[2022] JMSC Civ 17

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015/HCV01607

BETWEEN	**SHARON MOTT** **(Administrator of the Estate Kishauna Ann-Marie Clarke, Deceased, Intestate)**	**CLAIMANT**
AND	**UNIVERSITY OF TECHNOLOGY**	**1ST DEFENDANT**
AND	**DR. WINSTON ISLES**	**2ND DEFENDANT**
AND	**LITTLE TOKYO RESTAURANT**	**3RD DEFENDANT**

IN CHAMBERS (by Video Conference)

Mrs Marion Rose Green and Mrs Andrea Lannaman instructed by Marion Rose Green and Company for the claimant

Matthew Royal instructed by Myers Fletcher Gordon for the 1st defendant

Mikhail Jackson and Ms Annaliese Minott instructed by Livingston Alexander Levy for the 3rd defendant.

HEARD: 24th NOVEMBER, 2021 & 4th FEBRUARY, 2022

Civil Procedure - Unless Order - whether unless order made against a deceased claimant is a nullity - whether unless order took effect upon non-compliance of deceased claimant; Part 21 of Civil Procedure Rules - whether administrator ad litem for deceased administrator's estate should be appointed; Rule 64.13 of Civil Procedure Rules - wasted costs order - whether wasted costs order should be made against claimant's attorneys.

MASTER C. THOMAS (AG)

Introduction

[1] There are two applications before this court: (i) an amended application for the appointment of an administrator ad litem in the estate of the claimant: and (ii) an application for judgment for the 1st defendant and for wasted costs to be paid to the 1st defendant by the firm Marion Rose Green and Company, the attorneys who represent the claimant.

Background

[2] The claim filed herein was commenced by way of claim form and particulars of claim filed on 13th March 2015 in which it was alleged that on 21st March 2009, Kishauna Ann-Marie Clarke developed vomiting and diarrhea after consuming a meal which she purchased from the 3rd defendant and was later taken to the medical centre of the 1st defendant where she was treated by the 2nd defendant and later died. The particulars of claim aver that a grant of administration in the estate of the deceased was made to the claimant on 12th April 2013. The claim sought damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act.

[3] The chronology of the events subsequent to the filing of the claim and leading up to an application to strike out and for summary judgment before J Pusey J are set out in the judgment of J Pusey J in ***Sharon Mott (Administrator Estate Kishauna Ann-Marie Clarke, Deceased, Intestate) v University of Technology Jamaica and anor*** [2021] JMSC Civ 78, which I gratefully adopt and set out below:[1]

- Acknowledgment of Service on behalf of the 1st defendant was filed on May 27, 2015

[1] See paragraph [4] of the judgment

- 1st defendant filed its defence June 30, 2015

- 3rd defendant filed its defence June 3, 2015

- Mediation was set for April 26, 2016

- 1st defendant served its Statement of Facts and Issues for Mediation on April 15, 2016

- By letter dated April 28, 2016, the claimant's attorney advised that the mediation was postponed as the assigned mediator was ill.

- On June 26, 2019 the 1st defendant filed [an] application seeking summary judgment and to strike out the claim for want of prosecution, which was served on the claimant on January 1, 2019. The hearing of the application was set for April 27, 2020.

- On September 22, 2020 the Affidavit of Sara-Lee Scott was filed by the claimant in response to the application.

[4] The judgment of J Pusey J was delivered on 7th May 2021 in which she refused the order sought for summary judgment in respect of the claim under the Law Reform (Miscellaneous Provisions) Act, granted summary judgment in respect of the claim under the Fatal Accidents Act and refused to strike out the claim for want of prosecution. In addition, she made the following orders which have given rise to the applications which are before me for consideration:

1. ……

2. The parties to proceed to Mediation within 120 days hereof

3. Unless the claimant takes steps to have the mediation scheduled within 14 days of the date hereof, her statement of case [sic] stand struck out without further need for the court's intervention.

4. …..

[5] The application for appointment of administrator ad litem was first filed on 30th June 2021 and was subsequently amended on 22nd July 2021. The amended application seeks the following substantive order:

> That Keisha Clarke, the daughter of the late Sharon Mott who died on the 23rd day of October 2016 of Lilly Field, Bamboo PO in the parish of Saint Ann be appointed the Administratrix ad Litem in the estate of Sharon Mott, late of Lilly Field, Bamboo PO, in the parish of St Ann for the purpose of carrying on this claim in the Supreme Court of Judicature of Jamaica and to be substituted as claimant for and on behalf of the estate of Kishauna Ann-Marie Clarke against the defendants until this Honourable Court issues a full or normal grant of administration or until further order.

[6] In her affidavit in support of the application, Ms Keisha Clarke deponed that the claimant had obtained a grant of administration in the estate of her deceased daughter, Kishauna Clarke and that the claimant had passed away on 23rd October 2016. No application had been made within this jurisdiction or any other jurisdiction for a grant of administration concerning the estate of the deceased, Sharon Mott and there was no other personal representative of the estate of the late Kishauna Clarke.

