



[2022] JMSC Civ.206

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. CLAIM NO. SU2021CV01871**

<b>BETWEEN</b>	<b>MICHAEL HENLIN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DEXTER ROSE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
	<b>MAURICE ROSE</b>	<b>2<sup>ND</sup> DEFENDANT</b>
	<b>ALLAN JNR ROSE</b>	<b>3<sup>RD</sup> DEFENDANT</b>
	<b>ALVIN ROSE</b>	<b>4<sup>TH</sup> DEFENDANT</b>
	<b>LENNOX ROSE</b>	<b>5<sup>TH</sup> DEFENDANT</b>
	<b>OWEN ROSE</b>	<b>6<sup>TH</sup> DEFENDANT</b>

**IN CHAMBERS**

**VIDEO CONFERENCE**

Ms. Catherine Minto instructed by Nunes Scholfied and Deleon and Co. appeared for the claimant

Ms. Judith Clarke instructed by Judith Clarke and Co. appeared for the first, second, third, fourth and fifth defendants.

Heard: October 10<sup>th</sup> 2022

**Civil Procedure – Application to appoint personal representative — Whether application to appoint personal representative is properly before the Court –**

**Criteria for appointing personal representatives – When can the court exercise its power to appoint a personal representative - Application of Civil Procedure Rules 2002: 21.1, 21.2, 21.3, 21.4, 21.7 and 30.3**

**MASTER CARNEGIE (Ag)**

This is an oral decision delivered on November 3<sup>rd</sup> 2022 and which I have now reduced to writing.

**Introduction**

[1] This application arose out of a claim, filed on April 16<sup>th</sup> 2021 by the claimant, against all six defendants. The defendants erected a fence at Mount Olivet St. Ann thereby barring the claimant's entry to certain property. The claimant's claim is as follows:

1. A declaration that the claimant is the owner and the person entitled to the possession of All that parcel of land part of Mount Olivet in the parish of Saint Ann comprising by estimation two Acres more or less, butting and bounding as follows:
  - (a) North on the Mount Pleasant property;
  - (b) West on lands belonging to Amelia Alexander and/or her heir and assigns;
  - (c) South on lands belonging to Obadiah Slack, Herbert Rose, Sarah McFarlane William Dalling, their heirs and assigns
  - (d) East on lands belonging to William Parris his heir and assigns.
2. An Order granting the claimant the immediate Possession of the said lands.
3. Further and/or alternatively, an Order directing the Defendants to forthwith pull down and remove the fence that has been erected on the Claimant's

said lands, failing which the Claimant is permitted to remove and/or demolish said fence.

4. An injunction to restrain the Defendants whether by themselves, their servants or agents or otherwise from interfering with Claimant's use and enjoyment of the said lands and from preventing the Claimant from accessing the said lands.
5. An injunction to restrain the Defendants whether by themselves, their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the Claimant's said lands, and from erecting a fence or any other structure on the Claimant's said lands.
6. Damages for trespass
7. Mesne Profits until possession is delivered up.
8. Interest at such rate and for such period, as this Court deems just pursuant to the Law Reform (Miscellaneous Provisions Act).
9. Costs.

**[2]** The history of the matter since the filing and service of the claim and particulars of claim thus far is as follows:

- (a) An acknowledgement of service was filed on behalf of the 4<sup>th</sup> defendant May 17, 2021.
- (b) A defence and counterclaim was filed for and on behalf of the 4<sup>th</sup> defendant on June 14, 2021
- (c) An application was made on June 21<sup>st</sup> 2021, for default judgement against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants, for failure to file a defence.
- (d) On March 10<sup>th</sup> 2021, the hearing of the application for default judgement, was adjourned to May 30<sup>th</sup> 2022, to allow for the defendant's attorney at law

to be instructed. The attorney-at-law who appeared stated that there was no record of service on her clients – the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants.

