



[2026] JMCC Comm 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2024CD00430

**IN THE ESTATE of GORDON
ARTHUR CYRIL STEWART**, also known as
GORDON ARTHUR “BUTCH” STEWART,
late of 76 Barbican Road, Kingston 6, St.
Andrew, Businessman, Deceased, Testate

AND

IN THE MATTER of the Companies Act

AND

IN THE MATTER of the Trusts Act, 2019

Re: Gordon Arthur Cyril Stewart and the Companies Act and the Trusts Act

Appearances: Mr. Walter H. Scott KC, Mr. Ian Wilkinson KC, Mr. Conrad George, Miss Anna M. Gracie, Mr André Sheckleford, and Miss Gabrielle Chin, instructed by Hart Muirhead Fatta, Attorneys-at-Law for the Applicant.

Mr. B St. Michael Hylton KC, Mr. Kevin O. Powell KC, and Miss Timera Mason, instructed by Hylton Powell, Attorneys-at-Law for the Respondents.

Mr. John G. Graham KC and Miss Peta-Gaye Manderson, instructed by John G. Graham & Company, Attorneys-at-Law, watching proceedings on behalf of Gorstew Limited.

Mr. John Vassell KC, Mrs. Julianne Mais-Cox and Mr. Kyle Fong, instructed by DunnCox, Attorneys-at-Law watching proceedings on behalf of Appliance Traders Limited.

Mrs. Daniella Gentles Silvera, KC, Mrs. Kerri-Ann Allen Morgan, and Miss Kathryn Williams instructed by Livingston Alexander and Levy, watching proceedings for the Executors Elizabeth Desnoes and Martin Veira.

Civil Procedure - Application to strike out claim – Public Accountancy Act - Appointment of foreign accountant - Trusts Act - Whether applicable to executors - Whether the claim discloses reasonable grounds to bring the action - The Civil Procedure Rules 26.3 (1) (c).

Heard: February 3, 2026, March 16, 2026, March 20, 2026, and April 17, 2026

BROWN BECKFORD J

INTRODUCTION

[1] The late Gordon “Butch” Stewart was a prodigious businessman who died leaving a substantial estate. He is referred to as the Founder in this and other related proceedings. I will do likewise. He named Trevor Patterson, Cheryl Hamersmith-Stewart, Elizabeth (Betty Joe) Desnoes, and Hugh Martin Veira as the executors and trustees of his Will.

[2] Adam Stewart is the son of the Founder and one of the beneficiaries of the estate of the Founder. He may at times be referred to as Adam for ease of reference only, and no disrespect is intended or meant. There are a number of other beneficiaries, including the Founder’s partner and other children.

[3] The executors have brought a claim seeking the directions of the court, pursuant to the **Trusts Act**, to carry out a “red flag” audit. This “red flag” audit was said to be necessary based on certain allegations levied against Adam Stewart in relation to Gorstew Limited, Appliance Traders Limited, and their subsidiaries, in which the Founder held the majority of the shares. On his application, the court ordered that Adam be joined to this claim.

[4] Adam subsequently filed an Application for Court Orders seeking various orders, which were determined and judgment delivered in [2025] JMCC 35, save for an order that the Claimants' claim be struck out. On 02 January 2026, the Applicant filed an Amended Notice of Application for Court Orders reflecting this position.

[5] The Amended Application states:

The Applicant, ADAM STEWART, of 9 -10 The Lagoon, Freeport, Montego Bay, in the parish of St. James, seeks the following orders, namely that:

- a. The Claim herein be struck out as it discloses no reasonable grounds for bringing the action; and*
- b. Further, or in the alternative, the Claim be struck out as an abuse of the process of the Court.*

That there be such further and/or other relief as this honourable Court Deems Just.

[6] The grounds on which the orders are being sought:

On the face of the pleadings the Claim discloses no reasonable grounds for bringing the action and is legally unfounded. The Claim also constitutes an abuse of the process of the Court, in that it seeks to invoke the Court's jurisdiction in a manner that is contrary to statutory provisions and is incompatible with the procedural rules and statutory framework governing the administration of estates and the regulation of corporate entities. This is in circumstances where:

- a. The Claimants have no standing in law to bring the Claim;*
 - aa. The nature of the relief sought would be unlawful under the Public Accountancy Act, such that this Honourable Court is being invited to grant relief that would be contrary to the law of Jamaica;*
- b. The stated statutory basis for the Claim is inapplicable; and*
- c. The relief sought is not legally available under any pleaded or implied cause of action.*

THE CLAIM

[7] The executors of the estate of Gordon "Butch" Stewart filed a Fixed Date Claim Form in the following terms:

