JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

APPLICATION NO COA2022APP00032

BETWEEN	**FRANK HASFAL**	**APPLICANT**
AND	**KENNETH WALKER**	**RESPONDENT**

Rudolph Smellie for the applicant

Respondent not appearing nor represented

7 July 2022

LAING JA (AG)

[1] The applicant, Frank Hasfal, the claimant in the court below ('Mr Hasfal'), filed a notice of application on 17 February 2022 ('the application for leave'), seeking permission to appeal against the order of the Honourable Mrs Justice Lawrence-Grainger (Ag) ('the learned judge'), handed down on 3 February 2022, by which she refused the orders sought by Mr Hasfal in his amended notice of application, filed 8 July 2021 ('the application').

[2] By the application, Mr Hasfal asked the judge for a declaratory order and other reliefs, in default of appearance by the respondent, Kenneth Walker ('deceased') or a representative of his estate. The declaration he sought was:

> "… that the Claimant is the owner in fee simple of all that parcel of land at Seven Miles, Bull Bay, in the parish of Saint Andrew comprising 4152 square feet as per the attached copy plan prepared by Commissioned Land Surveyor Earl W. Spencer pursuant to a survey executed by him on March 14, 2016 …"

[3] Mr Hasfal asserted that his ownership of these 4,152 square feet (which will be described herein as 'the surveyed property' for ease of identification), was by virtue of a possessory title acquired by his continuous, exclusive, open, undisturbed and adverse possession of it for more than 12 years.

[4] Mr Hasfal also asked that the court direct that a registered title for the surveyed property be issued in his name and that the registration of certificate of title at volume 1275 folio 753 of the Register Book of Titles in the name of Kenneth Walker be rescinded.

[5] Mr Hasfal also applied for a rectification of the formal judgment made by Mr Justice Marsh, entered in Claim No E-248 of 2001 between Frank Hasfal and Kenneth Walker in which the trial judge ordered that:

> "there be Specific Performance of the Written Agreement between the Claimant and the Defendant dated the 30th day of July, 1991 of the sale by the Defendant to the Claimant of land at Seven Miles, St. Andrew being part of Abyssinia Cottage, formerly registered at Volume 1230 Folio 273 of the Registered Book of Titles **and now composed in Certificate of Title registered at Volume 1275 Folio 768 of the Register Book of Titles.**" (emphasis added by this court for identification)

Mr Hasfal's position was that the description of the land was in part accidentally erroneous in its inclusion of the words emphasized above, and accordingly, they should be deleted.

The background

[6] The parties entered into a written agreement dated 30 July 1991 ('the agreement), for the sale by Mr Walker to Mr Hasfal of land situated at Abyssinia Cottage in the parish of St Andrew ('the property') for the price of $45,000.00. The agreement

contained a clause which provided that the purchaser shall take title to the property subject to, *inter alia*, the approval of the planning authorities, the Kingston and St Andrew Corporation (KSAC) and the Town Planning Department (referred to in this judgment collectively as 'the municipal authorities'), to the sub-division of the land.

[7] Mr Hasfal made a part payment of $15,000.00 ('the deposit') towards the purchase price and was put in possession of the property to which he made improvements. In 1996 the attorney-at-Law who represented Mr Walker attempted to return the deposit and advised Mr Hasfal through his attorney that the subdivision of the property was not approved by the municipal authorities. This prompted Mr Hasfal to initiate a suit by filing a writ of summons, (the then appropriate originating process) claiming specific performance of the agreement. Marsh J found that by applying for subdivision approval for strata lots as opposed to service lots, Mr Walker was in breach of an implied term of the agreement by failing to apply for the kind of approval which would have made the sale of the property, as envisioned in the agreement for sale, possible. Accordingly, the learned judge granted judgment for specific performance in Mr Hasfal's favour. On 26 March 2010 the appeal against the judgment of Marsh J was dismissed for want of prosecution.

[8] On 4 November 2016, Mr Hasfal filed a fixed date claim form and particulars of claim. Amended particulars of claim and affidavit of Frank Hasfal were filed on 28 September 2018. On 30 April 2019 Mr Walker died. On 26 January 2021 a notice of application for court orders was filed by Mr Hasfal which sought the same reliefs prayed for in the fixed date claim form. This application was subsequently amended on 8 July 2021. On 3 February 2022 the learned judge refused the application.

[9] The learned judge's decision is an interlocutory one. In these circumstances, the applicant was required to seek permission to appeal (see section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act). Permission was sought from the learned judge but refused. Accordingly, the applicant renews his application to this court.

[10] In his affidavit filed in the Supreme Court on 2 September 2019, Mr Smellie averred that Mr Walker had never filed an acknowledgment of service or a defence and had never attended any of the hearings either personally or by way of a representative, despite having been served with all the relevant documents and notices. He further averred that he was not aware of any evidence that any relative of Mr Walker "would have any knowledge of or interest in the matter which would be greater than that of the deceased." He stated that he had been advised by a legal officer at the Administrator General's Department that because of their heavy workload they would be unwilling to be appointed as administrator *ad litem* unless required by law to so act.

[11] Mr Smellie has outlined in detail, the procedural history of the orders of the learned judge in respect of which Mr Hasfal now seeks the application for leave. He relies on his own affidavit filed in this court on 17 February 2022, (the affidavit in support) to which is exhibited a number of documents including an affidavit of service sworn to by Stephen Talbert, filed on 1 June 2017, in which Mr Talbert avers that on 7 April 2017 he served Mr Walker with copies of the fixed date claim form and particulars of claim bearing the date of 4 November 2016.