- (e) The claimant's attorney-at-law's request for entry of a default judgment on the 6<sup>th</sup> defendant was denied, as it was determined not to be an efficient use of the court's time to deal with the application in parts, especially when the application would centre on the issue of service.
- (f) The court's file reflected that an affidavit of service was filed on October 19 2021 in which the process server averred that he effected personal service upon all six defendants. Subsequent documents filed suggested the 6<sup>th</sup> defendant cannot be accounted for and is unknown to the other defendants.
- (g) At the adjourned hearing on May 30<sup>th</sup> 2022 three applications including the application to enter a default judgement were before the court. The other two applications were:
  - i. A Notice of Application for Court Orders/Declaration under Part 9.6 of the Civil Procedure Rules and affidavit in support of court orders filed May 3<sup>rd</sup> 2022 by the 1<sup>st</sup> defendant.
  - ii. A Notice of Application for Court Orders and an affidavit in support filed for and on behalf of the claimant on May 25<sup>th</sup> 2022, to appoint a personal representative for the estate of the fourth defendant who died in November, 2021.
- (h) In furtherance of their application for orders/declaration under rule 9.6 of the CPR the defendant's attorney-at-law filed an Acknowledgement of Service for and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants on May 3<sup>rd</sup> 2022.
- (i) A supplemental affidavit of service on the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants was subsequently filed on May 26<sup>th</sup> 2022 in which the process server averred that he had only served the 4<sup>th</sup> defendant, who indicated that he would deliver the packages to the other defendants.

- [3] At the hearing on May 30<sup>th</sup> 2022, submissions were made by counsel for the defendants as to whether the matter should be dismissed in favour of all the defendants, consequent on the filing of the supplemental affidavit of service on May 25<sup>th</sup> 2022, in which the process server averred that only the fourth defendant personally was served.
- [4] In a highly spirited atmosphere, both counsel were ordered to reduce to writing submissions in respect of the circumstances thus far on behalf of the respective parties, and the process server was asked to attend court to be cross examined.
- [5] At the adjourned hearing on October 10<sup>th</sup> 2022, the court determined that the application filed to appoint a personal representative for the 4<sup>th</sup> defendant should be heard first, as no further steps could be taken in the proceedings until a personal representative was appointed to represent the estate of the 4<sup>th</sup> defendant as per CPR 21.7 (1).

Submission on behalf of the Claimant.

- [6] The attorney-at-law for the claimant made oral submissions with an undertaking to reduce same to writing. However, up to the time this judgement was being reduced to writing, I am yet to have sight of the written submissions on behalf of the claimant.
- [7] The oral submissions on behalf of the claimant are therefore summarised with a view to capturing the significant oral submissions made.
- [8] Reliance was placed on the affidavit of Rena Sealy, in support of the Notice of Application filed on May 25<sup>th</sup> 2022, to appoint a personal representative. Counsel for the claimant grounded her submission in the affidavit sworn to by the 1<sup>st</sup> defendant at paragraphs 2, 4, 5, 6, 7 and 8, as well as the defence and counterclaim of the 4<sup>th</sup> defendant at paragraphs 3, 5 and 6.
- [9] Counsel argued that all five defendants have notice of the proceedings and made contact with the same attorney-at-law who is representing all five defendants. The

application therefore was made seeking leave to have the 1<sup>st</sup> defendant appointed as the personal representative of the 4<sup>th</sup> defendant, because as Counsel submitted, the 1<sup>st</sup> defendant had assumed a “lead role” in the substantive claim. Such an appointment, the attorney-at-law for the claimant submitted, would be for the limited purpose of the proceedings.

**[10]** As part of her submission counsel described the subject land as unregistered and measured in leaps and bounds. Counsel drew reference to the 4<sup>th</sup> defendant’s defence and counterclaim where the 4<sup>th</sup> defendant pleaded he holds adjoining lands as an equitable owner in possession. Counsel for the claimant argued that the land held by Hubert Rose in the context gives rise to two issues in determining the claim: whether the claim is the subject of a boundary dispute or whether the entire land is owned by Alvin Rose.

**[11]** Counsel for the claimant submitted that the matter has now morphed to the 4<sup>th</sup> defendant stating in his defence and counterclaim that he takes after Hubert Rose, the land that Robinson Slack bought – the paternal great, great, great grandfather of the Claimant.

