[2017] JMCC Comm 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2017 CD 00101

IN THE ESTATE OF THE DECEASED, INTESTATE

AND

IN THE ADMINISTRATION OF ESTATE UNDER THE INTESTATE PROPERTY CHARGES ACT AND THE ADMINISTRATOR GENERAL'S ACT

AND

IN THE MATTER OF AN APPLICATION FOR COURT'S OPINION, ADVICE OR DIRECTION UNDER SECTION 39 OF THE ADMINISTRATOR GENERAL'S ACT

IN CHAMBERS

Stuart L Stimpson and Vanessa A. Campbell instructed by Hart Muirhead Fatta for the Administrator General

Tania'ania Small-Davis and Mikhail A.C. Jackson instructed by Livingston, Alexander & Levy for RB

Chantelle Young and Samoya Young instructed by Clough, Long & Co. for AA

Heard: 25 May and 31 July 2017

TRUSTS-TRUST FOR SALE-APPLICATION BY ADMINISTRATOR GENERAL FOR DIRECTIONS REGARDING THE SALE OF TRUST PROPERTY-DUTY OF ADMINISTRATOR GENERAL-INDEPENDENT VALUATION OF TRUST PROPERTY COMMISSIONED BY ADMINISTRATOR GENERAL-VALUATION PARTIALLY DEPENDENT ON COMPANY'S AUDITED FINANCIAL STATEMENTS-WHETHER THERE IS ACTUAL OR APPARENT BIAS OR CONFLICT OF INTEREST IN THE MANNER IN WHICH THE AUDIT WAS CONDUCTED TO AFFECT THE RELIABILITY OF THE VALUATION-SECTIONS 39, 40, 43 AND 44 OF THE ADMINISTRATOR GENERAL'S ACT

EDWARDS, J

Background

[1] The deceased was a businessman who died intestate on the 10th July 2013. His sole beneficiaries at the date of his death were his adult son RB and his minor daughter AB. Under the Intestate Property Charges Act RB and AB are entitled to share equally in their father's estate. Due to the existence of the minor beneficiary, the Administrator General in the exercise of her statutory duty took charge of the estate and Letters of Administration was granted to her on 2nd December 2014.

[2] The Administrator General now makes this application which seeks, inter alia, the court's opinion and direction pursuant to section 39 of the Administrator General's Act, regarding her administration of the deceased's estate. The court's opinion and direction is being sought in relation to her management of two extant trusts for AB.

[3] The deceased died leaving the following assets:

a. 50% of the issued shares in a company known as Fit Farm Limited;

b. 50 % of the shares in a company known as Fit Shop Limited;

c. 100 of the 102 issued shares in a company known as Mega Marketing Company Limited;

d. 2 Jet Skis;

e. A 2012 Toyota Hilux; and

f. Cash in the bank.

[4] In addition, Mega Marketing Company Limited (Mega Marketing) owns a residential property in St. Andrew (currently occupied by the minor beneficiary and her mother AA). By virtue of the Intestates' Estates and Property Charges Act both issue are beneficially entitled to the deceased's entire estate. This application is however concerned with the 100 of the 102 shares issued in Mega Marketing as well as the deceased's 50% share in Fit Farm Limited. Mega Marketing is a company distributing confectionaries in Jamaica and Fit Farm Limited is a gym.

[5] AA Appears, on the face of it, to have been the business partner of the deceased and is the holder of the other 50% share in Fit Farm. She is not the mother of RB and by all appearances and accounts, there is little love lost between them.

[6] The deceased was a director and the majority shareholder of Mega Marketing, holding 100 of the 102 issued shares. His son RB was appointed as a director on the 8th of February 1995. Two nominee shareholders each held one of the two remaining shares. RB, although he owned no shares in Mega Marketing before the death of his father, was a director of that company and since his father's death became the Managing Director. He was the sole director until 2016. On the 1st of February 2016, Ms. Joan Ferreira-Dallas was appointed the Company Secretary and Director by RB.

[7] Following the death of the deceased, AA became the sole director of Fit Farm Limited. She failed in her bid to secure a court order which would entitle her to share in the deceased's estate as his spouse. There also appears, on the

surface, to be some level of hostility and mistrust between AA, her minor daughter and RB, as a result of which, it seemed a prudent course for the Administrator General to make this application to the court.

[8] It was proposed by AA that the shares to which the minor is entitled be sold to RB. To explore that feasibility and to determine whether this course would be in the best interest of the minor, a valuation of Mega Marketing was procured by the Administrator General. A valuation report was also commissioned for Fit Farm Ltd. McKenley & Associates, Chartered Accountants, was selected to undertake both valuations. Both RB and AA were advised of the proposed valuator and no objections were raised.

[9] The valuation report indicated that the shares held by the deceased in Mega Marketing were valued at Ninety Million Eight Hundred and Thirty Three Thousand and Ninety Dollars ($90,833,090.00). The report also highlighted that Mega Marketing operations were limited to its current four year distribution contract for one company and that the said contract would expire in February 2018. The report also indicated that the overall value of the shares in Fit Farm Limited was $6,692,924.00 with the deceased's share being $3,346,462.24.

[10] However, AA has since complained about the reliability of the valuation. Her complaint is based on the fact that the Audited Financial Statements were prepared by a Mr. Peter K.E. Knibb a Chartered Accountant, who she alleges is now an employee and/or agent of Abtax Limited an accounting firm. The said Abtax Limited is responsible for preparing the financial accounts of Mega Marketing. Joan Ferreira-Dallas who is now a director of Mega Marketing is also the CEO of Abtax Limited. AA argues that this amount to bias which renders the valuation unreliable.

[11] The Administrator General does not agree and this application is predicated on the parties' inability to present a workable solution, as well as the risk of RB's

offer being withdrawn which would result in the possible failure of Mega Marketing.

The Administrator General's duty under the Administrator General's Act

[12] The Administrator General's powers in matters such as these, is predominantly derived from section 12 of the Intestate Estates and Property Charges Act. Pursuant to that section, the Administrator General is mandated, as of right, to administer the estate of a deceased person who died intestate leaving behind a minor beneficiary.