*The Applicants, **TREVOR PATTERSON, CHERYL HAMERSMITH-STEWART, ELIZABETH "BETTY-JOE" DESNOES and MARTIN VIERA,** being the Executors of the Estate of the Honourable Gordon Arthur Cyril Stewart, also known as Gordon Arthur "Butch" Stewart, whose address for the purpose of these proceedings is in care of their Attorneys-at-Law, Hylton Powell of 11A Oxford Road, Kingston 5 in the parish of Saint Andrew seek the following orders:*

- 1. The Applicants are authorised to carry out an urgent "red flag" audit (if necessary, a court supervised audit) of Gorstew Limited Appliance Traders Limited, and their subsidiaries.*
- 2. That there be such consequential or other directions or orders as may be necessary or appropriate to give effect to the above order.*
- 3. Costs.*
- 4. Liberty to apply.*

The Applicants seek these orders on the following grounds:

- 1. The Applicants are the executors and trustees of the estate of the late Honourable Gordon Arthur Cyril Stewart, also known as "Butch" Stewart ("the Founder"), probate having been granted to them on October 31, 2023 in Claim No. SU2023 ES02145.*
- 2. Section 63 of the Trusts Act provides that a trustee may apply to the Court for directions as to how he should or might act in any of the affairs of the trust, and the Court may make such order as it thinks fit.*
- 3. At the time of his death on January 4, 2021, the Founder was the majority shareholder in Gorstew Limited and Appliance Traders Limited ("the Companies"), holding 999,999 of the 1,000,000 issued ordinary shares of each company. Gorstew Limited holds the remaining 1 share in Appliance*

Traders Limited, and Appliance Traders Limited holds the remaining 1 share in Gorstew Limited.

4. *The shares the Founder held in the Companies constitute property held on trust for his estate by the Applicants.*
5. *The Applicants have serious concerns about the way in which the Companies' business and affairs have been conducted since the Founder's death and have resolved that a "red flag" audit should be carried out in relation to the Companies and their subsidiaries. The Applicants' concerns include:*
 - (a) *Since the Founder's death, his son, Adam Stewart ("Mr Stewart"), assumed the title of Executive Chairman of Gorstew Limited ("Gorstew") and established a new board of directors without any authority to do so and to the exclusion of the duly appointed directors of the company;*
 - (b) *There were discrepancies in Gorstew's accounts based on a comparative analysis of the company's audited financial statements for financial year ended June 30, 2022 and unaudited financial statements up to March 2023;*
 - (c) *In or about 2022, there was a marked increase (by over 50%) in the management and employee costs in Appliance Traders Limited. This, in circumstances where the Founder is no longer on the Companies' payroll;*
 - (d) *Use of the Companies' corporate resources to fund and/or pay persons affiliated with Mr Stewart's personal business ventures;*
 - (e) *Unexplained mass resignations by employees in Gorstew's Accounts Department; and*
 - (f) *Allegations that Mr Stewart has been taking loans from the ATL Group pension fund.*
6. *The Applicants' Attorneys-at-Law have written multiple letters to Mr Stewart's Attorneys-at-Law to raise these issues and to seek explanations and/or clarifications in relation to their concerns. To date, the Applicants have not received a satisfactory response.*

7. *The Applicants are required by law to prepare accounts of the estate, and they are unable to do so without obtaining certain information from the management of the Companies.*
8. *The management of the Companies and in particular, Mr Stewart as the self-appointed "Executive Chairman", have refused to co-operate with the Applicants in carrying out the audit, or to provide the information requested by the Applicants.*
9. *Mr Stewart has also attempted to prevent the appointment of two of the Applicants to Gorstew's board as envisaged by the provisions of the Founder's will.*
10. *Section 64(1)(a)(i) of the Trusts Act, 2019 provides that the Court may, upon the Application of a trustee, make an order in respect of the execution, administration or enforcement of a trust.*
11. *Section 64(1)(a)(vii) of the Trusts Act, 2019 provides that the Court may, upon the Application of a trustee, make an order in respect of any trust property, including an order as to the vesting, preservation, Application, distribution, surrender or recovery thereof.*
12. *Section 66 of the Trusts Act, 2019 provides that the Court may order the costs and expenses of, and incidental to the Application to the Court under this Act, to be paid from the trust property or in such manner and by such persons as the Court thinks fit.*
13. *The directions and order sought in this claim are necessary for the Applicants to duly administer the Estate in accordance with the terms of The Founder's Will.*

[8] Written submissions in support of the Application were filed by Counsel for Adam, complemented by oral submissions by King's Counsel Scott. Written submissions were also filed by Counsel on behalf of the Respondents and supplemented by oral submissions made by King's Counsel Hylton. Counsel on behalf of Appliance Traders Limited indicated support for the Application. Counsel for Gorstew Limited indicated they had no instructions in relation to the Application. Counsel on behalf of the executors, Desnoes and Veira, indicated support for the Respondents' position. The submissions were, as usual, of great assistance to the Court.