**[12]** Counsel for the claimant drew reference to paragraph 6 of the defence and counterclaim which speaks to two holdings of land. In paragraphs 7 and 8 of the Particulars of Claim, the claimant’s position is that it is one land and one family who have asserted ownership of the claimant’s land by either estate of Herbert Rose or Alvin Rose. Counsel for the claimant’s submitted that the 4<sup>th</sup> defendant is now claiming to be an equitable owner in possession which includes the land the claimant asserts is his.

**[13]** Counsel for the claimant submitted that two years ago the 1<sup>st</sup> defendant objected saying that it was part of the Rose estate, which is a challenge to the ownership of the subject land.

**[14]** For the purpose of the defence and counterclaim the 1<sup>st</sup> defendant and the predecessor in title to Herbert Rose, says there is no inconsistency or no reason

that the 1<sup>st</sup> defendant would not be a suitable party to be appointed the personal representative for the fourth defendant. The appointment of the 1<sup>st</sup> defendant counsel submitted, is for defending the action so the claim can continue.

- [15] Counsel's submission is that Rules CPR 21.1, 21.2 21.3, speak to a class action type of suit, in which the 1<sup>st</sup> defendant had asserted a lead role. The submission on behalf of the claimant was that there is no interest adverse to the estate, because the 1<sup>st</sup> defendant is not putting himself out as being the owner of the land and maintains that it belongs to the estate of Alvin Rose.

Submission on behalf of the Defendants

- [16] The attorney-at-law for the defendants submitted that the visions of CPR 21.7 cannot be arrived at by deductions. Counsel further submitted that there was no indication that there was anything filed by the 1<sup>st</sup> defendant which suggests there is a connection between himself and Herbert Rose, and that the objection by the 1<sup>st</sup> defendant only stated that the land is part of the Rose Estate.
- [17] It was counsel's submission that CPR 21.7 and 30.3 cannot guide findings as there is nothing in the application before the court indicating that the 1<sup>st</sup> defendant could properly represent the 4<sup>th</sup> defendant in these proceedings. Further counsel submitted that reference to paragraph 3 of the defence of the 4<sup>th</sup> defendant does not lead to the deduction that the 1<sup>st</sup> defendant has no interest adverse to the estate of the 4<sup>th</sup> defendant.
- [18] Counsel submitted that reliance on the affidavit of Rena Sealy in support of the Notice of Application by counsel for the claimant could not properly set up the appointment of the 1<sup>st</sup> defendant under CPR 21.7.
- [19] Counsel for the claimant, in referencing the affidavit of Rena Sealy where she stated in paragraph 4 that she "verily believes", in and of itself is not in compliance with CPR 21.7. Counsel for the claimant submitted that the approach taken is an

opinion, and the affiant must state what the source is, otherwise it is a hearsay document.

**[20]** Counsel further premised her submissions on CPR 30.3, stating that that rule prescribes the general rule for making affidavits and the affidavit of Rena Sealy is not in compliance with this rule. Counsel submitted that it is not appropriate for a member of staff to swear the affidavit in support of the application.

**[21]** Counsel submitted on this ground that Rena Sealy didn't speak to the source of the information as is required and consequently the approach on her affidavit is flawed. Further counsel submitted that there are inaccuracies in the submission of counsel for the claimant that the court should look to the fact that it is "one family", as who knows the defendant will not say he has an interest.

**[22]** Counsel submitted that the 1<sup>st</sup> defendant filed an affidavit to challenge jurisdiction of the court on the basis that he was not served, therefore it cannot be said that he can competently represent the estate of the 4<sup>th</sup> defendant.

**[23]** In concluding her submission counsel argued that the rules must not be trifled with and that the requirements are that it must be proved that the person to be appointed personal representative must be one who is able to fairly and competently conduct the proceedings and have no interest adverse to the estate.

**[24]** The issues to be determined are as follows:

1. Is the application properly before the court?
2. Is CPR 21. 4 applicable in these proceedings?
3. Can the 1<sup>st</sup> defendant be appointed personal representative of the estate of the 4<sup>th</sup> Defendant against his will?
4. Can the court appoint a personal representative of the estate of the 4<sup>th</sup> defendant?



## Law and Analysis

Is the application properly before the Court?