[7] She also deponed, among other things, that she was one of the claimant's three surviving children and that she has no interest adverse to the estate of either the claimant or Kishauna Clarke and that she can fairly and competently conduct proceedings on behalf of the deceased's estate and she is the proper party to be appointed representative. On 14th June 2021, she had discussions with the offices

of Marion Rose Green and Company and learnt that the matter had come up for hearing on 7th May 2021 when the 1st defendant had made an application to have the matter struck out and the court had made an order that the matter should proceed to mediation by 6th August 2021 and such a representative is needed to be appointed urgently to continue the claim.

[8] The 1st defendant's application filed on 29th September 2021 is seeking the following substantive orders:

1. Judgment for the first defendant on the claim;

2. Costs of the claim is awarded to the first defendant to be agreed or taxed

3. Wasted costs to the first defendant in the Notice of Application for Court Orders filed June 26, 2019 to be paid by the firm Marion Rose-Green and Company to be taxed if not agreed.

4. Wasted Costs to the First Defendant in the application to be paid by the firm Marion Rose Green and Company to be taxed if not agreed.

[9] In support of its application, the 1st defendant relied on two affidavits sworn to by Moveta McNaught-Williams. The crux of the complaint of the 1st defendant is to be found at paragraph 12 of Mrs McNaught-Williams' first affidavit filed on 29th September 2021 where she stated that the claimant's former attorneys Marion Rose Green and Company knew or reasonably ought to have known that the claimant was deceased at the time of opposing the application to strike out and failed to disclose this fact to the court and counsel given that they purported to act on the claimant's instructions in opposing the application. She further deponed that the failure of the claimant's former attorneys to disclose the death of the claimant was a material non-disclosure. As a result, costs were incurred in advancing the 1st defendant's application to strike out and that had this fact been disclosed to the

court and counsel it is highly likely that the 1st defendant's application could have been disposed of without the need for a contentious application that required filing extensive submissions by counsel.

[10] An affidavit sworn to by Andrea Lannaman was filed in response to the affidavit of Mrs McNaught-Williams. It is the evidence of Andrea Lannaman that immediately after obtaining the order of J. Pusey J and complying with same, namely to commence making arrangements for mediation, on 7th May, 2021, correspondence was sent to counsel for the 1st and 2nd defendants to arrange a date for mediation and on 21st May 2021, the parties agreed to the date of 24th June 2021. It was on 21st May 2021 that efforts were made to contact the claimant. Numerous attempts were made to contact the claimant but were futile; however, her further checks of the file unearthed the name Constance Curriah, who was the claimant's cousin. There was no contact number or address for Ms Currah. However, she searched the various social media platforms and the search revealed that Ms Currah was a lecturer at the University of the West Indies ("UWI"). She thereafter made checks with persons whom she knew had affiliations with UWI but they did not know Ms Currah. Further checks using online platforms directed her to the Portmore Community College in the parish of St Catherine. This led her to the Waterford High School where Ms Currah was principal.

[11] Mrs Lannaman further deponed that it was on 21st May 2021 that having been put in contact with the claimant's son by Ms Currah, the claimant's son informed her that his mother had passed in 2016. From the initial stages of receiving the information of the claimant's death and without being provided with her death certificate, counsel for the 1st and 3rd defendants were informed. The claimant's attorneys had no knowledge of the passing of the claimant and would not have proceeded to any hearing and in particular the hearing on 7th April 2021 knowing that a litigant's death would put a pause to any proceedings. She stated that having tried to communicate with the claimant and not hearing from her, the firm formed the view that she had probably changed her telephone number as clients

often do without informing the office. She deponed that having an obligation to act in the interest of the claimant, they could not sit back and allow the claimant's claim to be struck out, having had her initial instructions as that would be a breach of the attorney/client retainer and a breach of the obligations under the Legal Profession (Canons of Professional Ethics) Rules.

[12] An affidavit sworn to by Constance Currah was also filed which supported the evidence of Mrs Lannaman in respect of the contact made with Ms Currah and the death of the claimant, among other things.

[13] In her second affidavit filed on 5th November 2021, Mrs McNaught-Williams deponed to the 1st defendant's attorney receiving an email from Marion Rose Green and Company proposing mediation dates and that the parties agreed to 24th June 2021 as a convenient date for mediation. She stated that it was within the week of 3rd June 2021 that the 1st defendant's attorneys were contacted by Marion Rose Green and Company informing them of the death of the claimant and that it was when they were served with the affidavit of Keisha Clarke in support of the application for appointment of administrator ad litem that the 1st defendant's attorneys became aware of the date of the death of the claimant.

Submissions

For the Claimant

[14] In support of the application for the appointment of administrator ad litem, Mrs Lannaman submitted that the natural personality of the claimant came to an end at her death. She submitted that it was not in dispute that the claimant had been appointed administrator for the estate of her deceased daughter, Kishauna Clark, and there was no need for the consent of the other beneficiaries in the estate before the order could be granted.