ISSUES

[9] From the submissions, the issues arising are:

1. Whether the relief sought is unlawful under the **Public Accountancy Act**
2. Whether the **Trusts Act** applies to the Claimant/Respondent as executors
3. Whether the executors are trustees under the **Trusts Act**

Issues two and three are two sides of the same coin and will be dealt with together.

LAW AND APPLICATION

[10] The court is empowered, by way of Rule 26.3 of the **Civil Procedure Rules (CPR)** to strike out a statement of case under certain conditions. It states:

Sanctions - striking out statement of case

26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-

- (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
- (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
- (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or***
- (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.*

[11] The Applicant relies primarily on Rule 26.3(1)(c), which I have highlighted above. It has been stated, and restated, as many times as to be now well accepted that the power bestowed upon the Court under this rule is not to be exercised lightly. It is an extreme, at times “draconian,” measure that should be used sparingly and as a last resort. The court should exercise this power with caution, and then only in the clearest of cases.

[12] The law was most recently restated in **Bengal Development Ltd v Wendy Lee et al** [2025] JMCA Civ 9, relied on by both parties. The Applicant’s representatives emphasise at paragraph 12 of their submissions that:

“The threshold engaged is therefore a legal threshold rather than a factual one. Where the pleaded allegations, viewed on their face, do not give rise to a legally recognisable cause of action against the defendant in question, the claim cannot be sustained and must be struck out.”

[13] Counsel for the Respondents/Claimants, relying on this authority, highlighted that striking out a statement of case should be reserved for plain and obvious cases that have no point of trial, and that they did not consider this to be one such instance.

[14] Against this backdrop of the applicable law, the Applicant has the burden of proving that the Claimants’ case has no reasonable prospect of success.

Issue 1 – Whether the relief sought is lawful under the Public Accountancy Act

[15] Counsel for the Applicant submitted that the Application to have a foreign firm carry out the “red flag” audit is unlawful as it is contrary to **section 15** of the **Public Accountancy Act (the PAA)**, which makes it an offence for a person who is not registered as a public accountant in Jamaica to practice as such. The court, it was further submitted, cannot condone, endorse or support such an illegality. The relevant portions of the PAA are stated below:

Sections 15(1)(a), 15(2)(a) and (b) and 15(3)

15.-(1) No person, unless he is a registered public accountant, shall in Jamaica-

(a) practise as a public accountant

(2) A person practises as a public accountant within the meaning of paragraph

(a) of subsection (1) if-

(a) he practices accountancy within the meaning of sub- section (3); and

(b) in practising accountancy as aforesaid, he holds him- self out (whether expressly or by implication) as being a professionally qualified accountant or an expert in accounting or auditing matters.

“(3) A person practises accountancy within the meaning of paragraph (a) of subsection (2) if, for reward, he prepares or examines financial, accounting or

related statements, or issues any written opinion, report or certificate concerning any such statement, but a person does not practise accountancy as aforesaid by reason only that-

(a) he does so in the course of his duties as an employee of any person;
or

(b) he engages in book-keeping or cost accounting or the installation of book-keeping, business or cost systems, not including the preparation of financial statements purporting to reflect a true and fair view or to be in conformity with generally accepted accounting standards or in such work as may be prescribed for the purposes of this subsection.”

[16] Counsel for the Applicant contended that the Court is being asked to make an order appointing a US-based accounting firm, Alvarez & Marsal. Counsel argued that the Affidavit of Trevor Patterson in support of the Fixed Date Claim Form supported this position. The affidavit of Trevor Patterson in paragraphs 61, 62 and 68 indicates the basis on which a foreign-based firm was to be appointed. These paragraphs state:

“SELECTION OF AUDITORS

61. Having decided to undertake the audit and complete the preparation of the estate accounts, the next decision was to elect an audit firm. In the discussion on this issue I made the point that we need an audit firm which: (a) (b) had no prior dealings with Adam, the Industrial Group or the Sandals & Beaches Group; appeared immune from Adam's substantial power and influence; (c) espoused substantial specialist experience in estate accounting; and (d) was not averse to giving evidence in estate court proceedings.

