JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA (AG)

APPLICATION NO 67/2018

BETWEEN	**CAROL LAWRENCE (Representative Party for the Estate of Joseph Lawrence)**	**APPLICANT**
AND	**ANDREA FLETCHER-DAWKINS (Representative Party for the Estate of Gertrude Lawrence)**	**RESPONDENT**

Miss Catherine Minto instructed by Nunes, Scholefield, Deleon & Co for the applicant

Mr Kent Gammon instructed by Kent Gammon & Associates for the respondent

4, 5 April 2022 and 2 June 2023

Permission to appeal – Realistic prospect of success - Stay of Execution – Jurisdiction to review the exercise of a judge's discretion - Delay in enforcing an executory consent order – Whether it is inequitable or unfair to order the enforcement of a consent order - Court's power to appoint someone to represent the estate of a dead person – Chain of transmission or representation – Court of Appeal Rules 1.8(7) and 2.13 – Civil Procedure Rules 21.4

F WILLIAMS JA

[1] I have read in draft the reasons for judgment of my brother Brown JA (Ag) and they accord with my own reasons for concurring with the order made.

D FRASER JA

[2] I too have read the draft reasons for judgment of my brother Brown JA (Ag) which accord with my own reasons for concurring with the order made.

BROWN JA (AG)

[3] This is a re-listed application for permission to appeal the decision of Laing J ('the learned judge'), given on 23 March 2018, and for a stay of execution of his orders. The learned judge granted an application to enforce a consent order made by Brooks J (as he then was) on 20 January 2004. The learned judge refused the applicant, Carol Lawrence, ('Mrs Lawrence') permission to appeal.

[4] The original notice of application for court orders filed in this court does not form a part of the judges' bundle. However, forming part of the bundle, is an affidavit from Miss Catherine Minto, counsel in the matter, that is dated and filed 29 March 2018 which, presumably, was associated with the original notice of application for court orders. My perusal of the file in this court's registry revealed that the notice of application for court orders was in fact filed on 29 March 2018. The re-listed application was filed on 20 January 2022.

[5] At the conclusion of the hearing on 5 April 2022, we made the following orders:

> "1. The application for leave to appeal the decision of Mr Justice Laing, made on 23 March 2018, is refused.
>
> 2. The application for a stay of execution of the orders made by Mr Justice Laing on 23 March 2018, is refused.
>
> 3. Costs to the respondent to be taxed, if not agreed."

At the time of making these orders, we announced that our reasons would follow. Before setting out our reasons, it is appropriate to give the background to the application.

Background

[6] The background facts are taken partly from Miss Minto's affidavit and the background in the learned judge's judgment ([2018] JMSC Civ 35). Mrs Lawrence is the executrix of the estate of Joseph Lawrence, the respondent in the court below in claim no 2001 E-511. Joseph Lawrence died testate on 7 March 2005. The respondent, Mrs Andrea Fletcher Dawkins ('Mrs Fletcher Dawkins'), in this appeal is the granddaughter of

Gertrude Lawrence, the applicant in the court below. Gertrude Lawrence died intestate on 26 August 2004. For the avoidance of confusion and without meaning any disrespect, the parties to the consent order will be referred to below by their Christian names.

[7] Gertrude and Joseph were married on 26 July 1950. Their marriage did not produce any children. However, Gertrude had two sons from a previous union: Ainsworth Whitfield Fletcher and Lascelles Michael Fletcher. Following the breakdown of their marriage, Gertrude, on 10 October 2001, applied to the Supreme Court under the Married Women's Property Act (subsequently repealed) for a 50% share of the properties acquired during the subsistence of the marriage. Seven parcels of land and shares in a company known as Lawrence Engineering Limited were the subject of the claim.

[8] The claim was determined by the execution of a consent order before Brooks J. Paragraph 1 of Brooks J's order is quoted below:

> "The Applicant, Gertrude Lawrence is entitled to the entire beneficial interest in property situated at 19 Castle Drive Kingston 9, in the parish of Saint Andrew registered at Volume 879 Folio 92 of the Register Book of Titles. The Respondent is to cause the premises to be transferred into the name of the applicant within **three (3) months** of today or as soon as practicable free from any encumbrances or charges. Costs of the transfer to follow normal conveyancing practice." (Emphasis as in original)

[9] At the date of the death of Gertrude (26 August 2004), Joseph had not complied with the terms of the consent order. Less than one month later, on 22 September 2004, Joseph executed his last will and testament under which he purported to devise 19 Castle Drive, on trust for Mary Jodee Lawrence and Dianne Bernadette Lawrence, his daughters from his marriage to Mrs Lawrence.