[15] In respect of the effect of the unless order on the claim in light of the claimant's death, Mrs Rose Green submitted that the unless order made by the court was

incapable of performance and as a consequence the order would be rendered a nullity. She further submitted that even if the order did take effect, that would not be the end of the matter. The provisions of the Civil Procedure Rules ("CPR") relating to the appointment of a personal representative and the prohibition of any action being taken by the claimant's representative before being appointed would take precedence over any other rule. In other words, she argued, if the claimant's representative can do nothing before certain steps under rule 21.7 of the CPR are taken, the impact of this would be to stay the matter up to the point where the personal representative is appointed. The personal representative must act promptly once appointed and must carry out or exercise the options given to him/her including applying for relief from sanctions. To interpret the rules as operating otherwise would be to defeat the overriding objective.

[16] Mrs Rose Green submitted that the application for wasted costs was based on the sole ground that counsel had failed to inform the 1st defendant of the passing of the claimant and it was implied that this was deliberately done. She argued that it was impossible for the claimant's attorney to have informed the 1st and 3rd defendants' attorneys-at-law of the death of the claimant at the time of the application to strike out and for summary judgment as Marion Rose Green and Company was unaware. She argued that it would not have been in the claimant's interest to withhold this information as the effect of the death of the claimant would have been to pause the claim and this would not have benefitted the claimant.

[17] She also submitted that the assertions in support of the application for wasted costs were not supported by the evidence, that is, that there was a withholding of information and material non-disclosure. It was the duty of the applicant for wasted costs to prove and not for the respondent to prove that what is alleged never occurred. Referring to ***Ridehalgh v Horsefield & Anor*** [1994] 3 All ER 848, she submitted that a wasted costs order is made where the conduct caused unnecessary costs and only in plain and obvious cases where the conduct of counsel was egregious. It should not be used as a weapon to bludgeon counsel or

used as a backdoor to get costs which would not otherwise be received. It must be something that would attract the sanction of being struck off the roll.

For the 1st defendant

[18] Mr Royal submitted that as a result of the failure to comply with the unless order, the claim was struck out. He submitted that there were three avenues available to remedy the unless order made by J. Pusey J, one of them being the filing of an application for relief from sanctions and no such application had been made. He further submitted that in May 2021, an application ought to have been made for the appointment of an administrator ad litem and for extension of time to comply with the unless order. That unless order had taken effect months ago and the application could not now be made as it would not pass the promptitude threshold. Another option open to the claimant was to appeal the decision and no appeal was filed; or to apply to set aside the order made in the absence of a party pursuant to rule 11.16(2) of the CPR. He argued that they had not sought to exercise any of these options; and these options were no longer available to them. He argued that even if the court finds that the unless order ought not to have been made due to the death of the claimant, this court being a court of concurrent jurisdiction, had no power to set aside the order. Consequently, the 1st defendant's position in relation to the application for appointment of administrator ad litem was that there was no extant claim before the court in respect of which such an application could be heard. He submitted that on a plain reading of rule 21.7 of the CPR, there is no injunction on the defendant to prevent him from taking any steps where a party has died.

[19] In respect of the application for wasted costs, he submitted that it was not the case of the 1st defendant that the attorneys-at-law for the claimant made a fraudulent misrepresentation; it was that they purported to act with an authority that they did not have. He relied on ***Yonge v Toynbe*** (1910) 1 KB 215 for his submission that the death of a client determines the retainer and that in circumstances where the

attorney proceeds to do acts which represent that the attorney had the authority, the attorney must be held to account.

[20] Mr Royal submitted that the criteria for the grant of wasted costs was well met in this case and that it should be made in respect of the application that was heard by J Pusey J and the instant application as the 1st defendant had to pursue these applications as a result of the misrepresentation of the claimant's attorney-at-law. He submitted that no reasonably well informed and competent member of the legal profession would proceed to warrant that their client was presently prepared to proceed with litigation in circumstances where the attorney-at-law: has had no contact with the client for more than four years; did not seek to inform the client that the application to strike out their claim was made until after orders in that application had been made; warranted to the court that the claimant is still prepared to attend mediation; and sent correspondence to other counsel confirming or purporting to confirm dates for mediation.

For the 3rd defendant

[21] It was submitted on behalf of the 3rd defendant that at the time the mediation dates were scheduled a representative of the estate was not appointed by the court nor was the court presented with an application for the appointment of a representative to carry on the claim. Relying on the case of ***Evan Bennett v Raymond Ramdatt*** [2016] JMSC Civ 206 and rule 21.7 of the CPR, it was submitted that unless the requirements under rule 21.7(4) of the CPR are satisfied, the claimant was estopped from taking any further action in the proceedings. Mr. Jackson also submitted that rule 21.7 of the CPR only limits the steps that may be taken by the claimant and did not extend to the defendant. He argued that the defendant would be severely handicapped if he were to be prevented by that rule from taking any steps as the claimant could decide not to take any step. More importantly, rule 21.7 did not prevent the court from taking any step it wishes.