[13] A grant of Letters of Administration was made to the Administrator General on 2 December 2014, who, pursuant to section 16 of the Administrator General's Act, took charge of the assets of the deceased with the task of discharging the debts and liabilities of the deceased and distributing the surplus in accordance with the rules of intestacy. Section 16 of the Act reads as follows:

> *"On the grant of letters of administration to the Administrator General, the property of the deceased shall vest in the Administrator General, and be assets in his hands for the payment of the debts and liabilities of the deceased, in the same way, and to the same extent in all respects, as such property would have vested in and been assets in the hands of any other administrator, if this Act had not been passed, and the Administrator General shall discharge the debts and liabilities of the deceased, and shall distribute the surplus, in the same way, and in the same order of priority, and to the same extent, that any other administrator would have been bound to discharge such debts and liabilities, and to distribute such surplus, if this Act had not been passed."*

[14] The case of **Clifton St. Hill v Augustin St. Hill** in the High Court of St Vincent and the Grenadines, Suit 402 of 1996, delivered 24 May 2001(unreported), reiterates the law as stated in Section 16 and provides a detailed analysis of the primary duties of a personal representative. At paragraph 13 of that judgment Mitchell J outlined that:

> *"An Administrator of an intestate's estate is a trustee. It is always the duty of an Administrator to satisfy the beneficiaries that he is properly administering the estate. He is required to act at a higher level even than he would in protecting his own interests. He must report and account. More than that, he is well advised to seek consensus and approval. If he tries and fails to secure the approval and consent of a particular beneficiary, he is opening himself up to a lawsuit. He is not well advised if he then relies on the statutory powers given to him by the Act and acts unilaterally. He is expected in such a case to apply to the court for directions on the administration of the estate. He is not safe in acting unilaterally. Only the shield of directions of the court will protect him absolutely from a lawsuit being brought by a discontented beneficiary."*

[15] Simmons J in **Jobson and another v Administrator General and another** [2015] JMSC Civ. 253 at paragraph [32] approved the dicta in **Clifton Hill v Agustin St. Hill.** It means therefore, that where the Administrator General, in the conduct of her duties towards an estate, is faced with obstruction or objections by any of the beneficiaries, she may seek the direction of the court and if she abides by that direction, she will be protected from suit.

[16] This approach was exemplified in the Privy Council decision in the case of **Marley and Others v Mutual Security Merchant Bank and Trust Company** [1990] 27 JLR 399. At page 403 it was stated by Lord Oliver that –

> *"A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court. If, however, he seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court, he has always to bear in mind that it is of the highest importance that the court should be put in possession of all the material necessary to enable that discretion to be exercised."*

[17] The Administrator General's duty to seek the court's direction when she has failed to secure the approval and consensus of all beneficiaries or to seek the

court's guidance regarding any issues arising out of the management or conduct of an estate is codified in section 39 of the Act which states;

> *"The Administrator-General may at any time apply to the Supreme Court for the opinion, advice, or direction of the Court or Judge respecting his rights or duties with regard to applying for, or obtaining administration of any estate, or trust, or probate of any will, or assuming the management of any estate, or trust, or with regard to any estate or trust vested in or administered by him under this Act, or with regard to any matters arising out of the management or conduct of any such estate or trust."*

[18] Pursuant to section 40 of the Act, where the appropriate guidance or direction has been sought the Administrator General will be deemed to have effectively discharged her duty as administrator of the estate. Further, in keeping with the provisions in sections 43 and 44, this court is bestowed with the authority to make the most appropriate order that meets the circumstances of the case.

[19] The authorities highlighted above collectively underpin the position that it is the duty of the Administrator General to discharge the debts and liabilities of the deceased and to distribute the surplus; and in circumstances where she is besieged with uncertainty regarding how best to proceed, so as to absolve herself from liability should questions of improper disposal be raised, it is always best that the Administrator General refrain from acting unilaterally and instead seek the court's direction and guidance.

What does the Administrator General want to do?

[20] Having died intestate, without a surviving spouse, the deceased's estate would be held on statutory trust for his two children. This is in accordance with section 4(1) Item 2(a) of the Intestate Estates and Property Charges Act. The section reads as follows -

> *"The residuary estate of an intestate shall be distributed in the manner or held on the trusts specified in the following Table of Distribution.*

Item 2. The issue:

There shall be held upon the statutory trusts for the issue of the intestate-

a. If the intestate leaves no surviving spouse, the residuary estate."

[21] Section 4 of the Intestate Estates and Property Charges Act must be read in tandem with Section 6. Implicit in Section 4 is the existence of a trust for the sale of an intestate's real and personal estate. Section 6 aptly provides a definition for statutory trust. It states that –

"For the purposes of this Part the residuary estate of the intestate, or any part thereof, directed to be held upon the "statutory trusts" shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, cost of insurance, repairs and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an encumbrance of a former undivided share or whose encumbrance is not secured by a legal mortgage) interested in the land."

[22] In outlining that the assets of the estate shall be held on trust for sale, it follows *a fortiori* that upon satisfying the estate's debts and liabilities, the Administrator General's next task is to sell the shares in Mega Marketing to which the minor is entitled. The Administrator General wishes to sell the minors shares in Mega Marketing to RB. RB wishes to purchase these shares. The Administrator General also wishes to hand over the shares in Fit Farm to which RB is entitled, to him. There is an objection to the first course but none to the second.

[23] In the Amended Fixed Date Claim Form which was filed on the 26 May 2017, the Administrator General claimed for the following:

"1. an order that the first hearing of this Amended Fixed Date Claim Form be treated as the trial of the claim;

2. *the Court's opinion and/or direction pursuant to section 39 of the Administrator-General's Act, regarding her administration of the estate of... (the **'deceased'**) particularly, her management of the trust in particular, for one of his two beneficiaries,... (the **'minor'**) namely –*

   (a) *Whether to accept the sole offer made by the deceased's other beneficiary ..., to purchase the 50 shares being held on trust for the minor, in Mega Marketing Limited, ('**Trust Shares'**) in the following terms:*

It then sets out the terms on which the sale would be effected.

[24] The objection to the sale raised by AA includes a suggestion that the Administrator General holds the shares until the minor comes of age. I agree with counsel for RB that the Administrator General has no authority to hold onto assets until a beneficiary attains the age of majority.