[10] Mrs Fletcher Dawkins filed an application to enforce the consent order against Joseph's estate. The application was made on behalf of herself and Gary Fletcher, her brother, the other named executor under Lascelles Fletcher's will. The application came in the wake of efforts by Mrs Lawrence in 2015 to get an order for recovery of possession

against Milton Baker, the occupant of 19 Castle Drive, in the Kingston and Saint Andrew Resident Magistrate's Court (now Parish Court). It appears Milton Baker was occupying 19 Castle Drive with the permission of either Ainsworth Fletcher or Lascelles Fletcher or both, the administrators of Gertrude's estate. Lascelles Fletcher was noted as deceased when the recovery of possession claim was filed. Subsequent to this filing, Ainsworth Fletcher also died. The action to obtain the order for possession was struck out. Also struck out, by George J, was the claim to enforce the consent order. George J awarded costs to Mrs Lawrence, to be taxed if not agreed. George J also ordered that enforcement of the consent order should proceed under claim no 2001 E-511.

The application in the court below

[11] By notice of application filed 6 July 2016, in claim no 2001 E-511, in which Gertrude and Joseph were named as the applicant and respondent, respectively, Mrs Fletcher Dawkins sought the following orders:

> "1. That the Applicant's name be substituted with the names '**GARY DEAN ST. MICHAEL FLETCHER and ANDREA MARIA FLETCHER DAWKINS, executors of the Estate of Lascelles Fletcher and Personal Representatives of the Estate of Gertrude Lawrence**.'
>
> 2. That the Respondent's name be substituted with the name '**Carol Pearson-Lawrence Executrix of the Estate of Joseph Lawrence**').
>
> 3. That the substituted Applicants be permitted to proceed to enforcement of the Order of the Honourable Mr Justice Brooks made on the 20th day of January, 2004 (hereafter called 'the said Order') same not having been fully complied with by the Respondent, Joseph Lawrence, save and except the payment of Two Million Dollars ($2,000,000.00) to Gertrude Lawrence on or around July 2004.
>
> 4. That pursuant to the Order of Mr Justice Brooks dated 20th January 2004 in Suit No. E-511 of 2001 that the property situate[d] at 19 Castle Drive, Kingston 9 in the parish of St. Andrew (hereinafter called "the said property") be

transferred to the Estate of Gertrude Lawrence (deceased) and that the Registrar of the Supreme Court be empowered to execute a transfer of the property to the Estate of Gertrude Lawrence and/or the Applicants being the Personal Representatives and/or Administrators *De Bonis Non* [sic] of the said Estate.

5. That the Duplicate Certificate of Title for the said property registered at Volume 1392 Folio 143 of the Register Book of Titles be delivered by the 1st Respondent to the Applicants' Attorney-at-Law within seven (7) days of an Order being made herein, failing which the Registrar of Titles be empowered to cancel the said Title and issue a new Title therefor.

6. That the Estate of Joseph Lawrence do bear the costs of this Application." (Emphasis as in the original)

[12] Three grounds supported the preceding orders sought. They are listed below:

"1. Joseph Lawrence died on 7th March 2005 without fully complying with the transfer of the property specified in the Order or payment of the full sum ordered payable to Gertrude Lawrence. Gertrude Lawrence also died before the Order was fully satisfied and the Executrix of Joseph Lawrence's Estate refuses to comply with the Order.

2. Lascelles Fletcher one of the Administrators of Gertrude Lawrence's Estate, died testate on 5 November 2010 and his Executors now seek to take his place in the Administration of Gertrude Lawrence's Estate.

3. The Executrix of Joseph Lawrence's Estate is attempting to claim ownership of the said property as a part of Joseph Lawrence's Estate."

Notice of application for a stay of execution

[13] Mrs Lawrence filed an application for a stay of execution of the applicant's notice of application. The basis of this application was the non-payment of costs of $3,588,509.55, awarded in the previous failed action before George J.

The affidavit evidence before the court below

[14] The application before the learned judge was supported by an affidavit from Mrs Mrs Fletcher Dawkins; sworn to on 27 June 2016 and filed 6 July 2016. In her evidence, Mrs Fletcher Dawkins said she is Lascelles Fletcher's daughter and executrix under his will dated 30 January 2002. Gary Fletcher is her brother and co-executor, both obtained a grant of probate of Lascelles Fletcher's will.

[15] It was her evidence that Mrs Lawrence represented herself in several court proceedings as the executrix of the Joseph's estate. In support of this assertion, a copy of the grant of probate to Mrs Lawrence was exhibited to Mrs Fletcher Dawkins' affidavit.

[16] Both administrators of Gertrude's estate, Lascelles and Ainsworth Fletcher, being deceased, Mrs Fletcher Dawkins was now applying for both herself and Gary Fletcher to be granted administration *de bonis non* in Gertrude's estate, in order to enforce the consent order. She said that the most significant outstanding matter under the consent order was the transfer of the title to 19 Castle Drive.

[17] In this regard, Mrs Fletcher Dawkins said she verily believed Joseph delivered up the duplicate certificate of title for 19 Castle Drive, originally registered at Volume 879 Folio 92, to Gertrude's then attorney-at-law. However, after Joseph's death a new certificate of title was applied for on "the fraudulent premise that the original Duplicate Certificate of Title had been lost" (see para. 9 of the affidavit filed 6 July 2016). The property is therefore now registered at Volume 1393 Folio 143 of the Register Book of Titles. She asserted that the original duplicate certificate of title is still in the possession of "our Attorneys".