62. The other Executors agreed. That ruled out local accounting firms (including those affiliated with the Big 4 (PricewaterhouseCoopers, KPMG and Ernst & Young) because of their affiliation with Adam and Sandals & Beaches across various territories in the Caribbean. Deloitte, the other Big 4, has ceased operation in Jamaica. In addition, I am aware from previous experience that Jamaican accounting firms tend to shy away from assignments which may be

inherently contentious and could mean giving evidence in a court of law. I had anticipated that the relevant accounting firm might have to attend court to assist the Executors in presenting the estate account under the Trustees, Attorneys, and Executors (Account and General) Act.

...

68. My research produced two (2) US-based accounting firms which I thought would fit the bill. I prepared a brief report to the Executors describing the firms. The Executors unanimously selected Alvarez and Marsal. I contacted the firm and set up a conference call to which all Executors were invited. The process culminated in the appointment of Alvarez and Marsal.”

[17] Counsel for the Applicant relied on the case of **Watts v Watt & Anor** [2013] JMCC Comm. 15, where Mangatal J stated the following at paragraph 102:

“ [102] must address the matter of Mr. Mills holding himself out as being an Accountant. In his Witness Statement Mr. Mills described himself as being an Accountant and the Accountant for Mr. Watts and the Company. He states that he had for years been responsible for reviewing Mr. Watts' accounts and giving financial advice to Mr. Watts. In the early 1990's he acquired FC Swaby & Company so thereafter Mr. Watts dealt with him personally. Mr. Mills indicated that FC Swaby died in the early 1990's but when cross-examined about his registration he stated that Mr. FC Swaby is registered as the principal. He gave financial advice relating to the Company, filed financial statements and tax returns. He also conducted the corporate secretarial work. I found it quite troubling that Mr. Mills did not disclose that he is neither a chartered accountant nor registered public accountant, had no professional status, and was only an accountant clerk, until he was cross-examined about it. As Counsel for the Claimant points out in their Closing submissions, Mr. Mills appears to have been acting in breach of section 15 of the Public Accountancy Act and ignoring the Rules and Recommendations of the Public Accountancy Board, notably paragraph 7.22(c). All of this

unprofessional and irregular behaviour plainly undermines his credibility.”

[18] Counsel further submitted that the proposal to appoint a US-based law firm would create an unlawful effect if accepted, and further that it might operate to narrow section 15 and interfere with its effect. At paragraph 23 of their submissions, they state the following:

“23. It is no answer to the question of illegality to contend that Alvarez & Marsal, or any other proposed accounting firm, is based outside Jamaica and therefore not caught by the Public Accountancy Act. Such an interpretation would be so narrow as to deprive section 15 of any meaningful effect, allowing the statutory prohibition to be avoided simply by situating the practitioner overseas. The Act regulates the practice of public accountancy in Jamaica, and its focus is on the substance and effect of the conduct, not the physical location of the professional. To accept the Claimants' position would be no different, in principle, from suggesting that a foreign lawyer could practise Jamaican law without a practising certificate, merely because the work was carried out from abroad - an outcome plainly inconsistent with the Legal Profession Act and with settled principle.”

[19] This argument is not without merit, in that it is correct in law as it relates to the appointment of Alvarez & Marsal to carry out the audit. However, the argument ultimately fails as the appointment of an accountant/accounting firm is not the Application before the court. The Court accepts the submission on behalf of the Respondents that the order being sought is for authorisation to carry out the process. The entreaty to the court, as seen from Order number 1, sought in the Fixed Date Claim, is for authorisation to carry out a “red flag audit” or a court-supervised audit. Order 2 seeks consequential orders if Order number 1 is granted. The precise consequential orders are clearly left to the discretion of the court as none is expressly requested. The position envisioned in Mr Patterson’s affidavit as to a suitable person/firm to carry out the audit can be no more than information for the court’s consideration, which the court may reject.

[20] Consequently, the Applicant cannot be successful on this basis.

**Issues 2 and 3: Whether the Trusts Act applies to the Claimants as executors/
Whether the executors are trustees under the Trusts Act**

[21] Counsel for the Applicant framed this question as to whether for the purposes of the **Trusts Act**, persons named as executors and trustees have, in law (not equity), become trustee as an issue of standing. Counsel submitted that as the attempted registration of the transfer of shares to the executors has been put on hold by way of an injunction, the executors are not Trustees within the meaning of the **Trusts Act**, despite so being named in the Founder's will, this goes to the heart of whether the Claimants/Respondents can engage Sections 63, 64 and 66 of the **Trusts Act**.

[22] Sections 63, 64(1)(a)(i) and (vii), section 66 of the **Trusts Act** 2019 permit trustees to approach the court for directions. These sections state as follows;

“63. A trustee may apply to the Court for directions as to how he should or might act in any of the affairs of the trust, and the Court may make such order as it thinks fit.