[12] Mr Smellie avers in the affidavit in support, that on 16 June 2017, a notice of adjourned hearing filed 1 June 2017 and giving 7 December 2017 as the new date for the hearing as well as a set of documents also filed on 1 June 2017 which were said to have been attached to the particulars of claim, but which were not so attached, were served by registered post on Mr Walker. Mr Smellie has also exhibited an affidavit of service by registered post sworn by him and filed on 28 June 2017 which confirms such service. Mr Smellie also exhibited an affidavit of service by registered post filed 5 October 2018, in which he averred that on 2 October 2018 he handed to the clerk at the Half Way Tree Post Office, an envelope addressed to Mr Kenneth Walker at Farm Estate, Seven Miles Bull Bay P.O. in the parish of St Andrew containing a sealed notice of adjourned hearing filed 2 October 2018, an amended particulars of claim filed 28 September 2018

and an affidavit of Frank Hasfal filed 28 September 2018, and received a registered slip from her.

[13] The grounds on which Mr Hasfal sought to support the application included, the failure of Mr Walker to have defended the claim prior to his death. It was submitted that he thereby forfeited his right to defend the claim. It was also stated as a ground that no personal representative of the deceased's estate could justifiably be appointed for the purposes of defending the claim.

[14] A very important ground was the following:

> "That, accordingly, it is just fair [sic] and reasonable and in keeping with the overriding objective, for the matter to proceed in default, it being precisely this sort of scenario which Rule 21.8 was promulgated to deal with, by empowering the court to give directions in suitable cases, such as [sic] for the matter to proceed in default.

[15] A number of issues arise on the application for leave, the most important of which is whether the learned judge erred in finding that the reliefs sought by Mr Hasfal could not be made in default of appearance.

Discussion and analysis

[16] It is first necessary to consider the guiding principles with respect to applications for leave to appeal. Rule 1.8(7) of the Court of Appeal Rules 2002 ('CAR') provides:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[17] It has been accepted, in several cases of this court that the term "real chance of success" may properly be expressed to be a 'realistic' as opposed to a 'fanciful' prospect of success, as stated by Lord Woolf MR in the oft cited case of **Swain v Hillman and another** [2001] 1 All ER 91.

[18] Further, as the applicant's proposed appeal seeks to challenge the exercise of the discretion of the learned judge, also of relevance are the principles espoused by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor**') regarding the function of an appellate tribunal. At page 1046, Lord Diplock stated:

> "… the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges … may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision … is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

It is within this overall context that this application for leave will be considered.

Whether the learned judge erred in finding that the reliefs sought by Mr Hasfal could not be made in default of appearance.

[19] The situation in which a defendant dies during proceedings is addressed by rule 21.7 of the Civil Procedure Rules ('CPR') which provides as follows:

"**Proceedings against estate of deceased person**

21.7 (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.

(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."

[20] Rule 21.8 is also relevant and it provides as follows:

"**Power of court to give directions to enable proceedings to be carried on after party's death**

21.8 (1) Where a party to proceedings dies, the court may give directions to enable the proceedings to be carried on.

(2) An order under this rule may be made on or without an application."

[21] In **Tanya Ewers (Executrix of the estate of Mavis Williams) v Melrose Barton-Thelwell** [2017] JMCA Civ 26 ('**Tanya Ewers**'), Brooks JA as he then was, at para. [65] made the following observations in respect of rules 21.7 and 21.8:

> "[65] Rules 21.7 and 21.8 of the CPR, when read together, do contemplate that the case would not continue until a representative is appointed for the estate of the person, especially a defendant, who has died. Rule 21.7(4) and 21.8(1) particularly, make that clear. The former states:
>
> > '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.'
>
> While rule 21.8(1) supplements that position and shows that orders are needed 'to enable the proceedings to be carried on'."

[22] In the **Tanya Ewers** case, Mrs Barton-Thelwell brought a claim against the mother of Ms Ewers who had filed an acknowledgment of service, but died over a year later without having filed a defence. Ms Ewers applied for an extension of time within which to file a defence, but her application was refused by a judge of the Supreme Court. The judge also granted Mrs Barton-Thelwell permission to enter judgment in the claim.

[23] This court held at para. [64] that the learned judge was in error in granting Mrs Barton-Thelwell permission to enter judgment in the claim because that order breached the requirement that the case should only proceed when there is a representative in place for a defendant who has died. It also did not comply with rule 12.10(4) which requires that judgment in default in cases not involving money or goods, should be in a form that the court approves.

[24] This court also decided that the judge erred in deciding that Ms Ewers could not have been allowed to have filed a defence on behalf of her mother's estate. This was pursuant to rule 21. 8 whereby the court was entitled, even of its own motion to appoint

Ms Ewers as the representative for the estate, and by that appointment she would have been empowered to file a defence if the estate had a meritorious defence.

Conclusion

[25] As Brooks JA observed in the **Tanya Ewers** case, having regard to rules 21.7 and 21.8 of the CPR, it is contemplated that when a defendant dies the case will not continue until a representative is appointed for the deceased's estate. Where the court has not appointed a representative of its own volition, rule 21.7(4) makes it patently clear that the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under rule 21.7. The categories of persons who may be appointed is not limited to relatives of the deceased and the qualifying conditions stipulated in rule 21.7(2) are that such 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.

[26] In these circumstances, in the instant case, there not having been a representative appointed to represent the estate of the deceased, the application for judgment in default was premature and having been made when a critical pre-condition was not satisfied, it was improper. The learned judge was correct in not granting the orders sought on the application. In the premises, the applicant has not demonstrated that he has a real chance of success on appeal as it cannot be said that the learned judge operated under a misunderstanding of the facts or evidence before her. The application for leave to appeal is refused.