[2022] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00115

BETWEEN	**MATTINO LIMITED**	**APPELLANT**
AND	**JODI BARROW**	**1st RESPONDENT**
AND	**LEIZA MUNN-BLAKELEY**	**2nd RESPONDENT**

Written submissions filed by Charles E Piper & Associates for the appellant

Written submissions filed by DunnCox for the 1st respondent

Written submissions filed by Tavares-Finson Adams for the 2nd respondent

29 July 2022

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

P WILLIAMS JA

[1] I have read in draft the judgment of my sister Simmons JA. I agree with her reasoning and conclusion and have nothing to add.

SIMMONS JA

[2] This is an appeal by Mattino Limited ('the appellant') against the decision of Wong-Small J (Ag) ('the learned judge') made on 16 December 2021. By that decision, the learned judge refused the appellant's application to be joined as an ancillary claimant in the Supreme Court matter of **Jodi Barrow v Leiza Munn-Blakeley** Claim No SU2020CV03177. The grounds of appeal are as follows:

> "(i) The Learned Judge erred in the exercise of her discretion by failing to consider or properly consider the effect of CPR Rules 1.1 and 1.2- the overriding objectives of the rules-in light of the facts of the case and the surrounding circumstances.
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> (ii) The Learned Judge erred in the exercise of her discretion by failing to recognize and appreciate that the Applicant/ Appellant's interest could be prejudiced if it was forced to commence separate proceedings, in circumstances in which its claim relating [to] the property which is common to all parties, could conveniently be dealt with in these Supreme Court proceedings, so that all matters in dispute may be resolved consistently with the primary objectives of CPR Rule 19.
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> (iii) The Learned Judge erred in the exercise of her discretion in concluding that because the Applicant/Appellant's interest is adverse to that of the Claimant/First Respondent, it should file a separate claim and have it consolidated with the proceedings in the current action.
>
> (iv)The Learned Judge erred in the exercise of her discretion in failing to appreciate that upon a consolidation of its proposed separate action with the existing proceedings, the Court will still be asked to resolve all matters in dispute, a circuitous and unnecessarily expensive process."

[3] The appellant seeks the following orders:

> "(i) The decision and order of the Honourable Mrs Justice Sandr[i]a Wong-Small (Ag) made on December 16, 2021 refusing the Applicant/ Appellant's application to be joined as an ancillary claimant be set aside and the orders sought in the

> Applicant/ Appellant's Notice of Application for Court Orders filed on October 12, 2021 be granted.
>
> (ii) Costs of the appeal and the hearing of the application in the Court below be awarded to the Applicant/ Appellant to be agreed or taxed."

Background

[4] The respondents, who are sisters, are registered as tenants in common of all that parcel of land part of Silver Sands in the parish of Trelawny, known as lot 187 and registered at Volume 1515 Folio 954 of the Register Book of Titles ('the property'). The property was originally owned by their parents, who are now deceased but was transferred to the respondents before the death of their mother. At some point, the 2nd respondent, Leiza Munn-Blakely, decided to sell her interest in the property and subsequently entered into an agreement for sale with the appellant.

[5] Subsequent to the execution of the agreement, the 1st respondent, Jodi Barrow, on 26 August 2020, filed a fixed date claim form (FDCF) seeking declarations that the property was held on trust "for the benefit, use and enjoyment of members of the extended Munn family" and an order that its sale was contrary to the terms of the trust. In the alternative, a declaration was sought that the sale of the property to an unrelated third party operated as a severance of the tenancy under section 3 of the Partition Act. The 1st respondent also sought an order that either she or her nominee be permitted to purchase the property from the 2nd respondent. Injunctive relief was also sought.

[6] On the same date, an *ex parte* application for an injunction was filed by the 1st respondent for an order :

> "That the [the 2nd respondent] be restrained, whether by herself or by her servants or agents or otherwise howsoever from interfering with disposing of, or otherwise dealing with her share of all that parcel of land part of Silver Sands, in the parish of Trelawny, known as Lot 187 on Deposit Plan No. 3002, registered at Volume 1515 Folio 954 of the Register Book of Titles, pursuant to the terms of the [2nd respondent's] undated Agreement for Sale with Mattino Ltd, or in any other

> manner that is inconsistent with the understanding or common intention that the property be held for the benefit, use and enjoyment of members of the extended Munn family, until further Order of the Court."