[22] Referring to ***Pool v Pool*** (1189) 58 LJP 67 and ***Yonge v Toynbee***, it was submitted that the claimant's retainer had ceased upon the death of the claimant. Therefore, at the time of the scheduling of the dates for mediation, Marion Rose Green and Company was estopped from scheduling dates for mediation given the automatic termination of the retainer.

[23] Mr Jackson argued that this court being a court of concurrent jurisdiction has no jurisdiction to set aside the order of Pusey J; however, the court has jurisdiction to enter judgment under rule 26 of the CPR. Mr Jackson submitted that the claimant's attorneys-at-law ought to have indicated to J Pusey J that the claimant was deceased and as such complying with the unless order would have been impossible until the court appointed a representative.

[24] He submitted that the unless order was not materially complied with due to the failure to satisfy the condition precedent embedded in rule 21.7(4) and as such the claim should be struck out.

[25] He submitted that while the CPR does not give a specific time period in which to make an application for the appointment of a personal representative, the application for the appointment of Keisha Clarke ought to have been contemporaneous with her death or within a reasonable time in keeping with the overriding objective. Relying on ***Ronham & Associates Ltd v Christopher Gayle and Mark Wright*** [2010] JMCA App 17, it was submitted that not only was the present application characterized by inordinate and inexcusable delay, it was also prejudicial in that the excessive delay is likely to affect the availability of witnesses having regard to the protracted trial date that would be scheduled for the trial. In light of the prejudice, it should not be granted.

Discussion and Analysis

[26] In determining the applications, I will adopt the formulation of the issues as identified by Mr Royal in his written submissions. These are:

(i) Whether the claimant's statement of case is at present struck out by virtue of order no 3 of the order of J Pusey J;

(ii) Consequently, whether there is an extant claim in respect of which Keisha Clarke may be appointed administrator ad litem;

(iii) Whether the firm Marion Rose Green and Company is liable to pay the costs of the 1st defendant for the notices of application filed on 26th June 2021, 22th July 2021 and 29th September, 2021.

Issue (i)

Whether the claimant's statement of case is at present struck out by virtue of order no 3 of the order of J Pusey J.

[27] It is well-settled law that upon the death of a person, his natural personality comes to an end. In ***Administrator General v Glen Muir***, Morrison JA (as he then was) stated:

> *But, as Arden LJ observed in* ***Piggott v Aulton, Deceased****, "[t]he natural personality of the deceased came to an end on his death". In these circumstances, as Lord Diplock explained in* **In *re Amirteymour,*** **deceased**, *albeit in a somewhat different context – ... there must be in existence some person, natural or artificial and recognised by law, as a defendant against whom steps in the action can be taken. If and so long as there is no such person the action, though it may not abate, cannot be continued, as, for example, where a sole defendant to a subsisting action dies and no executor or administrator has yet been appointed against whom an order to continue the proceedings*

> *can be obtained under Ord. 15, r. 7."* (Emphasis supplied)

[28] In ***Piggott v Aulton*** [2003] EWCA Civ 24, which was cited with approval by Morrison JA in ***Glen Muir***, the court held that the estate of a deceased has no legal personality.

[29] It follows from the dictum of Lord Diplock in ***re Amirteynour*** on which Morrison JA relied that the legal effect of the death of a defendant is that there would be no defendant in existence against whom an order may be enforced. Therefore, since the estate of the deceased has no legal personality, then a representative of the estate would have to be appointed before proceedings can continue. These principles of law find their expression in rule 21.7 of the CPR, which is titled, "Proceedings against estate of deceased" and to a lesser extent rule 21.8, which is titled, "Power of court to give directions to enable proceedings to be carried on after party's death". In ***Glen Muir,*** Morrison JA found that the defendant having died, no steps ought to have been taken until a representative was appointed to represent the estate of the defendant. In that case, subsequent to the death of the defendant, on the application of the claimant, the court had given judgment in favour of the claimant. Morrison JA stated:[2]

> *Rule 21.7(4) makes it explicitly clear that, upon the respondent becoming aware of [the defendant's] death, no further step in the proceedings ought to have been taken by him, other than to apply for an order appointing someone to represent [the defendant's] estate for the purposes of the proceedings. On the face of the matter, it would seem to follow from this that the respondent's without notice application for the first order, in which he quite properly disclosed the fact of [the defendant's] death the previous year, was wholly misconceived and ought not to have been granted by the judge.*

---

[2] See paragraph 18 of judgment

> *Instead, what ought to have been done, it seems to me, is that an application should have been made for an order appointing a suitable person - such as, perhaps, [the defendant's] widow, if indeed he had one - to conduct the proceedings on behalf of the estate.*

[30] I would add that though these authorities concerned the death of a defendant, the principle espoused in them would equally apply to a claimant as this must naturally follow from the principle that the natural personality of any person comes to an end at his death. It seems to me that rule 21.9 of the CPR, which is titled "Power of court to strike out claim after death of the claimant", was included to address the situation of the death of a claimant and perhaps to a lesser extent, 21.8 of the CPR.