[25] In Parry and Clark, The Law of Succession, Tenth Edition it states the general rule as follows –

> *"The general rule is that personal representatives have no authority to carry on the deceased's business."*
>
> *[T]here are certain exceptions to the general rule that personal representatives have no authority to carry on the deceased's business.*
>
> *[P]ersonal representative have authority to carry on the deceased's business with a view to proper realization of his estate; for example, to carry out the deceased's obligation under a contract made by him, or to enable the business to be sold as a going concern. Thus, if selling the deceased's business as a going concern is a proper method of realisation, his personal representative may carry on the business for such a reasonable period of time as is necessary to enable them to effect the sale. Normally this period is not longer than the executor's year."*

[26] It is therefore, self-evident, that the extent of the Administrator General's authority, as it relates to the estate, is to see to its proper realization. That is, to ensure that the sale is properly executed. There is no authority –as proposed by AA – to hold the minor's shares on trust until she attains the age of majority. In fact, should she traverse this path, she runs the risk of being held personally liable for any losses incurred whilst carrying on the business. This point was reiterated by the learned editors in Parry and Clark where it was succinctly stated that –

> *"[P]ersonal representatives who carry on the deceased's business without authority are liable to make good any losses they incur, If personal representatives consider it expedient to carry on the deceased's business but lack the authority to do so, it may be advisable for them to apply to the court for an order authorising them to do so, or to seek an indemnity from the beneficiaries (if they are ascertained and sui juris)."*

[27] It is settled therefore, that the Administrator General has an unequivocal right to sell the Mega Marketing shares, as she wishes to do. This raises the following questions:

1. Is RB the most suitable candidate to whom the minor's share in Mega Marketing should be sold?

2. If RB is deemed to be the most suitable candidate, are the terms of his offer in the best interest of the minor?

[28] Having taken charge of the deceased estate the Administrator General set about carrying out her duties under the governing Act. She procured valuations prepared by an agreed valuator McKenley and Associates for the deceased's shares in Mega Marketing and in Fit Farm. Upon the completion of the valuation, RB agreed to purchase his sister's share in the company. His offer price for mega Marketing was half the value plus a premium of $3,000,000.00, that is, $47,416,545.00; the full valuation being $90,833,090.00.

[29] However, the Administrator General in deciding to accept the single offer for the shares it holds on trust for the minor has come up against the obstacle presented by AA's strident objection to the offer. AA maintains that the offer is self-serving and not in the best interest of the minor. She maintains that the shares are undervalued and that the Administrator General should delay the sale until she could procure a second independent forensic audit of the company's accounts on which a second more reliable valuation could be based.

[30] The Administrator General in carrying out her duty and in determining that it is in the best interest of the minor beneficiary to accept the offer, took into account that:

(i) It was the only offer made for the shares;

(ii) RB has pre-emptive rights to the shares;

(iii) RB has indicated that if he does not own 100% of the shares he will sell his interest to a third party;

(iv) Mega Marketing viability and its value are contingent upon the ability to maintain its nonexclusive distribution agreement with its supplier that is set to expire February 2018;

(v) The supplier has indicated to the Administrator General that, in light of the ongoing acrimonious litigation, it is only prepared to continue business relationship with Mega Marketing if RB retains control of the company;

(vi) The objection is not to the sale of the shares but to the valuation.

[31] The Administrator General being unable to satisfy all the beneficiaries that she is acting in the best interest of the estate and especially the minor beneficiary, sought the court's direction.

What is the courts duty upon receipt of such an application

[32] In **Marley and Others v Mutual Security Merchant Bank and Trust Company** Lord Oliver at 403 further stated:

> *"It follows that, if the discretion which the court is now called upon to exercise in place of the trustee is one which involves for its proper execution the obtaining of expert advice or valuation, it is the trustee's duty to obtain that advice and place it fully and fairly before the court, for it cannot be right to ask the judge in effect to assume the burdens of a trustee without the information which the trustee himself either has or ought to have to enable him to carry out his duties personally. The court ought not to be asked to act upon incomplete information and, if it is so asked, the proper course is either to dismiss the application or adjourn until full and proper information is provided.*
>
> *Secondly, it should be borne in mind that in exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties. That is not always easy, particularly where, as in this case, the application has been conducted as if it were hostile litigation; ...Where beneficiaries oppose a proposal of a trustee with a host of objections of more or less weight, the court is, of course, inevitably concerned to see whether these objections are or are not well founded, but that must not be permitted to obscure the real questions at issue which are what directions ought to be given in the interests of the beneficiaries and whether the court has before it all the material appropriate to enable it to give those directions.*

[33] At page 407 Lord Oliver in further considering the approach a court should take when it is called upon to consider whether a bargain negotiated by trustees is the best reasonably obtainable in the interest of the beneficiaries and what evidence it should consider to satisfy it of that fact said this:

> *"It will need to have at least an approximate assessment of the value of the property of which it is intended to dispose. Where that value depends upon accounts, it will need to be satisfied of the accuracy of the accounts upon which the value has been based. It will need to have an informed professional assessment of whether any proposed sale has been effected under the most favourable conditions. Particularly in a case where there is scope for divergent*

views regarding the value of the property sold, it will normally need to know what efforts have been made to explore the market and what advice has been received with regard to the marketing of the property to the maximum advantage."

[34] The courts duty therefore, in this application, is to determine whether what the Administrator General proposes to do is in the best interest of the trust estate. It is clear therefore that the guiding principle must be to ensure that whatsoever order is made it is done in the best interest of the beneficiaries, especially the minor. Where there is scope for divergent views regarding the value of the property sold, the court will normally need to know what efforts have been made to explore the market and what advice has been received with regard to the marketing of the property to the maximum advantage.

[35] The court also has the duty to override the objections of the beneficiaries if it is convinced that it is in the best interest of the trust estate and the minor to do so. The court must consider whether the evidence presented is of such a nature as to enable it to properly exercise its discretion to direct a sale of the shares in the terms and for the value proposed by the Administrator General.

[36] At page 404 of **Marley and Others v Mutual Security Merchant Bank and Trust Company,** Lord Oliver said:

"The question whether the trustee has demonstrated that the contract submitted for approval is in the best interests of the beneficiaries reduces, in such a case as this, to whether the trustee can satisfy the court that it has taken all the necessary steps to obtain the best price that would be taken by a reasonably diligent professional trustee. The question may equally well be expressed as whether the trustee has shown that it has fully discharged its duty."

[37] The court also took the view that even if a course of action may not later prove to be a breach of fiduciary duty, it does not necessarily follow that the action was one done in the interest of the beneficiaries.

[38] The overarching principle is that the Administrator General, as trustee of the trust property, has the overriding duty to obtain the best price possible for the beneficiary. See **Buttle v Saunders** [1950] 2 All ER 193. It is the duty of the court, on the evidence presented before it, to ensure that this is being done.

The Objections

[39] I will now set out the full scale of the objections to the course contemplated by the Administrator General. RB offered to purchase the minor's 50 shares in Mega Marketing for $47,416,545.00, free from all encumbrances, claims, liens, equities, charges and adverse rights of any description on the following terms:

(i) He will acquire the residential property from Mega Marketing and transfer it to the Administrator General in trust for the minor.