[7] The *ex parte* notice of application was refiled on 20 October 2020. On 23 November 2020, when the matter came up for hearing, an interim injunction was granted in the above terms and an *inter partes* hearing scheduled for 3 February 2021. The first hearing of the FDCF, which was scheduled for 1 February 2021, was adjourned to 15 April 2021, and the interim injunction was extended to that date. The trial was fixed for 19 and 20 October 2021.

[8] On 12 October 2021, the appellant filed an application to be joined as an ancillary claimant on the following grounds:

> "a. The [appellant] entered into an Agreement for Sale dated August 10, 2020 with the [2nd respondent] for the purchase of her one-half (1/2) interest as tenant in common in [the property] for the sum of Two Hundred and Seventy Five Thousand United States Dollars (US$275,000.00);
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> b. At the time of entering into the said Agreement [the appellant] whether by itself, its servants or agents had no knowledge of the alleged or any Trust which the [1st respondent] in this action allege [sic] to exist.
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> c. [The appellant] contends that it is a bona fide purchaser for value without notice of the alleged trust if one is found to exist.
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> d. [The appellant] contends that it has an equitable interest in the property purchased under the said Agreement for Sale having performed same to the extent that it has been permitted to do so by the [1st respondent] and [the 2nd respondent].
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> e. [The appellant] will be directly affected by any order or judgment that this Honourable Court makes in these proceedings in the event that it were [sic] not joined as Ancillary Claimant.

f. The overriding objectives of the Rules would be best served by this Honourable Court making the order sought herein."

[9] The application was supported by the affidavits of Mr Stafford Burrowes, who was stated to be the sole director of the appellant, Mrs Marilyn Burrowes and Mr Charles Piper, attorney-at-law.

[10] Mr Burrowes stated that pursuant to the agreement for sale, the appellant paid the required deposit and made a further payment of US$68,000.00. An instrument of transfer was also executed and cross-stamped, evidencing the payment of the transfer tax and stamp duty. It was also indicated that the sale has not been completed due to the existence of a mortgage on the property and that the delay has prevented the appellant from letting it to tourists or other guests.

[11] In her affidavit, Mrs Burrowes indicated that she had offered to purchase the property and that the deposit and a further sum had been paid.

[12] Mr Piper, in his affidavit of urgency, stated that the appellant was seeking to be joined as an ancillary claimant on the basis of its status as a bona fide purchaser for value without notice of the alleged trust. It was averred that the appellant would be "severely prejudiced" if the matter proceeded to trial without the order being made.

[13] The 1st respondent opposed the application on the basis that the appellant was not a defendant to the claim. It was also posited that the appellant was seeking to introduce a new cause of action against the 1st respondent and, as such, was required to file a separate claim and seek its consolidation with the substantive claim.

[14] The 2nd respondent, whilst not opposed to the joinder of the appellant in principle, stated that it could not be joined as an ancillary claimant as it was not a party to the claim.

[15] On 16 December 2021, the application was refused by the learned judge and leave to appeal granted. Accordingly, the proceedings were stayed pending the outcome of the

appeal. The learned judge delivered an oral judgment which the appellant attempted to transcribe as seen on pages 7-10 of their bundle filed 25 March 2022. The 1st respondent has, however, not agreed to the transcript of the proceedings. As such, we have focussed solely on the orders that were made.

Submissions

Appellant's submissions

[16] Mr Piper QC, in his written submissions, outlined the history of the matter and stated that in the court below, the 2nd respondent's counsel had indicated to the learned judge that no issue was being taken with the application. However, it was submitted on the 2nd respondent's behalf to the learned judge that the appellant could only make the application if it were already a party to the claim. It was posited that the proper course was for the appellant to either commence a claim which could be consolidated with the substantive claim or apply to be joined as an interested party.