[31] It is my view therefore that as a matter of substantive law, the claimant having died in 2016, no further step could have been taken in the proceedings until a representative of the estate had been appointed. (I will address the question of which estate the representative ought to have been appointed for when I come to address the second issue.) However, this unfortunate circumstance was never brought to the attention of J Pusey J. Therefore, J Pusey J made the order on the mistaken belief that the claimant was alive. In that regard, the order was made without jurisdiction in that the death of the claimant having occurred, J Pusey J could not properly have made an order in the claim until a personal representative was appointed. The question that therefore arises is: the order of J Pusey J having been made at a time when it could not properly have been made, was it a nullity and of no effect, as contended by Mrs Rose Green?

[32] In ***Leymon Strachan v Gleaner Company Ltd*** [2005] UKPC 33 the Privy Council considered the effect of an order that is a nullity. Lord Millett, who delivered the judgment on behalf of their Lordships Board stated:

> *27. In the present case the validity of the proceedings themselves is beyond challenge. The only question is whether an order of a judge of the Supreme Court made without jurisdiction*

is a nullity, not in the sense that the party affected by it is entitled to have it set aside as a matter of right and not of discretion (of course he is) nor in the sense that the excess of jurisdiction can be waived (of course it cannot) but in the sense that it has no more effect *than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction.*

28. An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess.

Later, he stated:

29. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the ***Padstow*** *case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it.*

[33] The combined effect of the dicta of Lord Millett is that an order of a court of unlimited jurisdiction such as the Supreme Court which was made without jurisdiction has effect until it is set aside and cannot be set aside by a court of concurrent jurisdiction (unless expressly authorised by statute).

[34] Therefore, the order having been made in circumstances where the claimant had died and there being no claimant recognised by law in existence against whom the order could be made, the order was a nullity in the sense that upon a representative of the estate being appointed, that legal representative would be entitled to have it set aside as of right. However, until it was set aside, it was still an order of the court that was issued in proceedings that were properly commenced and properly continuing. Therefore, until set aside, it was a valid order.

[35] However, it seems to me that given the law as stated in ***Piggott v Aulton*** as to the need for a person recognisable in law being in existence against whom action can be taken, the principle as to the effect of an order that is a nullity as stated by the Privy Council in ***Leymon Strachan*** must be based on the presumption that there is such a person in existence against whom the order can take effect. To interpret/apply the principle in ***Leymon Strachan*** otherwise would be to disregard the law as stated in ***Piggott v Aulton*.** Therefore, though the order of J Pusey J is valid until set aside, based on ***Piggott v Aulton***, it could not be carried out a personal representative can take the necessary action.

[36] I therefore agree with Mrs Rose Green that as a matter of procedural law (rules 21.8 and 21.9 of the CPR, and not rule 21.7), and I would add, equally importantly, as a matter of substantive law, the order although being effective, could not be carried out without a representative of the estate being appointed. I also agree with Mr Royal and Mr Jackson that by virtue of ***Yonge v Toynbe***, the authority of the claimant 's attorneys having ceased as a result of her death, no steps could have been taken to carry out the order of J Pusey J and therefore the letters written by

Marion Rose Green and Company to agree mediation dates could not be regarded as steps carried out by the claimant. However, it seems to me that the 1st and 3rd defendants cannot blow hot and cold at the same time in that they cannot be allowed to rely on the claimant's death to say that because of her death, no steps could be taken on her behalf to arrange mediation while at the same time asserting that the terms of J Pusey J's order would have started to take effect despite her death. I agree with Mrs Rose Green that, in effect, the death of the claimant would have operated as a stay of the proceedings until a representative is appointed. I therefore think that in the circumstances, the 14-day time period stipulated in the order for the steps to be taken for the scheduling of mediation must be regarded as being 14 days from the date when the order could properly take effect against an existent claimant, that is, when there is an appointment of a representative of the estate.

[37] Mr Jackson has argued that the provisions of the CPR do not operate to bar the defendants taking steps; it only applies to the claimant not taking any steps because if it were otherwise, the defendant could suffer hardship where there is a failure to have a representative of the claimant's estate appointed. However, it seems to me that rule 21.8 of the CPR, (which allows either party to approach the court for directions) and rule 21.9 (which allows the defendant to apply for the claim to be struck out where a representative of the claimant's estate is not appointed) is aimed at avoiding precisely such a situation.

[38] It is therefore my view that the unless order including the sanction contained therein for the claim to be struck out could not take effect until a representative in the estate is appointed. Accordingly, no representative having been appointed, the sanction in the unless order did not take effect to strike out the claim.