(ii) He will make a lump sum payment for the balance in the sum of $14,416,545.00 to the Administrator General in trust for the minor, and

(iii) A payment of $3,000,000.00 as a premium payable to the Administrator General in trust for the minor in 24 equal instalments.

[40] AA objects to this offer and insists that it should be refused. She has asked that the sale be delayed pending an independent forensic audit and a second valuation of Mega Marketing shares. She has also asked for the appointment of an independent director. She claims that several factors cast doubt on the accuracy and integrity of the valuation report that was conducted in relation to Mega Marketing. She firstly, takes issues with the appointment of Joan Ferreira-Dallas to the Board of Directors of Mega Marketing by RB. She secondly, also takes issues with the fact that, in preparing the valuation report, reliance was placed on the Audited Financial Statements for period 2011-2015.

[41] The gravamen of her complaint however, is that the Audited Financial Statements were prepared by Mr. Peter Knibb a Charted Accountant, who is an employee and/or agent of Abtax Limited, which happens to be Mega Marketing's accountants. Abtax Limited is responsible for handling the financial accounts of Mega Marketing. Mr. Peter Knibb prepared Mega Marketing's audit reports for

the period 2011-2015. The final ammunition in her arsenal is that Ms. Joan Ferreira-Dallas is the Managing Director and CEO of Abtax Limited.

[42] AA claims that this connection gives rise to an apparent and/or ostensible bias which compromises the integrity of the audit conducted by Mr. Peter Knibb, as an employee of Abtax Limited, which she alleges also compromised the valuation report which placed reliance on those financial audits.

[43] She also complained that there was no disclosure of the fact that the auditor was an employee of Abtax Limited, Ms. Ferreira-Dallas' firm. She argues that the response of the Administrator General that the audit was done by Mr. Peter Knibb and not Abtax Limited was not acceptable as they were one and the same. She pointed out that Mr. Peter Knibb appeared on the firm's website as its lead auditor and his e-mail address was clearly stated as Abtax Limited. She further complained that the non-disclosure of the relationship gave an appearance of bias and that the Administrator General had therefore, failed to rely on an independent audit of the company and as a result was not in a position to determine the true value of the company.

[44] She complained further that there was an appearance of bias because;

(i) Ms. Ferreira-Dallas was the Director and CEO of Abtax Limited and a Director of Mega Marketing having been appointed by RB;

(ii) The valuation report of the Mega Marketing was prepared for the sole purpose of estimating the value of the minor's share, in order to sell to RB;

(iii) The valuation report relied on audited financials of Mega Marketing prepared by Mr. Peter Knibb of Abtax Limited.

(iv) RB has always been interested in purchasing the minor's share in Mega Marketing.

(v) No other offer of the shares could be made to 3rd parties as RB had the right of first refusal.

(vi) RB benefits from the undervaluing of the shares.

(vii) RB has been less than forthcoming regarding Mr. Knibb's involvement in Abtax Limited.

(viii) A fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that Mr. Knibb and by extension the audited financials of Mega Marketing was biased in favour of Ryan Black.

(ix) In the interest of equity and justice it is imperative that an independent forensic audit of Mega Marketing be conducted in an effort to safeguard the minor beneficiary's interest in the estate.

[45] She also complained that considering the significant increase in projected profits it would not be in best interest of the minor to sell her shares now and that the true value of the company may be more if audited financial statements were prepared by another company. She pointed to the fact that, in the valuation report, Mega Marketing retained profits were projected to be $215,585,782.00 in the next ten (10) years. The projection for retained profits in year three (3) was $101,062,964.00 which exceeds the current valuation, which would therefore mean, according to her, the minor would be entitled to more than the $45,000,000.00 currently being offered. AA was of the view that the performance of the company was considerably less than she had projected based on her prior knowledge of the company.

[46] She has also rejected outright the offer of the property as part of the offer to purchase, as well as to the $3,000,000.00 premium being paid over 24 months. Furthermore, she contends that there was no objection initially to the valuation report as at that time she was not aware of the relationship between Abtax Limited, Ms. Ferreira-Dallas and Mega marketing.

[47] It was also her contention that RB was intimidating the minor into selling through his representations to the company's sole suppliers. She denies that there is any real risk of the supplier not renewing its contract with Mega Marketing which expires Feb 2018.

[48] She has made an alternate suggestion for the shares to be sold on the open market or kept until her minor child reaches majority and for the Administrator General to enter into a shareholder agreement and appoint a director.

[49] She also alleges that there has been questionable use of Mega Marketing funds to purchase vehicles in RB's own name and leasing them to Mega Marketing.

The Administrator General's response

[50] The Administrator General has no wish to do a forensic audit and a new valuation as this would take time and money, which the estate does not have. They have denied that the valuation is compromised and that the shares are undervalued as a result of bias or conflict. The objections, it was submitted, are unfounded.

RB's response

[51] RB pointed out that the Administrator General is the registered owner on transmission of all 100 shares in Mega Marketing. He also pointed to the fact that unlimited access to the company books, records, offices and warehouses was given to the Administrator General and that he has submitted yearly audited financial statements to Administrator General.

[52] According to the affidavit of Mr. Ryan Black, which was not challenged, it was AA who first proposed a sale of the minor's shares to him on 29 August 2013. They could not however agree a valuator. Eventually McKenley and Associates were agreed and their valuation was completed 25 July 2016.

[53] RB made the offer to purchase the shares based on the value appraised by McKenley and Associates. This was refused by AA and following negotiations with the Administrator General for an increase in the offer price, an improved offer was made. RB contends that the continued delay in the sale of the shares could adversely affect the value of Mega Marketing in light of the fact that:

(a) Mega Marketing sole business is the distribution of confectionaries under a non-exclusive distribution agreement with its sole supplier. This contract is set to expire in February 2018. Its value as a viable business relies heavily on that agreement.

(b) The supplier has expressed concern with the uncertainties caused by the ongoing litigation and is likely to terminate its relationship with Mega Marketing.

(c) His offer is the only offer.

(d) The company's Articles of Association clause 9 provides that a share shall not be sold or transferred unless first offered to the members at a fair value fixed by the company's auditors. RB contends that as the beneficial owner of 50 of the 100 shares he must first be offered the trust shares for purchase at a fair value.

