JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 93/2013

APPLICATION NO 6/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**CARICOM INVESTMENTS LIMITED**	**1ST APPLICANT**
AND	**CARICOM HOTELS LIMITED**	**2ND APPLICANT**
AND	**CARICOM PROPERTIES LIMITED**	**3RD APPLICANT**
AND	**NATIONAL COMMERCAL BANK LIMITED**	**1ST RESPONDENT**
AND	**RIO BLANCO DEVELOPMENT LIMITED (in Receivership)**	**2ND RESPONDENT**
AND	**ESTATE of KARL AIRD (deceased) (former receiver of Ro Blanco Development Limited)**	**3RD RESPONDENT**

Ransford Braham QC, Mrs Caroline Hay and Neco Pagon instructed by Braham Legal for the applicants

Charles Piper QC and Mrs Petal Brown instructed by Charles E Piper and Associates for the 1st and 2nd respondents

Ms Geraldine Bradford for the Administrator-General

10, 20 November and 20 December 2017

BROOKS JA

[1] On 10 November 2017, the court heard an application by Caricom Investments Limited, Caricom Hotels Limited and Caricom Properties Limited (the applicants) for the appointment of a representative in the proceedings for the estate of Mr Karl Aird, deceased, the 3rd respondent. We handed down our decision on 20 November 2017 in the following terms:

> "1. The record of appeal shall be amended so that the name of the 3rd respondent shall read:
>
> 'Estate of Karl Aird, (deceased)
> (Former receiver of Rio Blanco Development Limited)'
>
> 2. The National Commercial Bank Jamaica Limited is hereby appointed to represent the estate of the 3rd Respondent Karl Aird, deceased, in these proceedings and in respect of any other aspects of this litigation.
>
> 3. Costs of the application to be costs in the appeal."

My reasons for agreeing to that decision are set out below.

[2] The applicants are appealing from a judgment of the Supreme Court that was handed down on 20 September 2013. The applicants had sued National Commercial Bank Limited (NCB), Rio Blanco Development Limited (in receivership) (referred to herein as "Rio Blanco") and Mr Karl Aird, Rio Blanco's receiver, for damages to the tune of billions of dollars. They succeeded against Rio Blanco only, and were awarded damages in the sum of $5,000,000.00. The applicants are dissatisfied with the decision.

[3] NCB, Rio Blanco and Mr Aird are the named respondents to the appeal. However, Mr Aird died on 31 January 2014, three months after the notice of appeal was filed.

[4] In order for the appeal to proceed, it is necessary to appoint a representative for Mr Aird's estate. It does not appear that a personal representative has been appointed by either the Supreme Court or the court for the parish in which Mr Aird lived. There is also no indication that Mr Aird left any will by which an executor could be identified.

[5] Rule 21.7 of the Civil Procedure Rules (CPR) has specific provisions to enable the Supreme Court to make such an appointment. Rule 21.7 is, however, not one of the provisions incorporated into the Court of Appeal Rules (CAR) and there is no equivalent provision in the CAR.

[6] Although there have, in similar circumstances, been applications made in the Supreme Court to allow for representation of a party for the purposes of an appeal, it has been held in **Richard Hall v Zada Hall** [2017] JMCA App 27, that an order may be made in this court to appoint a representative for a party's estate for the purposes of the appeal. Such an appointment was also made in **Tanya Ewers (Executrix of the estate of Mavis Williams) v Melrose Barton-Thelwell** [2017] JMCA Civ 26, in order for the appeal to have been heard. Based on those authorities, the application for the appointment of a representative may be heard by this court.

[7] The issue of jurisdiction having been settled, the next issue is to determine the person or entity that should be appointed to represent Mr Aird's estate. The applicants have identified three possible appointees. Dr Cecil Aird, who is Mr Karl Aird's brother,

the Administrator-General of Jamaica, the entity statutorily appointed to act on certain cases on behalf of the estates of deceased persons, and NCB.

[8] The first two proposed appointees have previously voiced objection to being appointed. They both stated that they knew nothing about the issues involved in the litigation and therefore cannot competently conduct the proceedings on behalf of Mr Aird's estate.

[9] In addition, the Administrator-General has pointed out that, this being a commercial matter, her department neither has the funds nor the in-house expertise to conduct the resisting of the appeal if needs be.

[10] NCB, which is the entity that had appointed Mr Aird as receiver for the 2nd respondent, had, up to the date of the hearing of the appeal, been silent on the issue as to whether it should be appointed. This is despite the fact that it was served with notice of the present application. It had previously indicated that it had no objection to the appointment of one or the other of the other proposed appointees. It was only during the course of the hearing of this application that NCB, through its legal counsel, Mr Piper QC, indicated that it was opposed to being appointed as the representative.