Whether there is an extant claim in respect of which Keisha Clarke may be appointed administrator ad litem;

[39] It follows from the conclusion that I have arrived at in relation to the previous issue that there is still an extant claim before the court.

[40] Having found that there is still an extant claim, the next issue that arises is whether the application for the appointment of Keisha Clarke as administrator ad litem should be granted in order to allow the matter to proceed. The application is seeking for her to be appointed as the administrator ad litem of the estate of Sharon Mott and to be substituted as claimant for and on behalf of the estate of Kishauna Clarke.

[41] It is of significance in this case that the claimant had obtained a grant of administration in the estate of Kishauna Clarke as the deceased Kishauna Clarke died intestate. Also, in so far as there is no evidence that Sharon Mott died leaving a will, it can be said that she died intestate. There is also no evidence in the affidavit of Keisha Clarke that Kishauna Clarke had died leaving a will and that Sharon Mott had also died leaving her a will. Therefore, issues of representation by virtue of the principles relative to a chain of representation clearly do not arise.

[42] It seems to me that in these circumstances, Keisha Clarke could not be appointed as administrator ad litem in the estate of Sharon Mott. This is so because by virtue of the Law Reform (Miscellaneous Provisions) Act, the cause of action which may have been created by the events of March 2009, survived for the estate of Kishauna Clarke. It did not survive for the benefit of the estate of Sharon Mott. Therefore, the appointment would have to be made in the estate of Kishauna Clarke and not the estate of Sharon Mott.

[43] In ***Jamaica Redevelopment Foundation Inc v Max Eugene Lambie* (as Administrator of Estate Elaine Tully, deceased**, [2012] JMCA Civ 12, a similar issue arose for the consideration of the Court of Appeal. In that case, the respondent was granted letters of administration in the estate of Elaine Tully. Upon

the respondent's death, the court granted an application by the respondent's wife and daughter for them to be appointed as representatives of the estate of the respondent for the purposes of continuing the claim. The order of the court was set aside on appeal, Morrison JA, finding that neither the wife nor the daughter of the respondent qualified for appointment. The learned judge of appeal stated:

> *[10] It is a well-known principle of the law of succession that the executor of a sole or last surviving executor of the testator's estate becomes the executor of the testator in the event of the original executor dying without having completed administration of the testator's estate. This is the principle of the chain of representation (see, for example,* ***Swoffer v Swoffer*** *[1896] P. 131). (And see further, rule 68.48(1) of the CPR, which provides that an application for a grant of probate may be made by [the 'second executor'] in relation to any estate that was being handled by [the 'first executor'] where the principle of the chain of representation is applicable".) It is, however, equally well settled that there is no chain of representation in relation to administrators of an intestate's estate, even where the administrator himself dies testate. The reason for the distinction was explained by Blackstone (in a passage quoted in Parry on Succession, 5th edn, at page 183), as follows:*
>
> > *"The power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom the deceased has reposed no trust at all; and, therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator.*

> *Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh of the goods of the deceased not administered by the former executor or administrator."*
>
> [*11]* *In the instant case, the deceased having died intestate, the principle therefore has no application and what will be required to complete administration of her estate is a fresh grant of administration in respect of the unadministered portion.*

[44] In this case, since there is no chain of representation which was applicable, what is required is an appointment of a representative of the estate for which the cause of action giving rise to the claim subsists, which is the estate of Kishauna Clarke. Since the cause of action does not subsist for the estate of Sharon Mott, the appointment of a representative for the estate of Sharon Mott would not be effectual to proceed with the continuation of this claim.

[45] I note that the application also seeks an order for Keisha Clarke to be appointed as claimant on behalf of the estate of Kishauna Clarke. It seems to me that this aspect of the order being sought must be interpreted to mean that Keisha Clarke is to be appointed as administrator ad litem of the estate as this is the only way that she can continue the claim as claimant on behalf of Kishauna Clarke's estate.

[46] I see no evidence to suggest that there is anyone with greater priority who could be appointed as administrator ad litem in Kishauna Clarke's estate. In addition, there is nothing to suggest that Keisha Clarke has an interest in the proceedings which is adverse to the interest of the estate of Kishauna Clarke. I am of the view that in these circumstances, Keisha Clarke is a fit person to continue the proceedings on behalf of the estate of Kishauana Clarke and she should therefore be appointed as administrator ad litem in these proceedings for the estate of Kishauna Clarke. I note that there has been a period of delay of five years since

the death of the claimant; however, I am not aware of any authority which establishes that this is a basis for the refusal of the application. The consideration in such an application, it seems, to me is whether the person to be appointed is a fit and proper person for the appointment. In any event, there is no evidence to contradict Mrs Lannaman's evidence that she learned of the claimant's death in 2021; thus there was no inordinate delay in making the application. In these circumstances, I am of the view that Keisha Clarke should be appointed administrator ad litem for the estate of Kishauna Clarke for the purpose of continuing these proceedings.