[18] It was Mrs Fletcher Dawkins' further evidence that she and Gary Fletcher are in possession of 19 Castle Drive, and had been so, since, in or around 2006, when they were put in possession by Mrs Lawrence. The executors in turn, and since that time, had put Milton Baker in possession with licence to occupy and secure the property. Since Milton Baker has been in possession, Mrs Lawrence twice tried to obtain an order for

possession against him. Copies of the more recent action for recovery of possession were exhibited to her affidavit. Mrs Fletcher Dawkins' further evidence was that Mrs Lawrence was contending that 19 Castle Drive was devised in a will which post-dated the consent order.

[19] Mrs Fletcher Dawkins asserted that the claim for recovery of possession raised a collateral challenge to the consent order, which had never been challenged in the courts. Accordingly, she said, the application before the court was one of utmost urgency.

[20] Mrs Fletcher Dawkins went on to declare that they were awaiting a certificate from the Administrator General's Department in order to proceed with an application for administration *de bonis non* in Gertrude's estate. In the meantime, they were seeking the leave of the court to be appointed representatives of Gertrude's estate for the purposes of protecting the assets of the estate. Additionally, Mrs Fletcher Dawkins asserted that, being Gertrude's grandchildren, they had a beneficial interest in the enforcement of the consent order, as they would be entitled to a share in Gertrude's estate, according to the rules of intestacy under the Intestates' Estates and Property Charges Act.

[21] Mrs Lawrence filed an affidavit on 28 October 2016. In it she admitted to being the executrix of Joseph's estate and his widow. She said further that she was responding to the affidavit of Mrs Fletcher Dawkins, sworn to on 27 June 2016. Mrs Lawrence acknowledged that Lascelles Fletcher and Ainsworth Fletcher were both deceased at the time of the application and gave the dates of their respective deaths as 5 November 2010 and 22 October 2011, backed by the relevant documentary support.

[22] Mrs Lawrence launched a frontal challenge to Mrs Fletcher Dawkins' evidence that Joseph delivered the duplicate certificate of title to Gertrude's then attorney-at-law and that an application was made for a new duplicate certificate of title. Mrs Lawrence asserted that the title was never given to any attorney-at-law on the death of Gertrude (this was not quite what Mrs Fletcher Dawkins said). Mrs Lawrence alleged that the certificate "was surreptitiously removed from the house on the subject property by Milton

Baker" (see para. four of affidavit filed 28 October 2016). She further alleged that the title remained in Milton Baker's possession until Jeffrey Daley, counsel for Milton Baker, advised the court (presumably the Parish Court for the Corporate Area) that the title was handed to him. Mrs Lawrence contended that the fact of the title having been in Milton Baker's possession was disclosed to the court. In further disputing the allegation that Joseph delivered up the title during his lifetime, Mrs Lawrence pointed to the absence of correspondence between Joseph and the then attorney-at-law to support this.

[23] As it concerned the occupation of 19 Castle Drive, Mrs Lawrence "categorically denied" the claim of Milton Baker having been put in possession by Lascelles Fletcher's executors. Mrs Lawrence countered that the property was "seized by Milton Baker, who entered the property through a window" (see para. 6 of affidavit filed 28 October 2016). She went on to confirm her efforts to "evict" him since then.

[24] Mrs Lawrence concluded her affidavit by saying (without any reference to any source for her belief or opinion) what she believed Joseph's intention was. She claimed it was never Joseph's intention for a "stranger" to benefit from the property. Reference was then made to Joseph's devise of the property to his children, after Gertrude's death.

The decision below

[25] The learned judge first considered the application for a stay. It was urged upon him that rule 26.3(2) of the Civil Procedure Rules, 2002 ('CPR'), dealing with the payment of costs after a case is struck out, applied. That argument failed. The reasons the learned judge gave are as follows. (1) The "enforcement application" was the only means open to the estate of Gertrude to obtain relief and was consistent with the overriding objective of dealing with cases justly. (2) While appreciating the interest in obtaining payment of the outstanding costs, the scale of justice weighed heavily in favour of the enforcement application proceeding without further delay. This was based on the exposure of Joseph's estate to more costs awards. However, considering the stage at which the matter had reached, counsel would have spent the greater portion of time in preparation for the hearing of the application to enforce the consent order. That, the learned judge

concluded, meant the additional exposure to costs would result from time spent in the hearing. Even if Joseph's estate was unsuccessful in the enforcement application, it still had the option of pursuing the earlier costs award. The learned judge therefore concluded that the interests of justice required him to refuse the stay.