...

64. -- (1) On the Application of any person mentioned in subsection (2), the Court may –

(a) Make an order in respect of-

(i) the execution, administration or enforcement of a trust;

...

(vii) any trust property, including an order as to the vesting, preservation, Application, distribution, surrender or recovery thereof;

...

66. The Court may order the costs and expenses of, and incidental to the Court under this Act, to be paid from the trust property or in such manner and by such persons as the Court thinks fit.

...

[23] Counsel for the Applicant contended that the Respondents are not entitled to seek the advice of the court as they do not come within the **Trusts Act**. They contend further that by section 95(4), the Respondents, in their role as personal representatives, fall outside of the purview of the **Trusts Act**. Section 95(4) is as follows:

95.(4) Nothing in this Act affects a personal representative acting as such."

[24] Paragraph 29 of the Applicant's Written Submissions states;

29. Section 95(4) of the Trusts Act 2019 provides that the Act does not "[affect] a personal representative acting as such". A personal representative, such as an executor, acting qua executor, therefore derives no rights under the Act.

[25] Counsel contends for this interpretation on the basis that it is made clear that the executors derive no rights under the Act.

[26] Counsel for the Respondents does not accept this interpretation of the law. They contend that s.95 means the Act does not affect personal representatives when acting in that capacity. At paragraph 28 of the Respondents' submissions, they state:

28. We submit that section 95(4) of the Act does not have the effect of disapplying the provisions of the Act in the case of personal representatives. There is nothing in this provision which says or indicates that the Act does not apply to the executors of an estate. The provision simply means that the provisions in the Act do not prevent personal representatives from acting in that capacity.

[27] Counsel relies on the House of Lords' interpretation of the phrase "nothing in this Act affects", in the case of **Re Cockell, Jackson v Attorney General** 16 TC 681, which is similar to the phrasing in the provision at hand. The following is stated on page 6,

“...nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors”. I understand that to mean this. Notwithstanding any inference which you might have drawn from other Sections of the Act, if you looked at them, the right of retainer remains as it as before the Act, subject to this, that it is enlarged to the extent to which in this subsection you find it enlarged, and it is diminished to the extent to which in this Subsection you find it diminished; and accordingly I understand that to mean this, that in the case of an insolvent estate there is still the right of retainer which will have to be brought into account and harmonised as best you can with the rules laid down in Part 1 of the Schedule - there is still that right of retainer, modified by way of increase or diminution in the way I have stated.”

[28] The Court is of the view that the Respondents’ interpretation of the meaning of “affects” as used in the Act is correct. There is no definition given in the Act, so the court is to apply the rules of statutory interpretation. In **Minister of Finance and others v Bennett** 2018 JMCA Civ 9, McDonald JA (as she then was) applied the reasoning of Brooks JA (as he then was), thus:

*“[24] The correct approach to determining the meaning of words or phrases in a statute is to ask what is the natural and ordinary meaning of those words in its context, in the statute. Brooks JA in **Special Sergeant Steven Watson v The Attorney General and Others** at paragraph [19] of the judgment, quoted and applied Lord Reid’s statement on this issue in **Pinner v Everett** [1969] 3 All ER 257 and stated thus:*

*‘In determining the meaning of any word or phrase in a statute the first question to ask always is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that **it is wrong and dangerous to proceed by substituting some other words for the words of the statute.**’ (Emphasis supplied)”*

[29] The definition of the word “affect” according to Webster’s New World Roget’s A-Z Thesaurus is “To have an effect upon”. The Oxford English Dictionary and Thesaurus give the same meaning. The Cambridge English Dictionary’s meaning is:

to have an influence on someone or something, or to cause a change in someone or something.

[30] In the context of the Act as a whole, the definition of the word "affect" carries no ambiguity. It is understood by the Court that the legislators intended that the Act would not have any effect on the personal representative, who is also a trustee, when acting in that capacity.

[31] In **Dudley May and Others v National Commercial Bank**, Supreme Court Civil Appeal No 101 of 1989, the Court of Appeal stated that the duties of the executor were to:

- **Bury the deceased**
- **Collect the estate**
- **Pay debts**
- **Satisfy all just claims**
- **Distribute the property to the persons entitled**
- **The limits of appointment could be widened with other duties.**

[32] The executor acting on these duties is acting qua executor and not as a trustee.

[33] Counsel for the Respondents makes a further point that the executors are also trustees, having been so named in the will, and that, as a result, they are plainly governed by the **Trusts Act**. To support this point, Reid Icolin J., in **Adam Stewart and Jaime Stewart McConnell et al v Hugh Veira** [2025] JMSC Civ 151, is cited, as she stated the following at paragraph 80:

[80] “... I agree that the term trustee is wide enough to encompass executors of an estate...”