[54] As to the claim of bias, RB stoutly denies any such bias and denies, as well, that the audited financial statements referred in the valuation report were all prepared by Mr. Knibb as an employee of Abtax Limited. He pointed to the fact that Mr. Knibb only became affiliated with Abtax Limited in 2015 so there could therefore, have been no bias on the part of Mr. Knibb in 2011-2015.

[55] He also asserts that there is no proof that Mr. Knibb was an employee or agent of Abtax limited during the relevant period. He also asserted that Mr. Knibb was an independent Chartered Accountant to whom clients would be referred during the relevant period.

[56] He joined with Administrator General in pointing to the Chartered Accountants of Jamaica Code of Ethics which provide that it is not a conflict of interest for the same firm to provide both accounting and audit services for a company, provided that separate employees are assigned to perform each service. Mr. Knibb, he said, provides independent auditing services and not accounting services.

Does the court have sufficient information to determine whether there is a fair and reasonable offer for the trust shares?

[57] The court has to consider the following;

(i) That the role of the Administrator General is to act in the best interest of the estate and the beneficiaries particularly the minor beneficiary;

(ii) It holds the shares in Mega Marketing on a statutory trust for sale and in selling it must ensure it gets the best price possible.

(iii) Acting within the letter and spirit of the Articles of Association of the company, it is correct to give RB first right of refusal.

(iv) There has been an undue delay in the winding up of the estate, letter of administration having been granted since 12 December 2014 and registered on 16 October 2015.

(v) It had been AA's offer, conferred through her attorneys, to sell the shares to RB.

[58] By e-mail dated 16 December 2016, the manager of the supplier indicated its preference to doing business with RB and that any decision adverse to RB owing 100% of shares in Mega Marketing would be fatal to the business relationship with the supplier. AA, thereafter, through her attorneys, contacted the suppliers. A meeting took place thereafter, at the Administrator General's office with AA's attorneys where AA's opposition to the proposed sale of the shares to RB was outlined. This was eventually followed by another meeting with RB's attorneys Livingston Alexander and Levy, whereby it was suggested that the Administrator General should retain the shares until the minor attained the age of majority. RB's disapproval with this suggestion was voiced by his attorneys.

[59] Several alternatives were suggested to the Administrator General by AA including:

(a) The shares be transferred to her on trust for minor;

(b) The Administrator General to retain the shares until the minor reaches majority and appoint independent directors, conduct a forensic audit and account for profits due and payable for minors benefit.

(c) Administrator General to enter into a Shareholders Agreement to govern the relationship.

[60] Having considered the factual background, the objections and submissions, it is now necessary to consider the report on the valuation done by McKenley and Associates and determine whether there was such bias/or conflict which would invalidate the valuation, thus making it necessary to conduct a forensic audit and a new valuation.

The valuation by McKenley and Associates

[61] The Administrator General provided to the court the full report submitted by the valuator. This company was selected by the Administrator General in accordance with Government Procurement Guidelines and was agreed by all the parties interested in this matter to conduct the valuation exercise.

[62] At the conclusion of the exercise the valuator provided a report. In its letter to the Administrator General which formed part of the report, the valuator indicated that the:

> *"The purpose of these valuations is advisory in nature and intended to be used for offering the businesses for sale as going concerns. Please refer to the statement of limiting conditions contained in this document. For the purposes of businesses appraisal, fair market value is defined as the possible price at which the subject business could change hands between a willing buyer and a willing seller, neither being under a compulsion to conclude the transaction and both having full knowledge of all the relevant facts. In this specific case, the notion of compulsion is increased as the Administrator-General's Department intends to sell the shares, a fact that will be known to potential purchasers.*
>
> *We have appraised a marketable, controlling ownership interest in the assets of the subject businesses. The appraisals were performed under the premise of value in continued use as going concern business enterprises.*
>
> *Based on the information contained in the report that follows, it is our estimate that the fair market value of a controlling interest of 98% in Mega Marketing Limited, which is included in the Estate...is*

> *$90,833,090. It is also our estimate that the fair market value of an interest of 50% or 400 shares in Fit Farm Limited, which is included in the Estate is $3,346,462.*
>
> *The values of the companies include cash, receivables, inventory, property, plant, equipment and furniture as well as business goodwill net of all known business liabilities. The valuations are subject to the limited information provided to us as well as well as the assumptions and financial data which appear in the reports."*

[63] The report also states that the valuation was done in accordance, to the extent relevant and practicable, with the guidelines of the Uniform Standards of Professional Appraisal Practice USPAP and conforms to the requirements of valuation engagement as that term is defined in the Canadian Institute of Chartered Business Valuator Standard No. 110.

[64] The report identified that it is a Calculation Valuation Report – that is – one that contains a conclusion as to the value of shares, assets or an interest in a business that is based on minimal review and analysis and little or no corroboration of relevant information and which is generally set out in a brief valuation report. The review did not include Director's Minutes, Strategic Business Plans or Marketing Forecast.

[65] The report pointed out that there were three (3) approaches to valuing a business, (a) Asset Approach, (b) Market Approach and (c) Income Approach. The first two (2) were found to be not suited to Mega Marketing; the first because it had no large fixed assets base and the second because no recent sale of any company of similar size whether, private or public, has taken place. The income based valuation approach was adopted and appropriately modified based on the available information. The valuation was done therefore, using the Income Based Valuation Method utilizing the multiple earnings and discounted cash flow approaches.

[66] In conducting the exercise the valuators referenced a number of different factors:

(a) A site review

(b) A business review taking into account;

(i) 2011-2015 audited financial statements along with insurance records, lease, employment contracts, legal documents, business expenses;

(ii) Income tax computations;

(iii) The distribution agreement;

(c) Discussions with management, accounting, marketing and inventory;

(d) Conference with RB;

(e) Other information sources (a list of 10)

[67] The following sources of information were used by McKenley and Associate in preparing the appraisal:

I. Interviews were conducted with the company's Managing Director, Accountant, Marketing Officer and other team members;

II. International and local economic data were reviewed. The sources used included 2015 Economic & Social Survey of Jamaica published by the planning institute of Jamaica, statistics from the Junior Market of the Jamaican Stock Exchange, audited financial reports for three years from 2015 to 2013 in the case of Mega Marketing and 2014 and 2013 for Fit Farm Limited.

III. The audited financial statements for both companies were examined. These were analyzed to evaluate the businesses recent performance and outlook for continued income generation.

IV. Research of comparative business sale transactions data was also conducted.

V. Reference was made to the Bank of Jamaica, Ministry of Finance, The institute of Chartered Accountants of Jamaica, Development Bank of Jamaica and the Jamaica Stock Exchange.