[11] Mr Braham QC, appearing for the applicants, submitted that any of the three proposed appointees would satisfy the requirements of rule 21.7 of the CPR for a person to be appointed as a representative. He argued that it would be more convenient for the Administrator-General to be appointed the representative. Learned Queen's Counsel, however, pointed out that Mr Aird was an employee of NCB, and that

it had given Mr Aird an indemnity for any liability he would or could incur in acting as the receiver of Rio Blanco.

[12] Mr Piper QC, appearing for NCB, submitted that NCB could not be said to satisfy the requirements of rule 21.7 of the CPR. He argued that NCB's interests may well be adverse to the interests of Mr Aird's estate. Learned Queen's Counsel pointed to the grounds of appeal, particularly grounds 15-19, and stated that there is an issue of whether NCB, as Mr Aird's employer, was vicariously liable for his actions. Whereas the applicants argued that NCB was vicariously liable for Mr Aird's actions, NCB argued that by virtue of the terms of the documentation by which Mr Aird was appointed receiver, he was the agent of Rio Blanco. On the issue of the indemnity which NCB had given to Mr Aird, Mr Piper submitted that the existence of the indemnity did not determine the case, and in any event, the matter of the indemnity was not assessed in the court below.

[13] Miss Bradford for the Administrator-General submitted that the Administrator-General's Department was not equipped to deal with a commercial matter of this magnitude. Learned counsel submitted that the Administrator-General's Department possessed neither the financing nor the special expertise to deal with the case. Miss Bradford candidly accepted that the Administrator-General was a public trustee and that, if financing was provided by some other source, the Administrator-General could not properly resist an appointment in this matter. She submitted, however, that if an alternative existed, the alternative entity or person should be appointed.

Analysis

[14] Rule 21.7 of the CPR, as mentioned above, is the relevant rule for guidance as to who should be appointed to represent a deceased person's estate. It states, in part:

> "(1) Where in any proceedings 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."

[15] It would not be fair or practical to appoint Dr Aird as the representative of Mr Aird's estate for these purposes. There is no evidence to contradict Dr Aird's assertion that he knows nothing about the litigation. There is also no evidence that he has or will have any access to any of the assets of Mr Aird's estate that would allow him to finance the estate being represented in this appeal. He is not even the first person in the order of priority to apply for letters of administration of Mr Aird's estate. This is because Mr Aird is survived by both a spouse and adult offspring. All of them would rank in priority to Dr Aird, but none of them has shown any interest in the efforts that have been made to have Mr Aird's estate represented in this appeal. There is evidence that at least one of Mr Aird's sons has been in contact with the attorneys-at-law for the applicants, but

he has indicated that he has no interest in the matter. He has also proffered reasons why he thinks that Mr Aird's widow and one of Mr Aird's other sons would be averse to being appointed.

[16] Whereas the Administrator-General has the statutory authority to represent the estate, the question is whether to override her objection.

[17] Section 12 of the Administrator General's Act allows the appointment. That section of that Act was amended on 25 June 2015 to read:

> "The Administrator-General shall be entitled to, and may apply for, letters of administration to the estates of all persons who shall die intestate without leaving a widower, widow, brother, sister, or any lineal ancestor or descendant, or leaving any such relative if no such relative shall take out letters of administration within three months, or within such longer or shorter time as the Court to which application for administration is made, or the Judge thereof may direct; and also to the estates of all persons who shall die leaving a will but leaving no executor, or no executor who will act, if no such relative as aforesaid of such deceased shall, within the time aforesaid, take out letters of administration to his estate. The Administrator- General shall be entitled to such letters of administration in all cases in which, if this Act had not been passed, letters of administration to the estates of such persons might have been granted to any administrator:
>
> Provided that this section shall not apply to the estates of deceased persons for the administration of whose estates provision is made by law, nor to estates where the total value of the personal property does not exceed five thousand dollars, but it shall be lawful to appoint the Administrator-General, with his consent, administrator of any estate, not-withstanding that the total value of the personal property does not exceed five thousand dollars."

[18] It is not known what the value of Mr Aird's personal estate is (that is whether it is less than $5,000.00) and so it is not known whether the Administrator-General can

only be appointed if she consents to such an order. Bearing in mind the nature of the responsibility that Mr Aird had as an employee of NCB, who had been appointed the receiver of a substantial company, it is more likely than not that his personal estate would be worth more than $5,000.00.