**[25]** For the purpose of determining whether the affidavit filed is properly before the court for these proceedings, the relevant rule is CPR 30, which states –

30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) However an affidavit may contain statements of information and belief –

(a) where any of these Rules so allows; and

(b) where the affidavit is for use in an application for summary judgement under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –

(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information and belief; and

(ii) the source for any matters of information and belief.

**[26]** The rule stated broadly refers to whomever depones an affidavit. However, in this instance where the claimant is not swearing the affidavit in support of the application, the affiant has stepped into the shoes of the claimant referencing documents filed for and on behalf of the claimant.

**[27]** I agree with counsel for the defendant that the affidavit in support filed for and on behalf of the claimant is not in the proper form. The source of the information not in affiant's personal knowledge has not been stated.

**[28]** CPR 30.3. provides that an affidavit can contain hearsay evidence, but same has to refer to the source of any matters stated as due to information and belief.

**[29]** Creative though it may be the member of staff who swore the affidavit did not speak to the facts within her knowledge, but referenced documents filed in respect of the claim. The effect of the affidavit in its current form operates to circumvent the requirements of CPR 30.

**[30]** In any case, notwithstanding the form of the affidavit the court has jurisdiction to appoint a personal representative with or without application as prescribed in CPR 21.7 (3). Whereas I would agree that the affidavit is not in the proper form, current context does not prevent the court from making a determination as to the appointment of a personal representative for the 4th defendant's estate. The court has the power to appoint a personal representative of its own motion by virtue of 21.7 (3) (**Tanya Ewers (Executrix of the estate of Mavis Williams) v Melrose Barton-Thelwell 2017 JMCA Civ. 26**).

Is CPR 21. 4, relevant to the circumstances in the application at bar?

**[31]** Counsel for the claimant sought to invoke CPR 21.4 in respect of the application. Though counsel abandoned invocation of the rule for the purposes of the application, it was worth spending some time on the interpretation of same, as it assists in putting context to the circumstances of the application at bar. CPR 21.4, in respect of proceedings about the estate of someone who is dead; property subject to a trust; or the construction of a written instrument.

*"21.1 (1) This rule applies to any proceedings, other than proceedings falling within rule 21.4, where 5 or more persons have the same or a similar interest in the proceedings.*

*(2) The court may appoint –*

*(a) one or more of those persons; or*

*(b) a body having a sufficient interest in the proceedings, to represent all or some of the persons with the same or similar interest.*

*(3) A representative under this rule may be either a claimant or a defendant.*

*21.2 (1) An application for an order appointing a representative party may be made at any time, including a time before proceedings have been started.*

*(2) An application for such an order may be made by –*

*(a) any party;*

*(b) any person or body who wishes to be appointed as a representative party; or*

*(c) any person who is likely to be a party to proceedings.*

*(3) An application for such an order –*

*(a) must be supported by affidavit evidence; and*

*(b) must identify every person to be represented, either*

*(i) individually; or*

*(ii) by description, if it is not practicable to identify a person individually.*

*(4) An application to appoint a representative defendant must be on notice to the claimant.*

*(5) An application to appoint a representative claimant may be made without notice.*

*(6) The court may direct that notice of an application be given to such other persons as it thinks fit.*

*(7) Where the court directs that a person not already a party is to be a representative defendant, it must make an order adding that person as a defendant.*

*21.3 (1) Where there is a representative claimant or defendant, a judgment or order of the court binds everyone whom that party represents.*

*(2) It may not however be enforced against a person not a party to the proceedings unless the person wishing to enforce it obtains permission from the court.*

*(3) An application for permission must be supported by evidence on affidavit and must be served on each person against whom it is wished to enforce the judgment.*

*(4) On considering an application under this rule the court may –*

*(a) take into account any facts or matters particular to any one or more of the persons against whom it is sought to enforce the judgment or order; and*

*(b) determine any issue arising on the application either –*

*(i) summarily; or*

*(ii) by trial, and, if the issue is to be determined by trial, give such directions as are appropriate to secure a just, economic and speedy decision upon the issue.*