[34] Counsel for the Applicant takes an alternative view, stating that section 4 does not extend to the assets of an unadministered estate. Section 4(1) states:

4. (1) Subject to the provisions of this Act, a trust exists if a person (a "trustee") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his own estate-

[35] Counsel took the view that, as the estate remains unadministered, the Claimants do not, "hold" or "have" vested in them, the shares of the companies. This, I fear, for the reasons below, may be too broad a view, being a view of the founders will as a whole, and not the particular bequest, the subject of the claim.

[36] On the issue of whether the executors are trustees for the purpose of section 4(1), I am not sure I am in complete agreement with my sister, Reid J, in **Hugh Veira** above, that the Act extends to executors, acting as such, given the limitations expressed by McIntosh JA in **Heather Montaque v GM and Associates et al** [2013] JMCA App 7.

[37] That case concerned an Application for an injunction to restrain executors from transferring the shares of the second respondent, which were the subject of a bequest in which the shares were to be sold, and the proceeds divided between the testator's wife and children.

[38] The argument was made that on a proper construction of the will, as a matter of law, the executors were constituted trustees in relation to the shares. Counsel there relied on the case of **Cumming v Land Banking and Loan Co** 1892 Can LII 33, at paragraph 20 of the judgment of McLennan JA.

[39] Rejecting the argument that the executors, were as a matter of law constituted trustees of the estate, McIntosh JA distinguished **Cumming** on the basis that the testator in **Cumming** devised all his estate, real and personal to the executors, "...upon trust and to the ends and purposes named therein", rendering the executors trustees from the beginning, with the property devised to them to invest and carry out all other functions in relation to the estate.

[40] In the case under consideration by McIntosh JA, the shares were not devised to the executor; the bequest was that the shares should be sold, and the proceeds distributed as indicated. She disagreed with the argument that the executors were trustees of the shares by operation of law.

[41] In commenting on the dicta of McLennan JA, that an executor is always a trustee from the beginning to the end of his office, she pointed out that the learned judge of appeal (McLennon JA) went on to add that he was speaking of a will of personal estate only because there were distinctions in the case of real estate. In any event, I would hesitate to rely on this dictum of McLennan JA since the decision of the Court of Appeal was reversed by the Supreme Court of Canada (1893) 22 SCR 246.

[42] In the judgment of the Supreme Court, delivered by the Chief Justice, Sir Henry Strong, it is clear that a personal representative acts in separate capacities as executor and trustee. To be constituted trustee, the personal assets held originally by the executor who is also a trustee, must be demonstrated to have been turned over to the trust. In that case, the fact the debts of the estate had been paid and it had been some 10 years after administration led to the presumption that the actions complained of were taken as trustee.

[43] My interpretation of the cases is that the executors do not automatically become trustees of the will despite the will naming them as 'Executors and Trustees'. It is noted that the executors are referred to as trustees throughout the will. This nomenclature, as shown in the preamble, was for convenience only.

[44] Clause 13.1 of the will of the Founder does not give the shares in the ATL Group, which includes Gorstew Limited and Appliance Traders Limited and their subsidiaries, to the executors on any trust. It states, "*I give the ATL Group to my following 3 sons in the following proportion...*" It is true that the Founder tasked the executors with certain duties in relation to the companies. However, those steps can only be an extension of their duties as executors, which is to distribute the property to the persons entitled to it. (see **Dudley May** above).

[45] Clause 14 states:

14. With respect to the ATL Group, I wish the following to be done and I charge my Trustees with the duty of reorganizing the ATL Group to ensure that these objectives are met; namely:

(a) that the ATL Group be reorganized under a single parent company in which shares can be allocated to my three (3) sons as stated in paragraph 13 above;

(b) that the ATL Group be managed and operated along strict business lines with a strong professional board of directors to generate income for the named beneficiaries:

(c) that my three (3) sons named above shall, if they so desire, have seats on the board of directors of the parent company and other principal companies within the ATL Group and, in the case of Gordon Jackson Stewart, who is an infant at the date of this Will, upon his reaching the age of majority in Jamaica.

(d) that Adam Stewart be the chairman of the ATL Group so long as he is willing and able to hold that office;

(e) that Adam may establish a management company or team to manage the businesses comprised in the ATL Group on terms that such company or team be paid management fees on strict arm's length basis as determined and approved by my Trustees during the initial set-up period with the assistance of professional management consultants as determined by my Trustees;

(f) that Jamaica Observer, although a loss-making venture at the moment, not be sold or disposed of or be closed down so long as the beneficiaries can, within reason, sustain this company by providing financial assistance from other companies within the ATL Group.

