[2016] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 25/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

BETWEEN	**DELROY OFFICER**	**APPELLANT**
AND	**CORBECK WHITE (in her capacity as representative of the estate of Berthram White, deceased)**	**RESPONDENT**

Written submissions filed by Clyde Williams for the appellant

Written submissions filed by Taylor-Wright & Company for the respondent

30 September 2016

PROCEDURAL APPEAL

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

MORRISON P

[1] I have had the advantage of reading in draft the judgment prepared by McDonald-Bishop JA. I agree with it and have nothing useful to add.

PHILLIPS JA

[2] I, too, have read in draft the thorough and well reasoned judgment of my learned sister, McDonald-Bishop JA. I agree with her reasoning and conclusion and there is nothing that I can usefully add.

MCDONALD-BISHOP JA

[3] This appeal was originally filed in the names of Delroy Officer, as appellant, and Berthram White (by next friend Corbeck White), as the respondent. However, for reasons detailed at paragraphs [30]-[45] of this judgment and in the exercise of the court's case management powers, the record was amended to reflect Corbeck White (in her capacity as representative of the estate of Berthram White, deceased) as the respondent for the purposes of this appeal. It stands to reason, therefore, that reference to the "respondent" in these proceedings shall be a reference to Corbeck White in her capacity as the representative of the estate of Berthram White.

The background

[4] Berthram White died on 22 August 2011. Corbeck White is his daughter. In or around 6 May 2004, Berthram White, then 71 years old, brought a claim in the Supreme Court against the appellant, Delroy Officer, as 1st defendant, and Warren Clarke, as 2nd defendant. He sought to recover damages for personal injuries arising from a motor vehicle accident that occurred on 25 October 2002, along the Bog Walk main road in the parish of Saint Catherine. He alleged that he was hit from his bicycle by a motorcar owned by the appellant and driven by Warren Clarke, the appellant's servant or agent.

He alleged negligence against Warren Clarke for which he said the appellant was vicariously liable. On 4 October 2004, a default judgment was entered in his favour against the appellant and Warren Clarke. On 22 September 2008, the appellant's application to set aside the default judgment was refused.

[5] In or around 2008, subsequent to the entry of the default judgment, Berthram White became incapacitated due to infirmity. Corbeck White was appointed his next friend by order of the court made on 4 June 2009.

[6] On 12 July 2010, damages were assessed in favour of Berthram White against Warren Clarke and the appellant. Between 2011 and 2012, before anyone was appointed to represent the estate of Berthram White for the purposes of the conduct of further proceedings, Corbeck White initiated proceedings for enforcement of the judgment. In doing so, she represented herself as the next friend of Berthram White, the claimant. She did not disclose to the court at any material time during those proceedings that Berthram White was dead.

[7] It was not until 5 February 2014 that Corbeck White applied to the Supreme Court to be appointed to represent Berthram White's estate for the conduct of proceedings relating to enforcement of the judgment, and it was then that she disclosed to the court, for the first time, that Berthram White was dead. The order appointing her as representative to carry on the court proceedings on behalf of the estate of Berthram White was made on 19 March 2014 by Lindo J (Ag) (as she then was).

[8] Prior to that order of Lindo J (Ag) appointing her representative of the estate for the purposes of the proceedings in the Supreme Court, Corbeck White had applied for and obtained two separate orders from the court for the enforcement of the default judgment. The first order was made on 24 October 2011 by Master Lindo (as she then was) on a judgment summons filed by Corbeck White purportedly as the next friend of Berthram White who was named as the claimant at the time. The order was made for the appellant to pay to Berthram White certain sums of money in accordance with timeline set out in the said order. The second order was made by Harris J (Ag) (as she then was) on 26 July 2012, for, inter alia, the sale of property situated at Caribbean Estate Portmore, Saint Catherine, and registered at Volume 1444 Folio 46 of the Register Book of Titles ("the property"), which Corbeck White alleged was owned by the appellant. She also sought and obtained from Harris J (Ag) other incidental orders, including that the appellant deliver up possession of the property and that furniture belonging to the appellant be sold. At the time the application and the orders were made, however, the property was not registered in the name of the appellant but in the names of his three children and a niece. The property is still registered in their names.