[17] Queen's Counsel submitted that it was apparent from her reasons that the learned judge accepted that based on rule 18 of the Civil Procedure Rules, 2002 ('CPR'), the appellant was an appropriate person to make the application to be joined as an ancillary claimant and that she had the jurisdiction to make the order pursuant to rule 19.2(3)(a) and (b). He stated that based on her reliance on **National Commercial Bank Jamaica Limited v International Asset Services Limited** [2015] JMCA Civ 7, the learned judge accepted that the correct course was to join the appellant as an ancillary claimant but declined to do so.

[18] It was submitted that the learned judge erred in finding that the appellant could not be joined as an ancillary claimant as its interests were adverse to that of the 1st respondent and that it should have filed a separate claim and seek for both actions to be consolidated. Further, the learned judge erred in finding that it was in the best interest of the parties for the appellant to file a separate claim, as the claim sought to be advanced

by the appellant (in seeking damages) is adverse to that of the 1st respondent. Queen's Counsel submitted that neither position is supported by law.

[19] Reliance was placed on rules 8.1(4), 8.3 and 8.4 of the CPR to make the point that a single claim form can be used to dispose of several issues in one proceeding. Additionally, any number of claimants and defendants may be joined to a claim. Moreover, the use of a FDCF does not prohibit a party from seeking damages.

[20] It was submitted that there are good reasons for both matters to be disposed of simultaneously as: (i) the 1st respondent and the appellant are both seeking declarations in respect of their rights to the same property, (ii) the property involved concerns the interest of both the 1st respondent and the appellant and (iii) the determination of the issues will affect the interests of both parties. Reference was made to **Joseph Benkel (as trustee in bankruptcy of Eliezer Fishman) v East-West German Real Estate and Another** [2020] EWHC 1489 (Ch) ('**Joseph Benkel**'), in which the court at para. 30 set out the requirements to be satisfied upon an application for a joinder. It was submitted that the appellant has satisfied this test, and as such, there was nothing to restrict the learned judge from joining the appellant as a party at that stage of the proceedings.

[21] Queen's Counsel stated that in **Joseph Benkel**, the circumstances did not permit the granting of the application for joinder. However, upon the commencement of the trial, the court granted the application for joinder, having found that it would not be unfair (see **Joseph Benkel (as trustee in bankruptcy of Eliezer Fishman) v East-West German Real Estate and Others** [2021] EWHC 188 (Ch), para. 78).

[22] Queen's Counsel rejected the position advanced by counsel for the 1st respondent, that the relief being sought by the appellant is "diametrically opposite" to that of the 1st respondent. Reference was made to **Dorett O'Meally Johnson v Medical & Immuniodiagnostic Laboratory Limited** (unreported) Supreme Court, Jamaica, Claim No 2006HCV03983, judgment delivered 16 November 2009 and **Medical &**

Immuniodiagnostic Laboratory Ltd v Dorett O'Meally Johnson [2010] JMCA Civ 42, where the reliefs sought by the claimant (damages for personal injuries caused by a defective chair) and the defendant/proposed ancillary claimant (for an indemnity against the proposed ancillary defendant) were found to be similar in nature. It was, therefore, submitted that the order ought to have been granted. This, it was argued, would result in the saving of judicial time and the costs of the litigation. Such a course would also ensure that the relevant parties are all bound by the court's decision.

[23] Where the issue of the commencement of separate proceedings is concerned, it was submitted that there is no rule or authority which mandates the commencement of fresh proceedings instead of an ancillary claim, where a claim already exists in relation to the same subject matter.

[24] Queen's Counsel acknowledged that rule 26.2(b) of the CPR does not prescribe the circumstances in which the court is empowered to exercise its discretion to consolidate proceedings. In this regard, reference was made to **Daws v Daily Sketch and Daily Graphic Ltd and Anor** [1960] 1 WLR 126. It was submitted that even if the appellant were to commence separate proceedings, it was unclear whether such an order would be granted in the circumstances, especially considering that there was no pending action before the learned judge other than that of the 1st respondent. As such, this may not be a proper case for consolidation. Further, the filing of a separate action would be contrary to the overriding objective of allowing the court to deal with cases justly, saving expense and dealing with cases expeditiously and fairly. Queen's Counsel further submitted that even if an order for consolidation was secured, the court would still be asked to resolve all matters in the dispute, which is what joinder pursuant to rule 19 of the CPR seeks to achieve.