[26] In respect of the enforcement application, Mr Kent Gammon submitted on behalf of Mrs Fletcher Dawkins, amongst other things, that the court had the responsibility to make matters right and see that justice is done by ensuring compliance with the consent order. Reference was made to **Barder v Calouri** [1987] 2 WLR 1350 to argue that there is no general principle against enforcing the consent order in the circumstances of this case. Additionally, owing to the factual difference of the husband being alive in **Barder v Caluori**, different considerations should apply.

[27] On behalf of the respondents, Miss Catherine Minto made a two-pronged submission. Firstly, she submitted, several cases including **Barder v Caluori** confirmed the courts' refusal to posthumously enforce an executory order, following the death of one or both parties. Secondly, the examination of the manner in which the court's discretion is exercised reveals that the death of one party makes it inequitable to enforce the judgment, as demonstrated in **Barder v Caluori**. Therefore, the court could set aside this executory consent order as was done in **Thwaite v Thwaite** [1981] 3 WLR 96.

[28] Basing her argument on **Barder v Caluori**, Miss Minto made the following additional submissions. (1) The intention of the parties is a valid consideration. In this regard, actions after the death of the applicant are relevant. Just as in **Barder v Caluori**, the intention was for Gertrude to benefit from residing at 19 Castle Drive. The distinguishing feature of this application is that it is the grandchildren who would now benefit from the consent order. So, as in **Barder v Caluori** where the claim of the mother of the deceased party failed, this application should suffer a similar fate. (2) There was delay in bringing the application, spurred on only by the action for possession against Milton Baker.

[29] Since both sides relied on **Barder v Caluori**, the learned judge conducted a full analysis of the judgment and also **S v S (ancillary relief: appeal against consent order)** [2002] 3 WLR 1372 (**'S v S'**), in which the principles of **Barder v Caluori** were isolated (collectively called the **Barder** principle). The learned judge, at para. [28], quoted para. 26 of the judgment in **S v S**, as follows:

> "In the House of Lords Lord Brandon of Oakbrook, …, laid down the governing principles to be applied. (a) New events must have occurred since the order which invalidate the basis or fundamental assumption upon which the order was made, so that if it were granted, the appeal would be certain or very likely to succeed. (b) The new events must have occurred within a relatively short time of the order. It would be extremely unlikely it could be as much as a year and in most cases will be no more than a few months. (c) The application for leave should be made reasonably promptly in the circumstances of the case. (d) The interests of third partied [sic] who have acquired an interest in [the] property in good faith and for valuable consideration should not be prejudiced by the grant of leave."

Although noting the unusual mode of the respondent's challenge to the consent order (use of the **Barder** principle instead of an appeal or application for re-hearing), the learned judge considered that he was nevertheless called upon to exercise his discretion.

[30] The learned judge opined that the four principles established in **Barder v Caluori** provided assistance in making a determination in the case before him. Accordingly, he proceeded to examine the circumstances of the application against the backdrop of those principles. Beyond that, the learned judge considered the application from the perspective of the justice of the case, in relation to Joseph's conduct. Observing that the consent order remained executory because of Joseph's omission to fulfil his obligation, the learned judge expressed the view that it would be grossly unfair and unjust for the court to assist a litigant who had either neglected or refused to comply with the consent order; and who, instead, attempted to profit from his non-compliance by his purported devise of the property.

[31] The orders of the learned judge, contained in the formal order filed on 14 January 2020, are set out below:

> "1. The Applicant's name is substituted with the names "GARY DEAN ST. MICHAEL FLETCHER and ANDREA MARIA FLETCHER-DAWKINS, Executors of the Estate of Lascelles Fletcher, representatives of the Estate of Gertrude Lawrence for the purpose of the claim herein.
>
> 2. The Respondent's name is substituted with the name "Carol Pearson-Lawrence Executrix of the Estate of Joseph Lawrence".
>
> 3. The substituted Applicants GARY DEAN ST. MICHAEL FLETCHER and ANDREA MARIA FLETCHER-DAWKINS are permitted to proceed to enforcement of paragraphs 1 and 2 of the order of the Honourable Mr Justice Brooks made on the 20th day of January 2004 made in the claim herein.
>
> 4. Costs of the Application to the substituted Applicants to be taxed if not agreed.
>
> 5. Leave to appeal is refused."

The application for permission to appeal

[32] The learned judge having refused the application for permission to appeal, Mrs Lawrence renewed her application before this court and also sought a stay of execution of the learned judge's order. I will quote the grounds of her application below:

> "1. Pursuant to Part 11.18 of the Civil Procedure Rules.
>
> 2. The dispute concerns a Consent Order of January 20, 2004. And the application by the Respondent to enforce the order thirteen (13) years later.
>
> 3. That the Applicant has real prospect of success in appealing the Order.
>
> 4. That is [sic] a stay is not granted, the Respondent will proceed to enforce the order and the appeal will be rendered nugatory.

> 5. No prejudice will be suffered by the Respondent by a stay being granted, as it has been thirteen years since the consent order which is the subject of the action was granted, and the Respondent was seeking to enforce the order thirteen years later."