[9] On 19 March 2014, Lindo J (Ag), upon granting the order that Corbeck White be appointed the representative of Berthram White's estate for the purpose of the proceedings, also ordered that the order made by Harris J (Ag) on 26 July 2012 should stand (paragraph 2 of the order of Lindo J (Ag)). In effect, Lindo J (Ag) purported to validate the order of Harris J (Ag) despite the fact that the order was made at a time when Corbeck White had acted in the proceedings purportedly in her capacity as next

friend of Berthram White who, at the time, was dead. She also allowed the order to stand despite the fact that the order was made in respect of property that was not registered in the name of the appellant and the registered owners were not notified of the proceedings.

Proceedings in the Court of Appeal

Application for extension for permission to appeal

[10] The appellant, though aggrieved by the orders that were made by Master Lindo on 24 October 2011; Harris J (Ag) on 26 July 2012 and Lindo J (Ag) on 19 March 2014, was out of time in applying for permission to appeal. He, however, successfully made an application before this court (differently constituted) on 16 February 2015 for, inter alia, extension of time to make an application for permission to appeal and for permission to appeal. The court ordered as follows:

> "1. The time for making an application for permission to appeal against orders of Master Lindo made on 24 October 2011 and Harris J (Ag) made on 26 July 2012 and paragraph 2 of the order of Lindo J (Ag) made on 19 March 2014 is extended to 31 October 2014.
>
> 2. Permission to appeal against the said orders is hereby granted.
>
> 3. Execution of the said orders is stayed pending the outcome of the appeal.
>
> 4. No order as to costs."

[11] In order for the grounds of appeal and the response of Corbeck White to the appeal to be better appreciated, it is considered fitting to highlight from the outset what

the state of the record was at the time the application for permission to appeal was brought, in so far as it relates to the party that was named as the respondent. Therefore, it is important to note as a background to the consideration of the appeal, that at the time the application for permission to appeal was filed, the appellant had named "Berthram White (by next friend Corbeck White)" as the respondent and the orders were granted on the application with that named respondent. The respondent in the proceedings was not changed although it was a known fact that Berthram White was dead and that there was no challenge to the order of Lindo J (Ag), which had appointed Corbeck White as the representative of the estate for the conduct of proceedings on behalf of the estate of Berthram White. In fact, Corbeck White actively participated in those proceedings and made strong representations, through her counsel, why the application for permission to appeal ought not to be granted.

The appeal

[12] Consequent on the order granting him permission to appeal, the appellant brought this procedural appeal against the three impugned orders. It is important to note that the appeal, like the application for permission to appeal, was brought against "Berthram White (by next friend Corbeck White)" as the respondent, despite the fact that Berthram White is dead and that Corbeck White is the court appointed representative on behalf of Berthram White's estate for the conduct of further proceedings relating to the claim.

[13] The appellant states the details of the orders appealed against (in a rather unconventional manner) in these terms:

> "(a) The learned Master on 24 October 2011, after the death of [Berthram White] (who died 22 August 2011) and before anyone was appointed to represent his estate in the proceedings, made orders on a Judgment Summons filed by [Berthram White (by next friend Corbeck White)] for the [Appellant] to pay certain sums of money in accordance with timelines set out in the said order. A perusal of the documents filed in the Claim shows that it was not until 5 February 2014 that an application was made for someone to be appointed personal representative of [Berthram White's] estate and to be substituted as Claimant in the proceedings. There is no evidence on record of *Corbeck White* disclosing at or before the Application that [Berthram White] was dead.
>
> (b) *Harris J (Ag)* on 26 July 2012, some 11 months after the death of [Berthram White] and before anyone was appointed to represent his estate, made orders on an application by *Corbeck White* for the sale of land registered at Volume 1444 Folio 46 of the Register Book of Titles in the names of *Krishana Sasha-Gaye Officer, Sharicia Maniphia Officer, Ann-Marie Gennevie Boyd* and *Adrian Delroy Officer* (a minor) as joint tenants. Which said order was purportedly made to satisfy the judgment debt of the Appellant. Perusal of the evidence filed in support of the application for sale reveals that *Corbeck White* failed to disclose to the Court that the [Appellant] was not the owner of the said land. There is no evidence on record of *Corbeck White* disclosing at or before the Application that [Berthram White] was dead.
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> (c) *Lindo J* (Ag) on 19 March 2014 made an order purportedly regularizing the orders made by the Master on 24 October 2011 and by *Harris J* (Ag) on 26 July 2014."