VI. Mega Marketing 2015 Income Tax computation and S01 and S02 statutory payroll documents were obtained.

VII. Information was obtained from discussions with representatives from Victoria Mutual Wealth Management Limited and Mayberry Investments Limited, both stock-broking companies with intimate knowledge of valuing private companies before listing on the Junior Market of the Jamaican Stock Exchange.

VIII. Research information from Victoria Mutual Wealth Management.

IX. Financial analysis including ratios from NCB Capital Markets Limited as at July 18 2016.

X. Information from The Retail Owners Institute relating to benchmark ratios for candy and nut stores based on date from Risk Management Association 2015/2016 Annual Statement Studies.

[68] The audited financials were therefore only one of a number of factors considered by the valuators.

[69] Special note must also be taken of the fact that the valuation was not based solely on Mega Marketing's profitability; in fact, the financial appraisal of Mega Marketing's operation in the future involved the preparation and assessment of a projected ten year profit & loss accounts, cash flows and balance sheets as well as a number of pertinent ratios. The financial appraisal was based largely on projected performance. It also considered world economic situation and prognosis. Nowhere in the report does it state, indicate or hint that the values would be affected by the existence or lack of a forensic audit.

[70] In the general statement of limiting conditions it states:

> *"This is a restricted appraisal report as defined under the USPAP standard 10. Not all pertinent information has been considered nor was a comprehensive valuation undertaken due to inadequate and non-existence of certain information and the limited time allotted to produce the report. This may affect the value conclusions presented in this report."*

The report also carried the disclaimer that it did not involve any corroboration to determine the accuracy of the information provided.

[71] The court therefore accepts that it is not a comprehensive valuation report and that the value arrived at is a calculation of value rather than a considered opinion of value. It is a "fair estimation of value based on the desk top approach".

[72] A possible weakness in the value put forth by McKenley & Associates is that it is not based on a reading of the market. In **Marley and Others v Mutual Security Merchant Bank and Trust Co. Ltd,** it was averred that where there is a scope for divergent views regarding the value of the property sold, it must be shown what efforts were made to explore the market and what advice has been received with regard to the marketing of the property to the maximum advantage. However, in that case the assets were intangible and involved a complicated mix. In this case, it is a simple income generating cash only distribution company. The valuator admittedly did not conduct a market read to determine what the market is willing to pay. It however, did note that there has not been any sale of any like company in recent years.

[73] However, the failure to do a market read is not the complaint made by AA. Given the delicate nature of the circumstances surrounding this matter, that is, the fact that the company has only one supplier who has voiced a willingness to conduct business only with RB, I am of the view that an exploration of the market as to whether any third party would be willing to buy the shares and at what price, may not the best way forward at this time.

The question of bias

[74] In keeping with the principle enunciated in **Marley and Others v Mutual Security Merchant Bank and Trust Co. Ltd,** it follows that in determining whether the sum of $90,833,090 put forth by McKenley & Associates is indeed a proper estimate of the fair market value of the Mega Marketing shares, this court will first have to be satisfied of the validity of the accounts upon which the value was partially based. As such, a determination must first be made as to whether there was any conflict and/or bias which compromised the integrity of the audit conducted by Mr. Peter Knibb.

[75] On the question of bias, there are two notable forms, actual bias and apprehended bias which at times is referred to as ostensible bias. The case of **Re: Medicaments and Related Classes of Goods** (No. 2) [2000] EWCA Civ. highlights the position in law that a claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudiced the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand. Whereas a claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. This position was adopted by the House of Lords in **Porter v Magill** [2001] UKHL 67.

[76] A claim for actual bias requires clear and direct evidence that the decision-maker was in fact biased and as such actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. However, for apprehended bias a court needs only to be satisfied that “a fair minded and informed observer might conclude there was a real possibility that the decision maker was not impartial”. Undoubtedly, this is an objective test predicated on the views and perception of the reasonable man who is not “overly suspicious.”

[77] AA relied on the decision of Sykes J in the case of the **ATL Group Pension Trustees Nominee Ltd v The Industrial Disputes Tribunal, Catherine Barber** [2015] JMSC Civ. 211 on the issue of apprehended bias. In that case Sykes J, at paragraph 73, examined the test for bias and relied on the various dicta in the cases which have pronounced definitively on the subject matter of bias. He identified the principles in the cases which may be summarised as follows:"

a) *"The rule against pecuniary bias extended to [matters where the] decision would lead to the promotion of a cause in which the judge was involved along with one of the persons making submissions before the court."* **R v Bow Street Metropolitan Stipendiary Magistrate** [1999] 1 All ER 57.

b) *...the test became 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased...'* **Porter v Magill [2002] 1 ALL ER 465, HL.**

c) *Lord Hope in affirming the apparent bias test set out in Porter v Magill held that rule against being a judge in one's own case extends to cases where the person has a personal or pecuniary interest in the outcome...***Meerabux v Attorney General (2005) 66 WIR 113 PC.**

d) *In imputing actual bias, it must be shown that the decision-maker has a financial or propriety interest in the outcome of the inquiry. Interest was not limited to pecuniary interest but extended to cases where there was an indirect interest.* **Roald Henriques v Shirley Tyndall and Others** [2012] JMCA Civ. 18.

e) *There may also be a real possibility of subconscious bias.* ***Lawal v Northern Spirit Ltd*** *[2003] IRLR."*

[78] Sykes J also considered what a court should do when the automatic bias principle does not apply. In such as case, he said, the court has to go on to consider the real possibility of bias. In so doing, the court has to consider what the fair minded observer would decide when all the facts are known to him in determining whether there is a real possibility of bias.

[79] In the matter of **The Board of Management of Bethlehem Moravian College** [2015] JMSC Civ 211, Phillips JA also adopted Lord Hope's dicta that:-

> *"...the legal test of bias to be applied in a case of apparent bias was to be found in his speech in **Porter v Magill**, that is "the question is whether the fair minded and informed observer, having consider all the facts, would conclude that there was a real possibility that the tribunal was biased." He reminded that it is equally well established that the fair minded observer is not "unduly sensitive or suspicious..."*

[80] In his dissenting judgment in the said case, Morrison JA (as he then was) also considered the principles surrounding the question of bias. In doing so he considered Lord Hope's statement in **Gillies v Secretary of State** for work and pensions (Scotland) [2006] UK HL2, para. 17where it was stated that:

> *"The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny..."*

[81] Morrison JA also considered the judgment of Harris JA in **Henriques v Tyndall and others** where in considering whether there was bias, the court said it ought to be guided by a two step process. The first step was to examine the evidence on which the allegation of bias was based. The second step was to consider whether a fair-minded observer would conclude that there was a real possibility of bias. For apparent bias the test is an objective one. It assumes the decision maker to be 'divorced from any semblance of partiality.' But it also takes into account of the fact that the informed fair-minded observer is not 'unduly complacent, naive nor unduly cynical or suspicious.'