Submissions on behalf of Mrs Lawrence

[33] Counsel for Mrs Lawrence, Miss Minto, commenced her written submissions with references to the legal principles governing the grant of leave to appeal. To this end, the court was referred to rule 1.8 of the Court of Appeal Rules ('CAR'). It was submitted that **Re W (Children) (Permission to Appeal)** 2007 Fam Law 897 highlights that permission to appeal should be granted if there is an arguable case that the decision of the lower court was plainly wrong.

[34] Turning to the question of a stay of execution, we were referred to rule 2.13 of the CAR which lays down that an appeal does not operate as a stay of execution. It was submitted that the approach of the court should be one of a balancing exercise. The considerations advanced as forming part of this balancing exercise are the applicant's prospect of succeeding on the appeal, the risks of injustice to both parties in the grant or refusal of the stay and irremediable harm. Several cases were cited in support of this submission, including the following: **Marilyn Hamilton v Advantage General Insurance Company Limited (formerly United General Insurance Company Limited)** [2019] JMCA Civ 48; **Polini v Gray** [1879] 12 Ch D 438; **Myrna Douglas and Jacqueline Brown v Easton Douglas** [2017] JMCA App 5; **United General Insurance Company v Marilyn Hamilton** [2018] JMCA App 23; **Ferrnah Johnson-Brown v Marjorie McClure** [2015] JMCA App 19; and **Reliant Enterprise Communications Limited v Twomey Group Limited and Infochannel Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 99/2009, judgment delivered 2 December 2009.

[35] Having outlined the law, Miss Minto submitted that the applicant has met the threshold of demonstrating that the appeal has some prospect of success. She sought to fortify this contention by submissions on the respondent's standing, delay in seeking to enforce the consent order and that it would be inequitable to enforce the executory consent order. On the question of standing, the essence of Miss Minto's submission was that the proper party to seek enforcement is the estate of the last surviving administrator of Gertrude Fletcher's estate, namely, Ainsworth Fletcher's, and not Lascelles Fletcher's, he having predeceased Ainsworth. Accordingly, the executors of Lascelles Fletcher's estate have no standing to seek to enforce the consent order.

[36] Aside from lacking standing to enforce the consent judgment, Miss Minto also submitted that there has been no explanation for the 12 years' delay in seeking its enforcement and, consequently, allowing the title to remain with the estate of Joseph Lawrence for at least a similar period. Having regard to the antiquity of the consent judgment, permission is required to proceed to enforcement. However, the prelude to granting that permission is the presentation of some evidence explaining the delay for such a significant period. As a matter of fact, Miss Minto argued, there was "no adequate explanation before the learned judge for this extensive delay in enforcing the order".

[37] In addition to the preceding two points, it was urged that this consent order, which remained executory at the death of the beneficiary (Gertrude), should not be enforced as it would be inequitable to do so. Miss Minto sought to anchor this submission in the dictum of Ormrod LJ in **Thwaite v Thwaite,** at page 102 of his judgment. The prevailing circumstances at the time of the application had three components. One of those components is the extensive delay in seeking enforcement. The second element is that Joseph intended only Gertrude to benefit from the consent order, not strangers to the matrimonial dispute. In Miss Minto's submission, Joseph's intention is exemplified by his act of devising the property to his daughters by Mrs Lawrence, by his will, within one month after Gertrude's death.

[38] The third constituent circumstance is the antecedent death of Gertrude. **Barder v Caluori** was cited as a case in which the House of Lords held the death of one of the parties to divorce proceedings to be a new event or prevailing circumstance, that would make it inequitable to enforce the order. As a sort of icing on the cake, Miss Minto concluded her submissions by arguing that it is felt generally that matrimonial proceedings do not survive the death of one of the spouses, which, she contended, informed the decision in **Barder v Caluori**. Therefore, following **Barder v Caluori**, the consent judgment can no longer be relied on.

Submissions for the respondent

[39] Mr Gammon did not dispute Miss Minto's submissions regarding the applicable principles which fall for the court's consideration in deciding whether to grant leave to appeal. However, Mr Gammon spent some time distinguishing the facts of **W (Children) between GW (The Father)** [2007] EWCA Civ 786 from the instant case. In a similar vein, Mr Gammon sought to demonstrate the inapplicability of the authorities Miss Minto cited in respect of the grant or refusal of a stay of execution.

[40] Moving from there to the pivotal consideration that is common to both parts of the application, a realistic prospect of success on appeal, Mr Gammon urged the court to say the applicant had foundered at this bar. Mr Gammon argued that the decision of the learned judge did not cause the applicant any miscarriage of justice. In support of this point, Mr Gammon quoted a part of para. [35] of the learned judge's judgment, which I reproduce below:

> "… [Gertrude] was not relying on the generosity of [Joseph]. She was asserting a claim of entitlement based on her contribution to the acquisition of property owned by the couple … She wanted her fair share to which she was legally entitled."

This quotation was followed by another from para. [41] of the learned judge's judgment in which the learned judge found that 19 Castle Drive belonged to Gertrude's estate by

operation of law, in consequence of which, upon whom it eventually devolved was immaterial.