The grounds of appeal

[14] The appellant filed six grounds of appeal, which state as follows:

"(a) Material non-disclosure by [Berthram White's] next friend *Corbeck White* that the[Appellant] was not the owner of land registered at Volume 1444 Folio 46 ofthe Register Book of Titles, which land she had applied for an order to sell to satisfy the Appellant's judgment debt.

(b) *Harris J (Ag)* (as she then was) erred in law when on 26 July 2012 she ordered the sale of the land Registered at Volume 1444 Folio 46 in satisfaction of the [A]ppellant's judgment debt, which land was not owned by the [Appellant] and which error was contributed to wholly or in part by [Corbeck White's] material non-disclosure.

(c) Material non-disclosure by [Corbeck White] at the time of her applications on 24 October 2011 that [Berthram White] was dead.

(d) The learned Master erred in law when on 24 October 2011 she made orders sought on an Application by *Corbeck White* at a time when [Berthram White] was dead and before anyone was appointed to represent his estate.

(e) Lack of capacity by [Corbeck White] at the time of her applications on 24 October 2011 and on 26 July 2012.

(f) *Lindo J* (Ag) erred in law when she made an order on 19 March 2014 purportedly regularizing the 24 October 2011 order by the Master and the 26 July 2012 order of *Harris J* (Ag) for the Sale of the land Registered at Volume 1444 Folio 46."

Order sought on appeal

[15] The appellant now seeks an order that the three impugned orders appealed against be set aside with costs to him.

Third party application to intervene in the appeal

[16] Also part of these proceedings is a notice of application to intervene in the appeal, dated 12 May 2015, which was filed by Anne-Marie Boyd, Sharicia Officer and Krishana Officer, three of the four registered owners of the property and adult relatives

of the appellant. No application was filed for and on behalf of the fourth registered owner, the minor son of the appellant. The applicants are seeking permission to "associate themselves with the written and oral submissions" of the appellant and "to support the order" sought by the appellant concerning the property. The basis of this application, according to the applicants, is that they were never served with the application for sale of the property as required by the Civil Procedure Rules (the CPR) and so were not placed in a position to intervene in the hearing of that application in the Supreme Court before the orders were made.

Preliminary objection to the appeal and to the third party application to intervene

[17] Corbeck White has raised several preliminary objections both to the hearing of the appeal and to the application of the third parties to intervene. The objection in relation to the appeal will now be examined.

(a) Procedural defect in the appeal

[18] The first point raised in objection to the appeal is that the appeal is procedurally defective on two bases. The first basis is that while permission to appeal was sought from this court, it was not first sought in the court below as required by rule 1.8(2) of the Court of Appeal Rules (the CAR).

[19] The second basis is that no permission to appeal against anyone was sought in accordance with the time limits laid down in the CAR, rule 1.8(1) or in writing, in accordance with rule 1.8(3). So, with Berthram White, the claimant in the proceedings

in the Supreme Court, having died, there is no next friend in the proceedings against whom an appeal could properly be brought. No appeal could properly be instituted against Berthram White (by next friend Corbeck White) because the appellant has not challenged the order of Lindo J (Ag) made on 19 March 2014 by which Corbeck White was appointed the representative for the estate of Berthram White to carry on the proceedings. The appeal can only properly be brought against Corbeck White in her representative capacity for the estate of Berthram White, but no permission to appeal against Corbeck White in that capacity was ever sought or obtained. Therefore, in the circumstances, the appeal is defective and not properly before the court and so should be struck out. For this argument, reliance is placed on **Hon Shirley Tyndall OJ and Others v Charles Ross and Others** [2011] JMCA App 5.