[19] Using that assumption, the objections that the Administrator-General proffers cannot withstand scrutiny. It is true, however, that it is not known whether there would be any value in the estate to which to look for funds to finance the litigation. The issue of funding the litigation may be addressed in one of two ways. Firstly, to require the Administrator-General to represent the estate in the usual way, using her own resources or secondly, to provide a source of funding for the Administrator-General to carry out her functions.

[20] In considering the first option it must be noted that the Administrator-General has a statutory obligation and she has attorneys-at-law on staff, who are paid from the public purse and who would ordinarily be competent to represent the estate. This is however, not a regular estate matter. It involves significant commercial implications which would not normally feature in a regular estate matter. The events involved in the case traversed the course of over 20 years. The applicants have filed 40 grounds of appeal. The likelihood is that the estate may be disadvantaged if it is not represented by counsel who is accustomed to the conduct of such intricate commercial disputes and can dedicate the time to becoming fully apprised of the details of this particular case.

[21] The second option requires the court to determine a source of funding for the Administrator-General's brief to counsel who is accustomed to conducting such

commercial matters. Rule 1.1(2)(a) of the CPR stipulates that in dealing with a case justly, a court is entitled to ensure "so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position". Rule 26.1(2) gives further guidance as to how that principle may be given effect. Rule 26.1(2)(r) speaks to ordering one party to pay the costs of another in certain situations. It states that a court may:

> "where there is a substantial inequality in the proven financial position of each party and the court considers it just to do so, order any party having the greater financial resources who applies for an order to pay the other party's costs of complying with the order in any event".

Mr Piper, on this point, submitted that there is no proof of any financial position of any of the parties in this case. Accordingly, he submitted, there may be a limitation to the court making use of rule 26.1(2)(r).

[22] Rules 26.1(2)(t) and (v) are, however, less restrictive than rule 26.1(2)(r). Rule 26.1(2)(t) is closer to the current case as it gives guidance concerning appointing persons and making orders as to the cost of those persons. Rule 26.1(2)(t) states:

> "where the court considers it just to do so, [it may] give the conduct of any matter to any person it thinks fit and make any appropriate consequential order about costs."

Rule 26.1(2)(v) is more general in effect. It states that the court may:

> "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective."

[23] Rule 26.1(4)(d) allows a court, where it gives a direction, to order that a condition of granting the order is for "a party to pay all or part of the costs of the proceedings".

[24] The provisions of Parts 1 and 26 of the CPR are expressly stated to be open to utilisation by this court. Part 1 is incorporated into the CAR by rule 1.1(10). All the powers and duties of the Supreme Court provided for in Part 26 are available to this court by virtue of rule 2.15(a) of the CAR, which states:

> "In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition -
>
> (a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26..."

[25] Based on that analysis, it is open to this court to order the Administrator-General to represent Mr Aird's estate, but to order either the applicants or NCB or both to pay the costs of retaining counsel to represent the estate. Such an order would require details as to levels of payment, time for payment, whether there should be any limits to exposure and the question of whether, if it arises, the losing party should reimburse the victor for its funding of the representation of Mr Aird's estate.

[26] Before deciding the logistics of such an order, the option of appointing NCB as the representative should be examined.

[27] Ordinarily it could be said that NCB is by far the most logical choice as the entity to represent Mr Aird's estate. It is knowledgeable about the litigation and there would be no conflict between the interest of Mr Aird's estate and its interest. They were

represented by the same counsel at the trial. NCB is therefore competent to conduct the litigation on behalf of the estate.

[28] The difficulty, however, is the risk of NCB having an interest that is adverse to that of Mr Aird's estate. Mr Piper relied on the grounds of appeal that sought to make NCB vicariously liable for Mr Aird's actions. On that basis, learned Queen's Counsel submitted, NCB has an interest that is adverse to that of Mr Aird's estate. The grounds of appeal, to which Mr Piper points, do not, however, support that position. They show the applicants as attempting to link Mr Aird with NCB. Neither NCB nor Mr Aird's estate would be inclined to support that position. The grounds to which Mr Piper points state:

> "15. In finding as a matter of law that the Receiver (the Third Defendant/Respondent) never acted as agent for the First Defendant/Respondent and always as agent for the Second Defendant/Respondent, the Learned Trial Judge erred in focusing on the documentation alone and failed to take into account the actions of the First Defendant/Respondent. The unchallenged evidence was that the First Defendant/Respondent interfered with and directed the Receiver (the Third Defendant/Respondent) comprehensively with regard to the sale of the property to the extent that contractual negotiations were held directly between the First Defendant/Respondent and the Claimants'/Appellants Managing Director; the First Defendant/Respondent provided the loan to the Claimants/Appellants to purchase; and, in fact, other than signing the agreement for sale, the Receiver (the Third Defendant/Respondent) had very little to do with it.
>
> 16. Any finding by the Learned Trial Judge on the basis that NCB was not a party to the contract is in error as the Receiver did, in the circumstances of this case, act as NCB's agent in signing and performing the contract.