[41] Moving on to the question of the delay in seeking enforcement, Mr Gammon endeavoured to show the falsity of the applicant's stance, and explain the position of the respondents. Mr Gammon submitted that a fixed date claim form, to achieve the end eventually obtained from Laing J, was filed in 2008. Therefore, the 12 years' gap about which Miss Minto made much, is explained by the slow pace of the matter through the court.

[42] In an apparent reply to Miss Minto's submission that it would be inequitable to enforce the consent order, Mr Gammon argued that the subsequent death of both parties to the consent judgment did not render it ineffective. For that proposition, Mr Gammon relied on **Barder v Caluori**. It was also submitted that Mrs Fletcher Dawkins would be disproportionately prejudiced as the judgment being challenged was regularly obtained, and Gertrude's estate would be deprived of the fruits of the judgment, these many years since the claim first arose.

Discussion

[43] Both sides are agreed that, fundamentally, what Mrs Lawrence is seeking permission to appeal is the learned judge's exercise of his discretion granting permission to Mrs Fletcher Dawkins and Mr Gary Fletcher to proceed to enforcement of the consent order. In order to succeed, Mrs Lawrence has to establish, pursuant to rule 1.8(7) of the CAR, that the proposed appeal had a real chance of success. The principles governing the circumstances in which an appellate court will interfere with the exercise of a judge's discretion are by now well-established.

[44] This court, in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, adopted and applied the principles laid down in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042. Morrison JA (as he then was) quoted what he described as "Lord Diplock's well-known caution" to appellate courts to respect judges' exercise of

discretion and refrain from disturbing its exercise merely because the appellate court would have exercised the discretion differently. Morrison JA then articulated the relevant guiding principles as follows, at para. [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or the evidence before him, or on an inference – that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[45] I will now examine the exercise of the learned judge's discretion against the backdrop of the preceding principles. Notwithstanding the order in which the subheadings in the submissions were addressed, the centrepiece of the arguments of both sides appears to be whether it would be inequitable to allow enforcement of the consent judgment, having regard to fact that it remained executory at the death of Gertrude, and the passage of time which has elapsed since it was entered. I will take first, Miss Minto's contention that Joseph intended only Gertrude to benefit. The basic proposition underlying this submission is that 19 Castle Drive was an asset in which Gertrude had little or no proprietary interest and Joseph, as an act of parting matrimonial magnanimity, agreed to transfer it to her for her sole use and benefit. This submission therefore seeks to make **Barder v Calouri** indistinguishable from this case.

[46] In **Barder v Calouri**, the tacit assumption upon which the order was made was that the wife and children would occupy the former matrimonial home, which was jointly owned, for an indefinite period of years. The matrimonial home appears to have been the only asset that was the subject of the order, save for insurance policies which were linked to the mortgage. Just over a month after the order for the husband to transfer his share of the property to the wife, and before the transfer could be effected, she killed their two children and committed suicide. It was against this background that Lord

Brandon of Oakbrook, at page 40, said "[t]hat assumption was totally invalidated by the deaths of the children and the wife within five weeks of the order being made".

[47] Respectfully, there is no basis for either Miss Minto's submission or the assumption undergirding it. Rather, the respective entitlements of the parties denote the very point which distinguishes **Barder v Calouri** from the present case. From the learned judge's judgment, at para. [36], it is clear that 19 Castle Drive was but one of a raft of assets that came up for division before Brooks J. Para. [36] is extracted below:

> "In addition to 19 Castle Drive, the Brooks J Order provided for her to obtain Four Million Dollars within 6 months (failing which the property located at 6 Cargill Ave was to be sold) and two hundred (200) shares or twenty percent (20%) of the shares in Lawrence Engineering Limited. The Respondent on the other hand obtained, absolutely, properties located at (1) 54 Spanish Town Road, Kingston 14, (2) 20 Champlain Avenue, Kingston 20; (3) 6 Cargill Ave, Kingston 10; (4) Apartment 4, Hampshire House 10 Reckadom Ave, Kingston 5; (5) 13 Lydia drive [sic] Kingston 19 and 1 Capri Close, Red Hills."

[48] When 19 Castle Drive is placed in the context of the wider division of matrimonial property, it is plain this was not a situation of an asset being handed over by one party for the sole enjoyment of another. The learned judge was, therefore, correct when he pronounced himself (at para. [39]) "unable to accept that the fundamental assumption underlying the order that it be transferred to [Gertrude] was the expectation that she would continue to occupy it". It seems fair to say that the ownership derived from the consent order reflected what the parties considered to have been their just entitlement arising from their years of contributing to the acquisition of the several assets.