(b) The appellant has no locus standi to bring the appeal

[20] Another argument raised by way of preliminary objection to the hearing of this appeal concerns the locus standi of the appellant to bring the appeal. The basis of the objection on this limb is as follows: The appellant has a "third party standing" in the proceedings, which deprives him of the necessary locus standi to bring the appeal. He cannot insist, on the one hand, that he has no legal or equitable interest in the property but, on the other hand, is seeking to obtain a remedy to protect someone else's interest. He has no legal or equitable basis to complain about the sale of the property when the registered owners had not intervened in the enforcement proceedings. The appellant has no standing in court to challenge the order for sale of property, which is registered to others and he is not entitled to seek the relief of setting aside an order for

sale of land in which he has no interest. He cannot protest the order for sale in this court or at all. The appeal is, therefore, a misuse of process by the appellant to prevent the lawful enforcement of the default judgment obtained against him and to seek the protection of this court in respect of property illegally transferred by him so as to overreach the judgment creditor.

[21] It is also contended further that the appellant ought not to be allowed to appeal the orders in question because he lacks the necessary standing to do so for other reasons. The following represent a synopsis of the main planks of the respondent's objection on this ground. The appellant now brings new litigation after default judgment has been obtained against him while the judgment is still in existence. The effect of this application is to ask this court to assist him by preventing the enforcement of a regularly obtained judgment in the manner decreed by the court below. The appellant has no standing to do so without showing that he has satisfied rule 12.13 of the CPR, which provides that while the default judgment exists, a defendant against whom default judgment is entered may be heard only on costs; the time of payment of any judgment debt; enforcement of the judgment and on an application under rule 12.10(2). Rule 12.13(c) cannot avail the appellant because the indisputable evidence is that he chose not to be heard on the applications relating to the enforcement of the judgment and so the orders complained of were made in his absence and those enforcement proceedings are spent.

[22] Furthermore, the appellant was notified of all the applications, which have led to the orders that are now being challenged and he did not challenge those applications or attended the hearings. It was in those proceedings that the appellant could have been properly heard. Without him obtaining an order to set aside the judgment, the proceedings are concluded against him and so any litigation that he commenced after the judgment in default was obtained against him is void and of no effect. The appellant has no right to take out proceedings, which are aimed at preventing the enforcement of a regularly obtained judgment, without setting aside the judgment itself. This would emasculate the judgment so that its worth is reduced or diminished. So for all these reasons, he has no proper standing to bring the appeal.

Discussion and findings on preliminary objection to the appeal

Procedural defect in the appeal

Permission to appeal not first sought in the court below

[23] Rule 1.8(2) of the CAR provides that where the application for permission to appeal may be made to either court, the application must first be made to the court below. It is on this basis that it is contended, by way of preliminary objection to the hearing of the appeal, that because permission was not first sought in the court below, then the appeal is defective and ought not to be entertained.

[24] In **Hon Shirley Tyndall OJ v Charles Ross**, the case cited in support of the objection, an appeal was filed by the respondents without any permission granted either from the court below or from this court. The applicants made an application for

the notice of appeal to be struck out due to the failure of the respondents to first obtain permission. The court found that without permission being first obtained, a valid notice of appeal had not been filed and so there was no appeal before this court.

[25] The circumstances as obtained in **Hon Shirley Tyndall OJ v Charles Ross** are, however, clearly distinguishable from the circumstances of this case so as to render that case wholly inapplicable to this appeal. In the instant case, permission to appeal had already been granted by this court by the time the notice of appeal was filed. So, the appeal cannot be held to be invalid on the basis that permission was not first granted, as was the case in **Hon Shirley Tyndall OJ v Charles Ross**.