Nothing in this clause 14 shall be construed to mean that the beneficiaries of the ATL Group may not wind-up, sell or dispose of any business or asset in the ATL Group subject to requisite board or other approval PROVIDED that any

such sale or disposal shall be on an arm's length basis. This clause shall also apply to Jamaica Observer if my three sons referred to in clause 13 above shall unanimously agree that it should be closed, sold or otherwise disposed of because it is a financial burden on the ATL Group.

[46] It can be readily seen that the duty imposed on the Trustees in clause 14(a) is a prelude to distribution as set out in the bequest. It is noted that this duty to reorganize is intended to achieve the objectives set out in 14(b) to (f). These, however, are not within the remit of the executors.

[47] Edwards JA in **Joni Young-Torres v Ervin Moo-Young et al** [2019] JMCA Civ 23 at paragraph 48 stated:

“[48] With respect to shares in a company, therefore, the title of a deceased shareholder is transmitted by operation of law, and, in the case of a will, it devolves immediately upon death to the executors, who act for and represent the estate, even before probate has been obtained....”

[48] This statement does not deal with whether the executor takes title as executor or as trustee, but I believe it is of some importance that she states, *“in the case of a will, it devolves immediately upon death **to the executors...**”* It seems inescapable that the executors' title to the shares, whether at law or in equity, is, at this stage, as executors and not as trustees.

[49] In view of this finding, the executors in seeking to carry out this red flag audit are acting qua executors and not trustees of the will of the Founder. In that event, they do not have standing under the **Trusts Act** to bring this claim. The Applicant succeeds on this basis.

ADDENDUM

[50] Following the delivery of the draft judgment, the Claimants'/Respondents' Attorneys-at-Law requested that the Court allow further submissions on the cases of **Heather Montaque v GM and Associates et al** [2013] JMCA App 7 and

Cumming v Land Banking and Loan Co., 1892 Can LII 33 referred to and relied on by the Court in the draft judgment. The Court acceded to this application and received and considered the further submissions from the Claimants/Respondents and the Applicant/ Defendant.

[51] Paragraph 2 of the Applicant's submissions, reproduced here for ease of reference, accurately reflects the Court's reasoning and use of these cases:

2. *By way of preliminary observation, we note that the primary authority relied upon by the Learned Judge was **Cumming v The Landed Banking and Loan Company** (1883) 22 SCR 246. In our view, the analytical scheme in which the cases were referred to is as follows:*

- *In **Montaque v GM Associates Limited and Ano** [2013] JMCA App 7, McIntosh JA was faced with an argument that the executor/applicant was a constituted trustee for the purposes of the will in relation to the shares, albeit with a trust for sale. In arguments, reliance was placed on the Ontario Court of Appeal decision in **Cumming v The Landed Banking and Loan Company** 1892 CanLII 33 (ON CA), particularly the dictum to the effect that an executor is a trustee from the moment he takes office as an executor (the "Dictum").*
- *The facts of that case were that Mr. Franklin Smillie, one of the executors of the late Seaton Montaque, a 50% shareholder in G. M. and Associates Ltd (the "Company") sought an injunction to restrain the Company and the other shareholder, Mr. George Gordon, from transferring or otherwise dealing with the deceased's shares. The appellant was added as the 2nd claimant prior to the application coming on for hearing before Campbell J., who refused the injunction but granted the appellant leave to appeal. The appeal came on for hearing before McIntosh JA. The question of the status of the executors as trustees was relevant to the determination of whether certain provisions of the Company's articles of incorporation applied.*
- *It appears that McIntosh JA did not have the benefit of the decision of the Supreme Court of Canada which reversed the Court of Appeal's decision, in which no credence was given to the Dictum. Despite not having the benefit of that further tier of appellate review, McIntosh JA at paragraph 19 of her decision was clearly of the opinion that the dictum was dubious and*

distinguished Cumming by reference to the terms of the will under consideration in that case, and the nature of the assets in question. McIntosh JA (correctly) disagreed with the view that executors are trustees as a matter of law.