[49] In **Barder v Calouri**, as well as **Thwaite v Thwaite**, it was the beneficiary of the order who was guilty of conduct which undermined the underlying assumption; or, put another way, the beneficiary's conduct ushered in the changed circumstances which obtained at the time of the application. I have already addressed the events that distinguished the assumption beneath the order in **Barder v Calouri** (see para. [45]

above). In **Thwaite v Thwaite**, the order requiring the husband to transfer his share of the jointly owned family home was made on the assumption that the wife would use the home as the permanent residence for herself and their two children. Subsequent to the making of the order, which remained executory, it was discovered that the wife had no settled intention to remain in the jurisdiction where the house was located. Therefore, the husband applied to have the order set aside. It was upon those facts that Ormrod LJ said, at page 102:

> "Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so ..."

[50] For that proposition, Ormrod LJ relied on **Mullins v Howell** (1879) 11 Ch D 763 and **Purcell v FC Trigell Ltd and Another** [1971] 1 QB 358 ('**Purcell v FC Trigell**'). In **Mullins v Howell**, taking the facts from the headnote, where on a motion for a mandatory injunction, the defendant mistakenly consented to a more extensive undertaking than he intended, the court refused to enforce the part of the undertaking that was given by mistake. The question before the court was whether it had the power to set aside the consent order. The court had no doubt that a mistake vitiated the consent order to the extent of the mistake. According to Jessel MR, at page 766:

> "I have no doubt that the court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only..."

[51] **Purcell v FC Trigell** also concerned the setting aside of a consent order, as well as its enforcement. The facts, in brief, were that, at the instance of the defendants, the parties entered into an agreement that their defence would be struck out by the registrar, if they did not answer interrogatories within 10 days of the date of the order. Upon the defendants' failure to answer all the interrogatories, the registrar entered judgment against the defendants, based on the parties' agreement, and upon the plaintiff's request. The defendants' appeal against the registrar's order was dismissed. The defendants then

filed an application before a judge in chambers asking for an extension of time to appeal the original consent order. That application was granted and the plaintiff appealed.

[52] Among the arguments made in the English Court of Appeal was that a consent order was not appealable, except in circumstances warranting the setting aside of a contract, such as mistake or misrepresentation. Lord Denning MR thought the matter was too widely stated; citing **Mullins v Howell**, Lord Denning opined (at page 363-364) that the consent order could be appealed on the ground of mistake. More to the point of this appeal, are the observations of Buckley LJ on the section extracted from Jessel MR's judgment by Miss Minto. According to Buckley LJ, Jessel MR acknowledged the subsistence of the parties' agreement but denied enforcement on its specific terms on equitable grounds. I quote:

> "... it is quite clear, in my judgment, from the terms of Sir George Jessel MR's observations in that case that he was not in any way disregarding the contractual effect of the arrangement arrived at between the parties. On the contrary, he was saying that there was an agreement but that it was an agreement which in the circumstances of the case the court would not enforce against the defendants; that is to say, he was saying that on equitable grounds, although there was a contract, it was one which ought not to be enforced in its specific terms ..."

[53] As in these reported cases, it is not the validity of the consent order that is under attack. On the contrary, the court is being invited to say it would be inequitable to enforce it, and accordingly, the learned judge was wrong in the exercise of the discretion permitting the respondent to proceed with enforcement. All the cases reviewed show that the inequity to which Ormrod LJ adverted in **Thwaite v Thwaite** sounds in the vein of either materially changed circumstances or the discovery of a mistake which would substantially affect the previously given commitment. On the other hand, where the court allowed enforcement to proceed, such as in **Purcell v FC Trigell**, the party who sought to deny enforcement was guilty of dilatory conduct which tended toward the prejudice of the other party.

[54] The question therefore becomes: was there anything in the circumstances appending the application before the learned judge, at the time it was made, which made it unfair or unjust to order the enforcement of the consent order? Miss Minto identified the extensive delay in making the application and the intention of Joseph for Gertrude to benefit and not strangers, as constituting the changed circumstances, contemporaneous with the making of the application.

[55] Although Miss Minto shone the spotlight on delay as part of the prevailing circumstances at the time of the filing of the application, there was no attempt to ground the point in authority. However, Blackstone's Civil Practice 2019, The commentary, at para. 79.11, and rule 46 of the CPR offers some guidance. It was argued that permission to enforce could only be granted in the face of evidence explaining the delay and why the order remained unenforced.

[56] Respectfully, the strictures learned counsel wishes to attach to the enforcement of the consent order do not find any expression in the CPR. There is an express requirement for a judgment creditor to first obtain permission before a writ of execution is issued, if six years have elapsed since the date judgment was entered (see rule 46.2(1)(a) of the CPR). In the application for permission, the applicant must satisfy the court or registrar, of, among other things, the reasons for the delay (rule 46.3 (2)(b) of the CPR). That, however, was not the application which was before the learned judge.

[57] What the learned judge had before him was an application to enforce a consent order. The learned judge considered the question of delay and found that it would not be just to refrain from granting the application on the basis of delay. While the learned judge acknowledged the fact of inordinate delay, he found the conduct of Joseph's estate equally dilatory or "more egregious", in the face of the absence of any challenge to the consent order. The learned judge was alert to the fact of Joseph's non-compliance with the court order and considered it "grossly unfair and unjust" for the court to come to the aid of a litigant who sought to benefit from his own disobedience of the court order.