Whether the firm Marion Rose Green and Company is liable to pay the costs of the 1st defendant for the notices of application filed on 26th June 2021, 22nd July 2021 and 29th September 2021

[47] The court's jurisdiction to make an order for wasted costs is to be found in section 28E of the Judicature (Supreme Court) Act and this provision is reflected in rule 64.13 and (14) of the CPR. Rule 64.13(2) of the CPR provides:

> "Wasted costs" means any costs incurred by a party –
>
> (a) As a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of such attorney-at-law: or
>
> (b) Which, in light of any act or omission occurring after they were incurred, the court, considers it unreasonable to expect that party to pay.

[48] In ***Jevene Thomas (An infant who sues by her mother and next friend Annette Innerarity) v McIntosh Construction Ltd*** [2013] JMSC Civ 114, Sykes J (as he then was) having considered the English Court of Appeal decision of ***Ridehalgh v Horsefield and Another*** and his previous decision in ***Catherine Nerissa Gregory v Aubrey Erlington Gregory*** Suit No 2003 HCV1930 (delivered

23rd July 2004) set out a five step enquiry to be applied in determining whether to make an order for wasted costs, as follows:

(i) Has the attorney-at-law acted improperly, unreasonably or negligently?

(ii) If yes, did the conduct of the case cause the applicant or any other party unnecessary costs?

(ii) If yes, is it in all circumstances just to make the order?

(iv) Whether the enquiry can be done without breaching legal professional privilege; and

(v) Are the circumstances such that the facts necessary to establish the attorney's conduct has caused unnecessary expense to any party to the proceedings immediately and easily verifiable? Or put another way, can the enquiry be conducted without significant additional expenses for any other of the litigants, counsel or other person and are the facts easily verifiable.[3]

[49] I will adopt the approach of Sykes J in ***Jevene Bent*** of considering questions (iv) and (v) first.

Whether the enquiry as to wasted costs against the attorney-at-law can be done without breaching legal professional privilege

[50] It is my view that given the circumstances of this case, the answer must be in the affirmative in that the response to the application does not require counsel to rely on information that would be subject to legal professional privilege.

[3] See paragraphs 22-25 of judgment

Are the circumstances such that the facts necessary to establish the attorney's conduct has caused unnecessary expense to any party to the proceedings immediately and easily verifiable/ Can the enquiry be conducted without significant additional expenses for any other of the litigants, counsel or other person and are the facts easily verifiable

[51] Sykes J explained that the wasted costs jurisdiction is not intended to be a major civil trial but a quick, efficient and fair enquiry. In this case, most of the facts are not in dispute; the only issue of fact that is live is when the claimant's attorneys-at-law became aware that the claimant had been deceased. The 1st defendant has characterized the actions of Marion Rose Green and Company as material non-disclosure; however, it seems to me that the real complaint in this regard is that Marion Rose Green and Company could have with reasonable diligence become aware of the status of their client well before the hearing of the application before Pusey J. Therefore, I am of the view that this question should also be answered in the affirmative.

Has the attorney-at-law acted improperly, unreasonably or negligently?

[52] On the issue of the type of conduct that would attract the descriptions of "improper, unreasonabe or negligent**"** Sykes J stated in ***Jevene Bent***:

> *In the judgment [of* ***Ridehalgh v Horsefield],*** *his Lordship gave an indication of the meaning of the important words "improper, unreasonable or negligent". His Lordship held that "improper" covers but was not confined to conduct which would justify disbarment, striking off, suspension form practice or other serious professional penalty (p81). "Unreasonable" means conduct that was designed to harass the other side rather than advance the resolution of the case. Even if the harassment arose from "excessive zeal" and not "improper motive", it would still fall within the definition of unreasonable*

> *(pp861-862). "Negligent" should be understood as failing to act with "competence reasonably expected of ordinary members of the profession (p862). To succeed under this head the applicant would have to prove that the conduct was such that "no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do what was done (p862).*[4]

Later Sykes J observed that the critical question is whether the conduct permits of reasonable explanation. If it does, then counsel should receive the benefit of the doubt.

[53] In the instant case, the effect of the evidence of Andrea Lannaman is that the Marion Rose Green and Company was not aware of the death of the claimant prior to 21st May 2021, the date on which the firm agreed to a mediation date. The discovery of the death of the claimant was made on the same day that Mrs Lannaman made diligent attempts to ascertain the claimant's whereabouts. The claimant having died from 2016, it is clear that the 1st defendant wasted costs in making the application to strike out. The question that therefore arises is: does the evidence provided by the Marion Rose Green and Company amount to a reasonable explanation?

[54] It is clear from the evidence of Mrs Lannaman that despite being served with an application that would have serious implications for the claim if granted, no effort was made to contact the claimant to advise her of the application. Mrs Lannaman deponed that the firm had no reason to believe that the claimant had passed away. It was her experience, she deponed, that as soon as a client passes away, this is communicated to this office, but this was never done. She deponed also that it was not unusual for clients to stay away for long periods of time and then suddenly

[4] See paragraph [18] of the judgment

turn up at the offices enquiring about their matters. Consequently, there was no reason for her to assume that the claimant had passed away.