- *The Learned Judge noted McIntosh JA's distinguishing of Cumming, but noted that the Canadian Supreme Court had reversed the Ontario Court of Appeal's order, and stated as a principle of law that for an executor to become a trustee, the assets must be turned over to trust, and in circumstances where all the debts of an estate are paid and 10 years have passed since the administration of an estate, a presumption arose that the executors were then trustees.*

[52] The Claimants/Respondents contended that the Court's reliance on these cases was flawed for the following reasons:

- The case of **Montaque** is distinguishable as (1) the will did not provide for the shares to pass to anyone and (2) the decision predates the **Trusts Act**, by which provisions the shares would automatically become the subject of a trust once vested in the trustees.
- The Supreme Court of Canada in the case of **Cumming** did not disapprove the dictum from the Appeals Court that an executor is also a trustee of an estate.
- The Supreme Court of Canada was not laying down a general principle that for an executor to be constituted a trustee, the personal assets originally held by an executor who is also a trustee must have been demonstrated to have been turned over to the trust, but was explaining the specific circumstances of the case.
- Neither the Appeals Court nor the Supreme Court held that executors are also not trustees of an estate.
- The **Cummings'** case did not consider a statute, the equivalent of the **Trusts Act**.

[53] The Applicant expressed general agreement with the findings of the Court making the following points:

- McIntosh JA did not accept the dictum of the Appeals Court that an executor was a trustee from the day he takes office as correct.

- **Young-Torres** supports the position in **Montaque** in that the Court of Appeal explained how an executor/administrator (not a trustee) derived title to the estate property for the limited purpose of executing a testator's wishes. The discussion did not relate to the payment of debts.
- The effect of the decision by the Supreme Court was that it must be demonstrated that the assets of an estate are turned over to a trust before an executor can be considered to be a trustee. The basis for this is that for there to be a trust, there must be certainty of subject matter as to what constitutes the property in trust. Where an estate remains unadministered, as in the instant case, there can be no certainty of subject matter.
- The case, as seen from the Fixed Date Claim Form, is framed as being brought by the Claimants as executors, and not as trustees, the real purpose of the relief being to prepare accounts for the estate. This is to be contrasted with the **Cumming** case, where the executor's action related to investing the assets in accordance with a trust
- Until administration is complete, there is no trust property, no trust fund, and no trusteeship in respect of the estate assets

[54] The Court relied on **Montaque** for the rejection of the argument that an executor is constituted trustee *as a matter of law* on the death of the testator pointing out that **Young-Torres** determined that shares owned by a testator were vested in the *executor* on the death of the testator. The submissions by the Claimants (paragraph 4) miss that nuance. The **Trusts Act** does not change this interpretation of the law.

[55] The relevant bequests were not made the subject of any trust. Therefore, if the trustees are not trustees by law, there must be some mechanism by which the property is constituted trust property. The **Trusts Act** defines 'trust property' as 'property held on trust'. The Claimants relied on Section 4 (1) of the Trusts Act that a trust exists if a person ("a trustee") holds or has vested in him property that does not form part of his own estate for the benefit of another person. This definition is however extended by subsection (2) which states the characteristics of a trust as follows:

(2) *A trust shall include the following characteristics-*

(a) the property of the trust constitute a separate fund and are not a part of the estate of the trustee;

(b) title to the property of the trust is held in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty to manage, employ or dispose of the property of the trust in accordance with the terms of the trust and the special duties imposed upon him by law; and

(d) the trustee is accountable for the management and administration of the property of the trust.

The characteristics of (c) and (d) are not present in the instant case, the Executors not having the duty to manage, employ or dispose of the property. They are, by the terms of the will, limited to reorganising the companies into one legal entity and not to their management or administration.

[56] So that even if I am wrong that the executors are not as a matter of law constituted trustees of the estate, the duties which they are seeking to carry out by this claim are clearly executorial and not trustee functions. This is confirmed by the Fixed Date Claim Form, which defines the Claimants as executors and not trustees, clearly denoting the capacity in which the claim was being brought.

*The Applicants, **TREVOR PATTERSON, CHERYL HAMERSMITH-STEWART, ELIZABETH "BETTY-JOE" DESNOES and MARTIN VIERA, being the Executors of the Estate** of the Honourable Gordon Arthur Cyril Stewart, also known as Gordon Arthur "Butch" Stewart, whose address for the purpose of these proceedings is in care of their Attorneys-at-Law, Hylton Powell of 11A Oxford Road, Kingston 5 in the parish of Saint Andrew seek the following orders: (underlined bold emphasis mine)*

These executorial duties are not governed by the **Trusts Act**. The Executors' duties, though they may overlap with Trustee duties and possibly in instances be the same activity, are not, in law, synonymous.

[57] For these reasons, the Judgment given and Orders made on March 16, 2026, are confirmed.

ORDERS

1. Amended Notice of Application for Court Orders, to strike out the Claimants' statement of case, filed on January 09, 2026, is granted
2. Cost of the Application to the Applicant to be taxed if not sooner agreed.
3. Leave to Appeal Granted
4. Applicant to prepare, file and serve Formal Order

Judge