[58] In other words, the learned judge found that it was demonstrably just to grant the application to proceed to enforcement, notwithstanding the passage of time that had elapsed since the making of the consent order. The learned judge was not wrong in assessing the application on the standard of what is just. If I might borrow from **Duer v Frazer** [2001] 1 WLR 919, an English case of application for permission to issue a writ of execution after the lapse of six years, the standard is what is demonstrably just, in explaining the pre-enforcement delay.

[59] Leaving aside the question of delay, I turn my attention to Miss Minto's submission on the respondent's standing. In essence, Miss Minto argued that the respondent is not entitled to make the application, not being the personal representative for the estate of Gertrude's last surviving personal representative. That is, there is a break in the chain of transmission. Borkowski's Law of Succession 4th ed, at para. 11.1.1.2, provides the following explanation of the chain of transmission or representation:

> "… The chain applies as follows: suppose that A is the sole or last surviving executor under T's will, and has obtained probate but dies before the administration of T's estate has been completed. If A himself has an executor, B, who obtains probate of A's will, then B becomes an executor of T's will as well – B represents A ..."

In short, "the last executor in an unbroken chain of representation is the executor of every preceding executor" (see Parry & Clark The Law of Succession 10th ed, at page 299)

[60] Both textbook writers give intestacy as an instance in which the chain of representation is broken. In the same vein, neither refers to a chain of representation commencing with an intestacy. In the present case, Gertrude's estate was being administered by Lascelles and Ainsworth pursuant to a grant of letters of administration. Mrs Fletcher Dawkins is one of the executors of Lascelles' estate. Therefore, in the strict sense of the foregoing exposition of the law, there was no chain of representation in relation to Gertrude's estate. A chain of representation could only be said to exist if

Lascelles and Ainsworth had been administering Gertrude's estate pursuant to a grant of probate. Even if there was a chain of representation commencing with Gertrude's estate, there was no evidence before the learned judge that Ainsworth died testate, entitling his executor to administer Gertrude's estate since he was the last surviving administrator of Gertrude's estate. It is therefore doubtful that this submission has the necessary factual, or legal support to be persuasive.

[61] In any event, submissions were made before the learned judge about the chain of transmission. He considered those submissions but made no pronouncements on them. After recounting the submissions, the learned judge went on to appoint the respondents as "representative". The learned judge, at para. [45] of his judgment, said this:

> "Ms Minto indicated that she had to [sic] objection in principle to Gary and Andrea Fletcher, being appointed as 'representatives' and in the circumstances of this case the Court is of the view that such a course is indeed sensible. Accordingly, the Court orders that they should by[sic] appointed as representatives for the purposes of this claim, which appointment will necessarily include enforcement of the claim ..."

[62] Although the learned judge did not say so, he was clearly acting under powers given to him by rule 21.4 of the CPR, which is headed, "Representation of persons who cannot be ascertained, etc., in proceedings about estates, trusts and construction of written instruments". Rule 21.4, in so far as is relevant, is set out below:

> "21.4 (1) This rule applies only to proceedings about –
>
> (a) the estate of someone who is dead;
>
> (b) …
>
> (c) …
>
> (2) …
>
> (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."

[63] Two points may be made. Firstly, it is abundantly clear that the learned judge was empowered to make the order he did. Secondly, Miss Minto raised no objection to the Mrs Fletcher Dawkins and Gary Fletcher being appointed as "representatives". In the section of his judgment quoted at para. [61 above, "to" is clearly the work of the printer's devil. The paragraph makes no sense without reading "to" as "no". Understood in that way, it is evident that learned counsel did not object to the representation order being made. Whether or not counsel objected in the court below, it has not been demonstrated that in resorting to the CPR the learned judge fell into error.

Conclusion

[64] It is clear that a stale executory consent order is enforceable only at the discretion of the court. The exercise of that discretion may be withheld if it would be inequitable to do so, in light of changed circumstances at the time the application to enforce it is made. The death of a party to such an order may not by itself constitute changed circumstances but a changed situation caused by the death may constitute changed circumstances that the court would consider material. In this case, the fact of Gertrude's death did not inaugurate any change in the circumstances or assumption undergirding the consent order. That is, the consent order was not made on the basis of a gift to Gertrude. Hence, there can be no question of who Joseph intended to benefit in agreeing to transfer 19 Castle Drive to her.

[65] As the learned judge found, making the order allowing the respondent to pursue enforcement, manifestly accords with the justice of the case. Therefore, the point

concerning delay has no merit. Equally, the arguments regarding the respondent's standing is misconceived as the learned judge grounded his order under the provisions of the CPR, and not the chain of representation, itself a doubtful proposition.

[66] In sum, it was not demonstrated that the prospective appeal had any real chance of success. It was for the foregoing reasons that we made the orders listed at para. [3].