[25] In the circumstances, the court was asked to set aside the order of the learned judge dismissing the appellant's application to be joined as an ancillary claimant.

1st respondent's submissions

[26] Counsel commenced by reminding the court of the principles pertaining to the appeal court's review of the exercise of the discretion of the judge as outlined in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 ('**MacKay**'). It was submitted that the appellant has not identified any error of law or incorrect finding of fact that would warrant this court's interference with the decision of the learned judge. Counsel stated that the decision of the learned judge was based on the finding that the appellant, an independent third party to the litigation, should not be permitted to join the claim as an ancillary claimant. The grounds of appeal were then addressed.

Ground (i) - The Learned Judge erred in the exercise of her discretion by failing to consider or properly consider the effect of CPR Rules 1.1 and 1.2- the overriding objectives of the rules-in light of the facts of the case and the surrounding circumstances.

Ground (iv) - The Learned Judge erred in the exercise of her discretion in failing to appreciate that upon a consolidation of its proposed separate action with the existing proceedings, the Court will still be asked to resolve all matters in dispute, a circuitous and unnecessarily expensive process

[27] It was submitted that the learned judge had due regard to the rules regarding joinder and those in respect of ancillary claims. The likely prejudice to the existing parties against that which the appellant may suffer was also considered. In the circumstances, it was submitted that nothing in the learned judge's reasoning could be said to be "so aberrant" to justify this court's interference.

[28] It was submitted further that the learned judge would have fallen into error had she granted the application, as the reliefs sought by the appellant were entirely dissimilar in nature to those being sought in the claim. Such an order would also have been contrary to the overriding objective of the CPR, as new substantive causes of action against the parties to the claim would have been introduced at that stage. This would have resulted in substantial prejudice to them and derail the matter, which was ready to proceed to trial. In this regard, it was stated that the trial of the claim was adjourned to facilitate the hearing of the appellant's application. The granting of the order, it was submitted, would,

in effect, return the proceedings to the starting line as the parties would have been required to file defences to the ancillary claim and engage in a case management conference, at which orders for disclosure and the preparation of witness statements would be made. The parties would be required to prepare further submissions and proceed to a pre-trial review.

[29] The alternate approach of filing a separate action and seeking an order for consolidation, it was submitted, would have been more appropriate. Upon considering such an application, the learned judge would consider whether this would interrupt trial ready litigation and whether the appellant was dilatory when it sought to make such an application. It was further submitted, that the appellant cannot seek to utilise the overriding objective as a means to seek an order that it deems more favourable.

[30] In addition, the ancillary claim instrument is designed for specific purposes which do not include the intended use by the appellant. Reference was made to **Windell Simms v The Administrator General for Jamaica et al** [2019] JMSC Civ 216, paras. [15] - [18] and rule 18.9 of the CPR in support of that submission. It was argued that based on the above, ancillary claims are typically used by defendants or ancillary defendants for the purpose of bringing a claim against an existing or new party. It was submitted that whilst the categories of persons listed in rule 18.9 and para. [15] of the judgment of Nembhard J are not exhaustive, the appellant has shown no justifiable reason to depart from the set circumstances where an ancillary claim is deemed appropriate. It was also submitted that whilst the learned judge acknowledged that the facts of the claim and the proposed ancillary claim were connected, her finding that the application ought to be refused on the basis that the remedies sought by the appellant were dissimilar to those sought by the parties, was a correct application of rule 18.9(2)(b) of the CPR. It was also pointed out that the appellant is an external party to the litigation.

Ground (ii) - The Learned Judge erred in the exercise of her discretion by failing to recognize and appreciate that the Applicant/ Appellant's interest could be prejudiced it if it was forced to commence separate proceedings, in circumstances in which its claim relating [to] the property which is common to all parties, could conveniently be dealt with

in these Supreme Court proceedings, so that all matters in dispute may be resolved consistently with the primary objectives of CPR Rule 19.