[82] An examination of the law as it relates to bias shows that the issue raised by AA of apparent and/or ostensible bias in the connection between Mr. Peter Knibb, Ms. Ferreira-Dallas, Abtax Limited and Mega Marketing, does not arise. The question which arises is whether Mr. Peter Knibb would deliberately falsify the financial audits for Mega Marketing, in order to promote a cause in which he was involved with RB? Put another way, is the under valuing of Mega Marketing

shares for the benefit of RB, a cause which Mr. Peter Knibb is likely to promote? It also requires the reasonable observer to consider whether Mr. Peter Knibb has a personal or pecuniary interest in the outcome of the audits at the time he conducted them. Mr. Knibb is not a member of Mega Marketing and between 2011 and 2015 was an independent chartered accountant. He became an employee of Abtax Limited in 2015. Ms. Ferreira-Dallas became a director of Mega Marketing in 2016. Automatic disqualification therefore does not apply. There is no evidence that Mr. Peter Knibb knew from 2011 or thereafter that there would need to be a sale of the shares to RB, nor is there any evidence that would suggest that he was divorced from any semblance of impartiality in the conduct of the audits. Therefore, a fair-minded and informed observer, armed with all the facts could not conclude that there was a real possibility of bias in the conduct of the audit for those years in favour of RB as alleged by AA.

[83] Despite counsel for AA's insistence that she is not relying on conflict of interest to ground her objections, I did consider whether there may have been a conflict of interest sufficient to invalidate the audited financial statements prepared by Mr. Peter Knibb.

[84] The case of **Aberdeen Railway Co v Blaikie Brothers** [1854] UKHL 1 explores a director's fiduciary duty of loyalty and his duty not to engage in self dealing. The overarching principle emanating from this case is that where a director has an interest in a corporate transaction, the said transaction is voidable at the company's will, and it a director's duty to avoid any possibility of a conflict of interest.

[85] The facts of **Aberdeen Railway Co v Blaikie Brothers** are as follows; the plaintiff needed a large quantity of iron chairs and contracted for their supply over an 18 month period with Blaikie Brothers, a partnership. Thomas Blaikie was the managing partner of Blaikie Bros and a Director and the chairman of the Aberdeen Company. The contract was partly performed but, having taken delivery of about two-thirds of the iron chairs, the Aberdeen Railway Company

refused to accept any more. The defendant sought to enforce the contract or in the alternative requested an order for damages for breach. Lord Cranworth in assessing the circumstances held that –

> *"The railway company's defence succeeded on the grounds that Mr. Blaikie's self-dealing rendered the contract voidable at its suits. The equitable rule as to the accountability of directors is not limited to cases in which there is a maturing business opportunity but extends to cases in which the director either has or can have a personal interest conflicting, or which possibly may conflict, with the interests of whose whom he is bound to protect. 'This, therefore, brings us to the general question, whether a Director of a Railway Company is or is not precluded from dealing on behalf of the Company with himself, or with a firm in which he is a partner. The Directors are a body to whom is delegated the duty of managing the general affairs of the Company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a so into.' and 'Mr. Blaikie was not only a Director, but (if that was necessary) the Chairman of the Directors. In that character it was his bounden duty to make the best bargains he could for the benefit of the Company. While he filled that character, namely, on the 6th of February, 1846, he entered into a contract on behalf of the Company with his own firm, for the purchase of a large quantity of iron chairs at a certain stipulated price. His duty to the Company imposed on him the obligation of obtaining these chairs at the lowest possible price. His personal interest would lead him in an entirely opposite direction, would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed, and I here see nothing whatever to prevent its application. I observe that Lord Fullerton seemed to doubt whether the rule would apply where the*

> *party whose act or contract is called in question is only one of a body of Directors, not a sole trustee or manager. But, with all deference, this appears to me to make no difference. It was Mr. Blaikie's duty to give his co-Directors, and through them to the Company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty, and whether he was the sole Director or only one of many, can make no difference in principle. The same observation applies to the fact that he was not the sole person contracting with the Company; he was one of the firm of Blaikie Brothers, with whom the contract was made, and so interested in driving as hard a bargain with the Company as he could induce them to make."*

[86] A comparison of the **Aberdeen** principle with the case at bar suggests that the relationship between Ms. Ferreira-Dallas, Abtax Limited and Mega Marketing may give rise to a presumption of conflict of interest in the future. In the case of **Aberdeen**, Thomas Blaikie was the managing partner of Blaikie Brothers and a Director and the chairman of the Aberdeen Company. Likewise, Ms. Ferreira-Dallas is a director and company secretary at Mega Marketing as well as the managing director and CEO at Abtax Limited, the firm contracted to do its accounts.

[87] However, in assessing the current situation, the evidence provided to the court is that Ms. Ferreira-Dallas was appointed as a Director and Company Secretary of Mega Marketing on 1 February 2016. There is no evidence from either side as to when the audit for 2015 was completed. Assuming that Mr. Knibb conducted the audit for the period ending December 2015 sometime in early 2016, there can be no question of a conflict of interest, as at the time the audits 2011-2015 were completed, Ms. Ferreira-Dallas was not yet appointed as a director or company secretary of Mega Marketing.

[88] In this scenario also, even if I accept that Mr. Knibb was employed by Abtax Limited in 2015 and conducted the 2015 audit as an employee of Abtax Limited rather than as an independent auditor, the issue of a conflict of interest would not arise as he would have been absolved by the Institute of Chartered Accountants of Jamaica Code of Ethics. That Code stipulates that it is not a conflict of interest for the same firm to provide both accounting and audit services for a company, provided that separate employees are assigned to perform each service. AA has not alleged that that Mr. Knibb provided Mega Marketing with both accounting as well as auditing services. In fact, when one examines Mr. Knibb's function, it is pellucid that Mr. Knibb primarily conducts independent audits and does not provide accounting services. Therefore, the instances of self dealing present in the **Aberdeen** case that gave rise to a potential conflict is not present in the case at bar.

[89] There is no merit in AA's claims impugning the valuation.

Is there a need for a forensic audit?