*21.4 (1) This rule applies only to proceedings about –*

*(a) the estate of someone who is dead;*

*(b) property subject to a trust; or*

*(c) the construction of a written instrument.*

*(2) The court may appoint one or more persons to represent any person or class of persons (including an unborn person or persons) who is or may be interested in or affected by the proceedings (where presently or for any future, contingent or unascertained interest) where –*

*(a) the person, or the class or some member of it, cannot be ascertained or cannot readily be*

*ascertained;*

*(b) the person, or the class or some member of it, though ascertained cannot be found;*

*or*

*(c) it is expedient to do so for any other reason*

*(3) An application for an order to appoint a representative party under this rule may be made by-*

*(a) any party; or*

*(b) any person who wishes to be appointed as a representative party.*

*(4) A representative appointed under this rule may be either a claimant or a defendant.*

*(5) A decision of the court binds everyone whom a representative claimant or representative defendant represents.*

*27.1 (1) Where in any proceeding it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.*

*(2) A person may be appointed as a representative if that person –*

*(a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and*

*(b) has no interest adverse to that of the estate of the deceased person.*

*(3) The court may make such an order on or without an application.*

*(4) Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.*

*(5) A decision in proceedings in which the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate."*

**[32]** Counsel for claimant was of the view that the application at bar falls into the category of a class action type of suit for the appointment of 1<sup>st</sup> defendant. However, in grounding her submissions in same she has equated the circumstances of 21.7 with said rules. This is not the intent of the rules for the application at bar. I do not agree with counsel's submission in this regard.

**[33]** Application of 21. 4 do not apply for the purposes of 21.7 for the circumstances outlined therein. Rule 21. 7 speaks specifically to a situation where the party died after proceedings commenced. In the absence of any information as to the

similarity in interest it cannot be said that the 1st defendant is capable of stepping into the role of the 4th defendant. These paragraphs referenced by the claimant are not about proceedings regarding the estate of someone who is dead. It is an application to appoint a representative to carry on the substantive claim on behalf of defendants who are alive. It is understood that counsel sought to invoke this rule in the context of a deceased party who had no known legal representatives for his estate. However, to do so is a misapplication of the CPR 21.4.

Can the 1<sup>st</sup> defendant be appointed personal representative of the estate of the 4<sup>th</sup> defendant?

[34] I now give consideration to the substantive application at bar.

[35] The claimant is well within his right to make this application as the rule does not preclude either party making this application regardless of which party to the proceedings died. Hence the claimant making the application is within the ambit of CPR 21.7, **Hall v Hall [2017] JMCA App 27; Administrator General for Jamaica v Glen Muir [2016] JMCA Civ 47.**

[36] What is of importance is that the circumstances fall within the requirements for the rule 21.7 which are that, the person in respect of whom the application is made is a party to the proceedings; the person had indicated an interest in the claim prior to their passing and have no personal representative. Having regard to the fact that prior to his death the 4th defendant demonstrated that he was interested in the proceedings by filing his defence and counterclaim on the claimant and the fact that there is nothing at the time of the hearing of the application that a personal representative has been appointed, it is beyond doubt that this present case meets the criteria for invoking the rule.

[37] However, having established that 21.7 applies it has to be determined whether the 1st defendant is to be appointed as personal representative for the estate of the 4th defendant's estate. Can he fairly and competently conduct the proceedings on behalf of the estate and has no interest adverse to the estate. Also can a person

be appointed against their will? Such a person cannot be appointed against their will. As the CPR 21.7 is silent on determinations to meet this test, the guidance of case law is necessary to come to such a determination.