[31] It was submitted that any allegation of inconvenience and potential prejudice does not outweigh the court's obligation to properly interpret the law and rules of court. Further, no evidence was presented to the court pertaining to the likelihood of prejudice to the appellant if the application was refused. In any event, it was submitted that the outcome would be the same. Reliance was placed on the decision of **Nyron Wright and Another v Ceon Collins et al** [2016] JMSC Civ 64, in which the court assessed the late filing of amended pleadings.

[32] It was submitted further that the appellant should not be permitted to rely on the overriding objective or allegations of prejudice which have not been particularised to avoid filing its own claim.

Ground (iii) The Learned Judge erred in the exercise of her discretion in concluding that because the Applicant/Appellant's interest is adverse to that of the Claimant/First Respondent, it should file a separate claim and have it consolidated with the proceedings in the current action.

[33] It was submitted that this ground has no merit as ancillary claims are regularly filed by defendants against claimants and naturally involve adverse interests. On this ground, counsel submitted that the appellant has misconstrued the findings of the learned judge. Her position, it was said, was not that the interests of the parties are adverse but rather that the nature of the relief sought by the 1st respondent differed from that being sought by the appellant.

[34] Counsel submitted further that the issue raised by the learned judge was that the appellant was seeking to introduce new cases against the existing parties and to pursue remedies which were not ancillary to the existing litigation. Whilst the first orders sought by the appellant are both declaratory, the substantive relief sought is specific performance of an agreement for sale. It is, therefore, more appropriate for the appellant to file a separate claim.

2nd respondent's submissions

[35] The 2nd respondent indicated that reliance was being placed on the submissions made before the learned judge in the court below. It was submitted that whilst no issue was being taken with the appellant being joined as a party, it could not be joined as an ancillary claimant as it was not a party to the claim. Two alternate courses of action were suggested; that the appellant file its own claim and then seek consolidation with the original claim or apply to be added as an interested party and then file a claim.

Discussion

[36] This appeal arose from the learned judge's exercise of her discretion. The basis on which this court will disturb such a decision is well settled. In order to succeed, the appellant must demonstrate that the learned judge, in the exercise of her discretion, erred on a point of law or made a decision that no judge "regardful of his duty to act judicially could have reached" (see **Mackay**). It is not the function of this court to substitute its views for that of the learned judge. In **Mackay**, Morrison JA (as he then was), having summarised the principles in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042 at 1046, stated at para. [20] :

> "[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 of 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'."

[37] In my view, the grounds of appeal have raised only one substantive issue. It is whether the learned judge correctly applied the provisions of rule 18.9 of the CPR. They can, therefore, be conveniently addressed together.

[38] Where there are multiple claims, dealing with the same subject matter, the court, in keeping with the overriding objective "to deal with cases justly" (rule 1.1 of the CPR),

is required to deal with claims as efficiently as possible to save both time and expense. As such, the court has a duty to "actively manage cases" and should endeavour to deal with "as many aspects of the case as is practicable on the same occasion" (see rules 25.1(a) and 26.1(2)(h) of the CPR). In this regard, rule 26.1(2)(b) of the CPR provides for the consolidation of claims. The provisions in the CPR relating to ancillary claims (rule 18) and the joinder of parties (rule 19) are also geared towards this objective.

[39] Rule 18.1(2) of the CPR on which the appellant relied states:

> "(2) An '**ancillary claim'** is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes-
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> (a) a counterclaim by a defendant against the claimant or against the claimant and some other person;
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> (b) a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and
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> (c) a claim by an ancillary defendant against any other person (whether or not already a party)." (Emphasis as in original)

[40] Rule 18.9 states:

> "(1) This rules applies when the court is considering whether to-
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> (a) permit an ancillary claim to be made;
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> (b) dismiss an ancillary claim; or
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> (c) require an ancillary claim to be dealt with separately from the claim.
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> (2) The court must have regard to all the circumstances of the case including-
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> (a) the connection between the ancillary claim and the claim;

(b) whether the ancillary claimant is seeking substantially the same remedy which some other party is claiming from the ancillary claimant;

(c) whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim; and

(d) whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings-

(i) not only between the existing parties but also between existing parties and the proposed ancillary claim defendant; or

(ii) to which the proposed ancillary defendant is already a party but also in some further capacity."

