprint, meaning “from time to time”) imports of necessity a scope of operation wider than the English statutes actually listed in the English Law (Application) Ordinance. Secondly, s.12 refers specifically to “all the jurisdiction, powers and authorities,” which expression cannot properly be regarded as limiting the operation of the section to matters of practice and procedure only; such matters are expressly and widely provided for by s.15 as follows:

“The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Ordinance or by such rules as may be made pursuant to this Ordinance or any other Ordinance and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.”

The very wording of ss. 12 and 15 precludes the necessity of continually and painstakingly listing and specifying every English statute and statutory instrument to be applied in Gibraltar. To do so would be an extremely burdensome and almost superhuman, if not impossible, task and, to that extent, a consequent lack of the “certainty” urged by Mr. Nuñez of the substantive law applicable in Gibraltar must remain a fact of life here and is justified. Thirdly, ss. 36, 37 and 38 of the Interpretation and General Clauses Ordinance are merely interpretative provisions and are not to be regarded as having any impact upon the scope of the jurisdiction of this court. Indeed, I can see nothing in the wording of those sections to suggest that they have any such impact.

I therefore hold that the current jurisdiction of the English High Court to cancel the resealing of a grant which is contained in s.121 of the Supreme Court Act 1981 is conferred upon this court by s.12 of the Supreme Court Ordinance. It is a jurisdiction “possessed and exercisable” by this court by virtue of s.12, requiring no extension of any kind of the 1981 Act to Gibraltar in express terms, whether by Order in Council (which, as regards matters of probate, is not therein provided for) or otherwise. On the same basis, I consider that the general probate jurisdiction of this court consists at least of the same jurisdiction as is conferred on the English High Court by ss. 19, 25 and—so far as is practicable—Part V of the Supreme Court Act 1981, and that it is quite sufficient to enable this court to proceed to a determination of the issues in this action.

The manner in which this court should approach the matter is now provided for by the Non-Contentious Probate Rules 1987, made under s.2(5) of the Colonial Probates Act 1892 and s.127 of the 1981 Act. To

the extent that they were made under s.2(5) they have application in Gibraltar on the basis of reciprocity following the Colonial Probates Act Application Order 1965, Schedule 1. The 1987 Rules have been substituted, in England, for the Non-Contentious Probate Rules 1954 (formerly applicable in Gibraltar) made under s.2(5) of the Colonial Probates Act 1892 and s.100 of the Supreme Court of Judicature (Consolidation) Act 1925. Both sets of rules were, under similar powers, made by the President of what is now the Family Division.

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The 1987 Rules are to be applied in Gibraltar having regard also to s.15 of the Supreme Court Ordinance, and to r.8(1) in Part III of the Supreme Court Rules (to the extent that they are not specifically excluded by r.10 and Schedule 2). Rule 8(1) provides:

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“Where no other provision is made by these rules or by any Ordinance, rule or regulation in force in Gibraltar, and subject to the express provisions of these rules, the rules of court that apply for the time being in England in the High Court shall apply to all original civil proceedings in the court.”

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Therefore, I am satisfied that the former power of this court to amend or revoke a grant of probate exercisable under r.42 of the 1954 Rules, is now to be exercised in conformity with r.41 of the 1987 Rules whereby, if this court is satisfied that a grant should be amended or revoked, it may make an appropriate order either on the application or with the consent of the person to whom the grant was made or otherwise only in “exceptional” (formerly “special”) circumstances. And, as I have already indicated, I have no doubt that s.121(3) of the Supreme Court Act 1981 confers jurisdiction upon this court to deal with this case, and that Mr. Catania’s principal submission on the point of law raised is correct.

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Subject to hearing any argument to the contrary, I propose to order that the costs of and occasioned by the hearing of this point of law which have been incurred by the applicants should be paid to them out of the estate of the deceased in any event, and I propose that the court should now proceed to give directions as to the future conduct of this case.

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Declaration accordingly.