- [38] In the case of **Tanya Ewers (Executrix of the estate of Mavis Williams) vs Melrose Barton - Thelwell 2017 JMCA Civ. 26**, the judge ignored CPR 21.7 and 21.8 which provides for substitution of a personal representative for the estate of the deceased. Brooks JA stated that a representative who could be executor first has to be appointed by the court to act as the deceased representative, before that person can act on behalf of the estate of the deceased.
- [39] Though the application at bar is distinguished on the facts of that case, the principles in making a determination under CPR 21.7 remain applicable. The decision of **Tanya Ewers (Executrix of the estate of Mavis Williams) vs Melrose Barton - Thelwell** suggests that the starting point of consideration is to determine whether a person is competent and can fairly represent the estate.
- [40] Counsel for the claimant emphasised the capability of the 1st defendant in being appointed personal representative because of the lead role he has taken in the proceedings. Taking a lead role in the proceedings cannot be a criterion under CPR 21.7 for being appointed personal representative of a deceased's estate. It is yet to be established whether the 1st defendant could be appointed executor or who is a beneficiary under will or estate, to determine if he can fairly and competently execute the task of a personal representative for the 4th defendant or that he has no interest adverse to same.
- [41] I do not agree with the submissions made by counsel for the claimant that the requirements prescribed under 21.7 have been fulfilled.
- [42] The affidavit filed by the 1<sup>st</sup> defendant also made reference to the relationship between the 1<sup>st</sup> defendant and the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants. While the claimant's attorney at law has demonstrated the role played by the 1<sup>st</sup> defendant in respect

of the proceedings. However, the critical element of the relationship between the 1<sup>st</sup> and 4<sup>th</sup> defendant is absent from counsel for the claimant's submissions.

[43] There is nothing contained in the affidavit of the relationship between the 1<sup>st</sup> and the 4<sup>th</sup> defendant. Further the 1<sup>st</sup> defendant has not filed a defence to the substantive claim filed November 19, 2021 which would provide insight of the interest of the 1<sup>st</sup> defendant in respect of same.

[44] There is no information as to whether the 4<sup>th</sup> defendant died testate and those who stand to benefit or would be in a position as executor to be appointed the legal personal representative. There is on the court file a letter dated November 16<sup>th</sup> 2021 requesting information as to whether there are any beneficiaries of the 4<sup>th</sup> defendant, but by virtue of the letter dated November 19, 2021, no assistance was forthcoming in that regard.

[45] I agree with the submissions made by counsel on behalf of the 1<sup>st</sup> defendant that in the circumstances there is no basis on which to appoint the 1<sup>st</sup> defendant as personal representative of the 4<sup>th</sup> defendant. At this stage where there is a dispute as to ownership and the consequences flowing from same, in the absence of information as to the intentions of the 1<sup>st</sup> defendant and his relation to the 4<sup>th</sup> defendant, there is insufficient information that would satisfy the court that the 1<sup>st</sup> defendant can competently and fairly administer the estate or has no interest adverse to the estate of the 4<sup>th</sup> defendant.

Can the Court make an Order to appoint a representative for the 4<sup>th</sup> defendant?

[46] It is beyond question that the court does have power by virtue of CPR 21.7(3) to appoint a personal representative: **Artwell v Advantage General Insurance Company Limited and Administrator General of Jamaica [2020] JMSC Civ 119**. However, the court can only do so having regard to information that will allow the court to make such a determination: **Evan Bennett v Raymond Ramdatt [2016] JMSC Civ 206**. The court can only exercise its powers to appoint any

person a representative of a deceased's estate, if it has all the information that allows for such a determination to be made.

[47] In **Bennet v Ramdatt** Justice Wint Blair J (Ag) as she then was, determined that the application to appoint a personal representative should be supported by affidavit in respect of indicating, birth certificate whether the person was an interested party, whether the person died intestate, any person interested in being appointed personal representative. Though distinguishable on the facts, notwithstanding that it has already been determined that 4<sup>th</sup> defendant is an interested party it has not been determined that whether the 4<sup>th</sup> defendant died intestate or whether any person is interested in being appointed personal representative. Further consent of a person who fulfils the requirement to be appointed under CPR 21.7 is necessary.

[48] In the case of **Murray and Anor v Petros [2020] JMCA APP 4**, the court of appeal had to consider "three discrete but interconnected applications in the matter. The third application was made to Mrs. Karin Murray, seeking directions to enable the proceedings to be carried on after the death of Mr. George Murray, her husband. This application though filed last in time, was considered as a preliminary application and the court ordered that Mrs. Karin Murray is substituted for Mr. George Murray in her capacity as representative for his estate for the purpose of hearing the applications.