[41] The appellant, who entered into an agreement for sale with the 2nd respondent for her share of the property, has sought to be joined as an ancillary claimant on the basis that it is a bona fide purchaser for value without notice of the alleged trust. In addition, it has been argued that the outcome of the claim between the respondents is likely to have an impact on its position as the purchaser.

[42] The proposed ancillary claim seeks specific performance of the agreement for sale and a declaration that the appellant is a bona fide purchaser for value without notice of the alleged trust. Damages have also been sought for breach of contract and unlawful interference with the performance of the agreement for sale.

[43] The claim is concerned with the determination of the issue of whether the property is subject to a trust and, if so, whether, by virtue of that trust, the 2nd respondent was precluded from selling it. The viability of the proposed ancillary claim is, therefore, closely connected to the outcome of the claim.

[44] Rule 18.1(2), whilst it does not purport to provide an exhaustive definition of an ancillary claim, is to be considered in the context of part 18 as a whole. It is to be noted

that rule 18.5 of the CPR which deals with the procedure for making an ancillary claim only speaks to an application being made by a defendant. Rule 18.5(1) states:

> "A defendant may make an ancillary claim without the court's permission if-
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> (a) In the case of a counterclaim, it is filed with the defence; or
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> (b) In any other case, the ancillary claim is filed before or at the same time as the defence is filed."

[45] In addition, the note to rule 19.2(2), which deals with the change of parties, states that "[p]art 18 deals with counterclaims and the adding of additional parties by a defendant". The ancillary claim form (form 10) also refers to a claim being made by the defendant to the original claim. Based on the foregoing, an application to be joined as an ancillary claimant can only be made by a party to the proceedings, specifically a defendant. In the circumstances, the learned judge was correct when she refused the application made by the appellant.

[46] I will now consider whether, based on the close connection between the claim and the proposed ancillary claim, the learned judge ought to have considered whether the appellant could have been joined as a defendant pursuant to rule 19.2(3) of the CPR, which states:

> "(3) The court may add a new party to proceedings without an application, if-
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> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
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> (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue."

[47] Rule 19.3(1) states that a party may be added, removed or substituted on or without an application. Rule 19.3(2) provides for the making of an application by either an existing party or a person who wishes to become a party.

[48] In this case, it is in the interests of justice for the court to be fully aware of the issues concerning the property as the outcome of the claim would affect the issue that the appellant sought to raise as an ancillary claim. The commencement of a separate claim by the appellant and its trial before a different tribunal than that which has conduct of the trial of the claim between the respondents has the potential to render a judgment in the 1st respondent's favour otiose if the appellant's claim succeeds and it obtains registered title. That is clearly not a desirable situation. As stated by Phillips JA in **National Commercial Bank Jamaica Limited v International Asset Services Limited** at para. [39], "…the court must be careful to ensure that all parties concerned in the dispute before the court, are before the court, as that serves the ends of justice". The learned judge of appeal stated at para. 40 that, "…the intervener, should have some substantial interest in the outcome of the litigation". However, the 2nd respondent in this case has no issue with the appellant, who from all indications is not in a position to address the issue of whether the property is subject to a trust. It would, therefore, not be appropriate for the appellant to be joined as a defendant.

[49] The issues in the claim and the proposed ancillary claim are in my view, sufficiently linked that they should be determined by the same tribunal if possible. If such a course cannot be facilitated, the progress of any claim commenced by the appellant should be contingent on the resolution of the claim in **Jodi Barrow v Leiza Munn-Blakeley**. It would, however, have been procedurally incorrect to join the appellant, which is not a party to the claim, as an ancillary claimant.

[50] In light of the foregoing, I propose the following orders:

1. The appeal is dismissed.
2. Costs are awarded to the respondents to be agreed or taxed.

V HARRIS JA

[51] I too, have read in draft the judgment of my sister Simmons JA. I agree with her reasoning and conclusion and have nothing useful to add.

P WILLIAMS JA

ORDER

1. The appeal is dismissed.
2. Costs are awarded to the respondents to be agreed or taxed.