[90] According to Black's Law Dictionary:

> *"A forensic audit is the process of reviewing a persons or company's financial statement to determine if they are accurate and lawful. It may be commissioned by private companies to establish a complete view of a single entity's finances. It is used wherever an entity's finances present a legal concern for example cases of embezzlement, fraud or tax liability. These forensic audits are performed by persons with skill sets in criminology and accounts who specialize in the following "a money trail, keeping track of fraudulent actual balance sheets and check for inaccuracies in overall and detailed reports of income and expenditure."*

[91] It is clear therefore, that a forensic audit and a financial statement audit have separate objectives that present no opportunity for overlapping. It is generally thought that a forensic audit is requested in cases of suspected asset–theft fraud. On the other hand a financial audit is generally commissioned to give a picture of

the company's financial position at a specific period. Such an audit may uncover financial fraud but not asset theft fraud.

[92] The court has to consider whether the valuation done by McKenley and Associates represents a fair assessment of the value of the company or if it is necessary to do a forensic audit to achieve that.

[93] To my mind the forensic accountant doing a valuation of Mega Marketing would do nothing more than what McKenley and Associates has done. The forensic audit would investigate and analyze all the accounting and financial information to determine its accuracy and competencies. So for example it would look at tax returns to see if there was income from other assets. In this case there is no dispute the company owns only one asset, the home in which AA lives with the minor and there is no allegation it earns any income from that. It is not disputed that its only business is the distribution of confectionery supplied by one company.

[94] It would also examine whether income is being siphoned off elsewhere because that would not be included in net value of company so the real value of shares would be understated. However, if that were the case the financial statement audit would pick that up as financial statement fraud.

[95] The effect of all this is that a forensic audit at $25,000.00-$27,000.00 an hour is, in this courts view, totally unnecessary and the projected cost far exceeds any expected benefit. In any event, the estate cannot afford it and neither can AA. Although in her supplemental affidavit filed May 2017 she says she discussed the need for it with family and friends who agreed to help, this is mere speculation at the worst and a sanguine expectation at best.

[96] Whilst I accept that an accurate valuation is unattainable if the income and expenses of the business are misstated, I have no basis on which to conclude that this is the case here, other than AA's suspicions. She has provided to this court, no grounds on which those suspicions are based.

[97] The multitude of sources that McKenley & Associates have utilized in the preparation of the valuation report is the strongest evidence that their estimated value of $90,833,090.00 is the best that can reasonably be obtained in the interests of the beneficiaries, and I am reasonably satisfied that the accounts used to assess the value were not tainted by bias or conflict of interest. On this basis, I see no reason for a forensic audit. In any event as a side note, such audits are usually utilized when there are allegations of theft and fraud. No such allegations have been made against RB. I am satisfied that the valuation done by McKenley and Associates is adequate for the purposes of the present sale.

Are the terms of the offer made by RB in the best interest of AB?

[98] RB has offered to purchase the shares being held on trust for his sister on the following terms:

i. Purchase of the Trust Shares for $45,416,545.00 free from all encumbrances, claims, liens, equities, charges and adverse rights of any description;

ii. Acceptance of this payment for the Trust Shares with

a. The acquisition of premises in Saint Andrew comprised in the Certificate of Title registered at Volume 1427 Folio 624 valued at $31,000,000.00 from Mega Marketing;

b. Its subsequent transfer to the Administrator General in trust for AB;

c. Payment of the balance of $14,416,545.00 in cash; and

d. Payment of $3,000,000.00 premium payable in 24 equal monthly instalments to the Administrator General in trust for the minor.

[99] Whilst a cash payment may have been more desirable, the Administrator General has seen it fit to accept this offer. To my mind, it provides a safe non depreciating, investment for the minor's future and sufficient cash for her education, care and advancement. I see no basis on wish to decry the terms of the offer.

Fit Farm

[100] AA owns 400 shares in Fit Farm, the remaining shares belonged to estate of the deceased. Even though McKenley and Associates valuation of the shares in Fit Farm carries the same disclaimer and expresses the same limitations, that is, limited documented information and absence of any future business strategic plans and projects, AA has raised no objections to the value of these shares. I will therefore, say no more on that.

[101] The Administrator General has received no offer for the shares in Fit Farm belonging to the estate but also wishes to dispose of them as well as to transfer RB's shares to him. There being no objection to that course, the Court directs that the Administrator General is entitled to dispose of the shares as indicated in its amended claim and as per the court orders set out below.

Conclusion

[102] The sale or other disposition of the shares in Mega Marketing is governed by the company's Articles of Association. Intrinsic to clause 27 is the proposition that a share shall not be transferred unless it first be offered to the members at a fair value to be fixed by the company's auditors. RB is the beneficial owner of 50 of the 100 shares held by the Administrator General on transmission. It therefore follows that the Administrator General must first offer RB the trust shares, for fair value.

[103] To date, RB's offer is the only offer received by the Administrator General. If not accepted, he has voiced his intent to have his shares purchased by a third party. Also, if his offer is not accepted, the supplier will be put to the test of their stated intent to conduct business with another company. Should the supplier hold steadfast to their stated intent, undoubtedly, the minor will suffer most as the company would lose its sole supplier and possibly its financial viability. In such as case, the $47,416,545.00 which the minor would have received if the offer had been accepted may possibly be lost. Additionally, if the company was to be

purchased by a third party, there is no way of predicting that individual's ability to source a new supplier or to predict that person's success. Thus the minor's financial future would face uncertainty. On these premises, I believe that since RB holds the right of first refusal and even more so, the fact that he has extended an offer to purchase the minor's share demonstrates a willingness to continue with his father's business. As such, I am of the view that he is the most ideal candidate to whom the minor's share must be sold.

[104] Given the state of affairs I am of the view that the Administrator General should accept RB's offer to purchase the 50 shares being held on trust for the minor on the terms agreed.

[105] As such my orders are as follows:

1. The Administrator General of Jamaica is directed to accept the offer made by RB to purchase the 50 shares being held on trust for the minor, in Mega Marketing Limited on the terms agreed.

2. The Administrator General is directed to sell the minor's 200 beneficial shares for no less than $1,673,321.12 subject to necessary statutory deductions and charges, in keeping with the estimate in McKenley & Associates' 25 July 2016 Business Valuation Report, of the fair market value of the deceased's 400 shares in Fit Farm Limited as $3,346,462.24.

3. The Administrator General is directed to transfer the deceased's remaining 200 shares in Fit Farm Limited to the adult beneficiary.

[106] Costs of this application to be borne by the deceased's estate.