[49] In paragraph 10 of the decision, McDonald-Bishop JA made reference to the affidavit of counsel for the applicants, where it was stated that the deceased party died testate and his wife named the executrix of his will. By his will, Mrs. Murray was also bequeathed among other things all interest and shares, which he possessed in Tensing Pen (one of the companies in dispute). Counsel further submitted, as referenced in paragraph 12 of the decision that Mrs. Murray being a co-litigant a personal representative sole beneficiary of the estate and her interest not being at variance with the deceased or the estate, was the most appropriate person to continue the litigation.



McDonald JA stated in paragraph 20:

“[20] As submitted by Mrs. Davis, Mrs. Murray’s interests in these proceedings are clearly not in conflict with that of the estate of Mr. Murray, when the facts from which the matter has emanated are considered. She is named as executor to Mr. Murray’s estate, and the sole beneficiary under the purported will. Even if the will were to be declared invalid, she as his spouse would be entitled to share in his estate on intestacy and would be absolutely entitled to his personality. Furthermore, and even more significantly, she has been party to these proceedings with Mr. Murray since its inception and they both share identical interest in the outcome of these proceedings as well as the substantive appeal.

Her Ladyship further stated:

[21] I could discern no potential conflict of interest and risk of injustice in appointing her for the limited purpose of the hearing of these applications, which were originally filed by Mr. Murray, in his own right, with her as co-applicant. Mrs. Murray was regarded as someone who would be able to fairly and competently carry on these proceedings on her own behalf as well as on behalf of the estate of Mr. Murray.

[50] Having regard to this information brought forward by counsel the court was minded to exercise its power of appointing Mrs. Murray as a representative for the estate of Mr. Murray for the purpose of the hearing, as the information satisfied the court of the requirements laid out by Rule 21.7 – that is the person to be appointed can fairly and competently and has no interest adverse to the deceased’s estate.

[51] In the case of **Century National Bank Ltd. & Ors. v Windsor Commercial Land Company Ltd. & Ors.**, the court had to consider three interlocutory applications: an application to substitute claimants, an application to amend the claimant’s particulars of claim, and an application to approve a witness as an expert. However, during the course of the proceedings, the 2<sup>nd</sup> defendant passed away. In those circumstances the court was asked to consider an application to appoint a personal representative.

[52] Brooks J, as he then was stated that though evidence of Mr Smith’s death was provided in an affidavit it did not provide information as to whether or not Mr Smith

died intestate, nor was any indication given that any person was interested in representing his estate.”

Brooks J held at page 15 of judgment:

“There is, in my view, insufficient information available to the court, at this time, to make an order appointing a representative for Mr Smith’s estate. There are options open to the court in the appointment of a representative; it may appoint the Administrator General for Jamaica; it could consider appointing Mr Crichton or appointing one of the beneficiaries of Mr Smith’s estate. The most appropriate appointee would, of course, be the individual who would allow this claim to proceed as quickly as possible. The court has to leave it to the parties to make that decision...”

- [53] It is demonstrated by the case law that the threshold for meeting the criteria is someone who can act on behalf of the estate as an executor or a beneficiary under a will; and the person “is interested in so acting” It has not been established which, if any, of the defendants meet the criteria.
- [54] Appointing a personal representative should not be viewed lightly. Such an appointment carries serious implications to the estate and can put the estate in jeopardy. **Century National Bank Ltd. & Ors. v Windsor Commercial Land Company Ltd. & Ors.** Brooks, J held further that where a court appoints a personal representative in circumstances such as these a judgment or order of the court would bind the estate as per CPR 21.3.
- [55] In this case, it has to be determined if there is any person or a beneficiary who is more likely appropriate to represent the estate. The application did not demonstrate whether any checks were done to determine who such other person would likely be. Despite the court having the power under 21.7 to appoint a representative, the court cannot exercise such power to appoint a personal representative where no information is available to determine if any of the five defendants or another person can be so appointed.
- [56] In the absence of information as to the estate of the deceased the court is unable to appoint the 1<sup>st</sup> defendant or any other person at this point.

I make the following orders therefore:

1. The Claimant's Notice of Application for Court Orders filed May 25<sup>th</sup> 2022 is refused.
2. No order as to costs.