17. The Learned Trial Judge erred in finding that any undertaking of assistance from NCB to secure the titles would have come after completion of the contract and there was no consideration for such a promise as NCB, as principal of the Receiver, made this promise at the time of the signing of the contract and also the evidence was clear that NCB not only received payment directly from the Purchasers but provided the mortgage to permit this payment and accordingly received a benefit in that it found itself with a preferred mortgagor and cauterizing their losses.

18. The learned Trial Judge erred in dismissing the evidence of the Receiver (the Third Defendant/Respondent) as of little use when in fact the Receiver's (the Third Defendant/Respondent's) evidence was crucial with regard to the actions of the First Defendant/Respondent's acceptance of vicarious responsibility under the contract and, as the Vendor's representative, his evidence corroborated that of the Claimants main witness in many particulars material.

19. The Learned Trial Judge erred in law in finding that the Receiver (the Third Defendant/Respondent) did not act as agent of the First Defendant/Respondent when, on the totality of the pleadings agency was admitted (at worst not denied) and the evidence of agency uncontradicted, unchallenged and confirmed by the Receiver (the Third Defendant/Respondent)."

[29] An examination of the counter-notice of appeal filed by NCB shows no divergence in interest between Mr Aird's estate and itself. NCB's position is that Rio Blanco did nothing which would warrant any of the applicants being entitled to damages. In fact, some of the grounds show a claim of unity of approach by NCB and Mr Aird. Examples are grounds (a) and (c) on which NCB relies. They respectively state:

"a) Having regard to the totality of his findings, conclusions and Judgment the Learned Judge wrongly concluded that the Second Defendant, through the Third Defendant, only made one attempt to apply for

the Duplicate Certificates of Title the subject of Special Condition 15 of the Agreement for Sale of Land.

b) ...

c) As a result, the Learned Judge failed to give any or any adequate weight to the evidence of the efforts of the Second Respondent, **with the assistance of the First and Third Respondents to implement the provisions of Special Condition 15 of the Agreement for Sale of Land**." (Emphasis supplied)

[30] On that analysis, it is plain that, on the issue of the vicarious liability, NCB's position is not adverse to the interest of Mr Aird's estate. Both NCB and the estate would be resisting any finding of liability.

[31] In the event that there was liability, NCB's position is that Mr Aird was acting as agent for Rio Blanco and so the applicants have to look to Rio Blanco for damages for any loss that they have suffered. On that position, liability would not rest with Mr Aird's estate, but with Rio Blanco.

[32] The issue of the indemnity does not create an adverse position. NCB contracted with Mr Aird that it would indemnify him in the event of liability. There is no denial or qualification of that fact by NCB.

Conclusion

[33] Both the Administrator-General and NCB would satisfy the profile required by rule 21.7 of the CPR. There are, however, significant challenges associated with an appointment of the Administrator-General. The size and complexity of the material involved in the case suggest that the appointment of NCB would significantly reduce the

costs involved. Meanwhile, despite the submissions made by Mr Piper for NCB, there is no real conflict between the interests of NCB and Mr Aird's estate. The appointment of NCB as the representative would be less cumbersome and costly than to appoint the Administrator-General. The application to appoint a representative of Mr Aird's estate, for the purposes of the appeal, should, therefore, be granted and NCB be the entity appointed as the representative.

[34] NCB being the better choice in terms of representation, it is unnecessary to further consider the logistics of providing funding for having the Administrator-General represent the estate.

[35] In light of the fact that the application has arisen from Mr Aird's unfortunate death there should be no order as to costs.

[36] It is for those reasons that that I agreed that the orders set out at paragraph [1] above, be made.

P WILLIAMS JA

[37] I have read, in draft, the reasons set out by my brother Brooks JA and agree that they accurately reflect my own reasons for agreeing with the orders made herein.

STRAW JA (AG)

[38] I also have read the reasons drafted by Brooks JA. I agree that they reflect my reasons for agreeing to the orders made herein. I have nothing to add.