[55] She also deponed that on the last occasion that mediation had been scheduled and was aborted because of the illness of the mediator, the claimant had been ready and willing to attend the mediation when it was rescheduled. She deponed that in the claimant's best interest, the claimant's attorneys having been retained and given fulsome instructions to prosecute her claim relating to the death of her daughter, the attorneys had an obligation and responsibility to proceed with the claim for which they were retained until contrary instructions were received and no such instructions were received until 21st May 2021. [5]

[56] I am of the view that the firm Marion Rose Green and Company ought to have obtained their client's instructions in relation to the 1st defendant's application to strike out and for summary judgment. This was necessary particularly having regard to the fact that the firm had not had any communication with the claimant since 2016. In circumstances where the 1st defendant's application was seeking to strike out for failure to prosecute the claim since 2016, it was incumbent on the firm to locate the claimant, advise her of the seriousness of the application and ascertain her readiness to proceed. If they encountered difficulty in contacting the claimant, they ought to have communicated this to counsel and the court and requested time to obtain the instructions. Having not made contact with the claimant, I agree with Mr Royal that there was no basis for the firm to represent that the claimant was still ready and willing to proceed. Though the claimant may have been willing, she may not have been ready, and as it unfolded, her death rendered her neither ready nor willing to proceed. I therefore find that the firm's conduct in these circumstances could be said to be improper, and if not improper, negligent, in that they failed to do what any competent attorney would do after being served with the application to strike out and for summary judgment.

[5] See paragraph 25 of affidavit filed on 5 November 2021

<u>Did the conduct of the case cause the applicant or any other party unnecessary costs?</u>

[57] The firm Marion Rose Green and Company could have tried to contact the claimant between 2016 and 2019 to advise her of the need to proceed with mediation. However, I share the views expressed by J Pusey J[6] that it is the claimant's claim and she should be energized to have it resolved.[7] I also share J Pusey J's views that nothing precluded the 1st defendant from contacting the mediation agency to reschedule mediation, as the cancellation of the mediation in 2016 was due to the default of the agency; but the parties sat back and the matter went into abeyance until 2019 when the 1st defendant's application was filed. In the light of this, I do not find that the wasted costs of the filing of the application should be attributed to the firm Marion Rose Green & Company.

[58] However, it is my view that the same cannot be said for the costs incurred after the filing of the application. The 1st defendant's application was filed on 26th June 2019 and the judgment of Pusey J indicates that the hearing had been set for 27th April 2020. On 22nd September 2020, the affidavit of Sara-Lee Scott was filed in response to the application. In that affidavit, Ms Lee deponed that despite the delay the claimant "is still ready and willing to participate in mediation".[8] The court file indicates that the application came on for hearing on 5th October 2021 and was adjourned to 7th April 2021. The application was vigorously opposed.

[59] I am of the view that had the firm made efforts to contact the claimant, it would have learned of the death of the claimant. It is notable that the very day on which Mrs Lannaman made diligent efforts to locate the claimant, she was able to ascertain that the claimant had died. Had these efforts been expended in preparation for the first hearing date of the application in April 2020, before the

---

[6] See paragraphs [23} and [24] of the judgment
[7] See paragraph [24] of the judgment
[8] See paragraph 9

filing of the affidavit asserting that the claimant was ready to proceed or even prior to the date of the hearing before J Pusey J, the information as to the death could have been ascertained and the costs incurred in preparing for the application could have been avoided. Consequently, the firm's failure to act after being served with the 1st defendant's application caused unnecessary expenses to be incurred by the 1st defendant in pursuing the application.

Is it in all circumstances just to make the order?

[60] It is my view that in circumstances where Marion Rose Green and Company had some many opportunities to ascertain the status of the claimant and failed to do so, its action or inaction was the cause of the wasted costs incurred by the 1st defendant. I therefore find that it is just to make an order in favour of the 1st defendant for the wasted costs spent in pursuing the application to strike out from the first hearing date of 27th April 2020 as well as the costs of the 1st defendant's instant application to be paid by Marion Rose Green and Company.

Conclusion

[61] In light of the foregoing, my orders are as follows:

1. Judgment for the 1st defendant on the claim is refused.
2. Keisha Clarke is appointed as administrator ad litem for the estate of Kishauna Clarke for the purposes of continuing the instant proceedings until further order of the court.
3. Wasted costs to the 1st defendant from 27th April 2020 for the Notice of Application for Court Orders filed June 26, 2019 to be paid by the firm Marion Rose-Green and Company to be taxed if not agreed.

4. Wasted Costs to the 1st defendant in the instant application to be paid by the firm Marion Rose Green and Company to be taxed if not agreed.