[26] It should be noted within this context that section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act provides that certain specified matters cannot be appealed without leave of the judge of the Supreme Court or of this court. So there is no question that this court has the power to grant permission to appeal in circumstances specified by the statute. The statute, however, does not expressly state that this court cannot grant permission unless it was previously sought down below. It is the CAR, rule 1.8(2) that expressly provides that permission must first be granted below.

[27] In any event, while rule 1.8(2) states that leave must first be sought in the court below, it has not expressly provided a sanction for failure to do so. In other words, there is no provision that failure to make an application in the court below would render an application to this court for permission to appeal a nullity. It follows then, in keeping with rule 26.9 of the CPR, which applies to this court by virtue of the CAR, that failure

to comply with the relevant rule does not invalidate the proceedings, unless the court so orders. This court, in dealing with the application for permission to appeal, had not so ordered and had proceeded to deal with the application and granted permission on it. It means, essentially, then that the failure of the appellant to first apply in the court below for permission was not treated as invalidating the application for permission before this court. In light of that permission having been granted, the appeal filed pursuant to it cannot be held to be flawed as a result of failure on the part of the appellant to comply with rule 1.8(2). It must be stated categorically, however, that a party who is desirous of appealing in cases in which leave is required pursuant to section 11(1)(f) should, generally, ensure strict compliance with rule 1.8(2) as each case falls to be determined on its own peculiar facts.

[28] I would conclude that at this point in the proceedings on appeal, there is no compelling reason for this court to reverse its decision and to treat as a nullity the permission to appeal that was granted on the basis that no permission was first granted below. As such, the appeal would have been filed pursuant to that permission unlike in the case of **Hon Shirley Tyndall OJ v Charles Ross** in which no permission at all was granted prior to the filing of the appeal. In the result, I would be hesitant to hold that the fact that no permission was given below is fatal to the appeal.

[29] Accordingly, I would rule that the preliminary objection that the appeal is defective due to the failure of the appellant to first obtain permission in the court below is unsustainable.

The respondent to the appeal does not exist and no permission was granted for an appeal to be brought against Corbeck White as representative of the estate of Berthram White

[30] The second argument in support of the preliminary objection that the appeal is procedurally defective is that the appeal is brought against "Berthram White (by next friend Corbeck White)" and so permission to appeal was granted for the appeal to be brought against a respondent who no longer exists. This argument means, in effect, that there is no respondent to the appeal, although permission to appeal was granted by the court. This seems to be an argument that would have been most suited for hearing at the time the application for permission was being heard. It is not clear, however, whether this argument was raised because it is being repeated as a preliminary objection to the appeal and the record had still reflected the names of the original parties to the claim up to the time the appeal was filed.

[31] Be that as it may, however, in treating with this argument at this point, it is necessary to indicate that there is no denying that there is some measure of untidiness in the proceedings, which has led to this issue concerning the question as to who is the proper respondent to the appeal. I cannot help but to state that Corbeck White is the author of this untidiness because in her purported capacity as next friend, she applied for and obtained orders in the Supreme Court when she knew that Berthram White was no longer alive. It is these orders that now form the subject matter of the appeal. It is for that reason, that the appellant has filed the appeal in the name of the original parties, in whose names the orders were granted.

[32] To exacerbate the confusion, counsel acting for Corbeck White (and who now have raised the objection that Corbeck White in her capacity as representative of the estate is not named as respondent to the proceedings) have entered their name on the record as acting for and on behalf of the "respondent" who in the record of the proceedings is named as "Berthram White (by next friend Corbeck White)". Counsel also went further to file submissions on behalf of the "respondent" in response to the appeal, as well as in opposition to the application of the third parties to intervene in the appeal. It means then that counsel who are now contending that there is no respondent, would have entered their names as representing and acting for a respondent that does not exist.

[33] The unavoidable question that arises from the existing state of affairs is this: If the named respondent no longer exists, then on whose behalf does counsel appear and act in the proceedings, when there is no application made to this court for Corbeck White to be joined in her new capacity as representative of the estate of Berthram White? In other words, who is the "respondent" that is represented on the record by counsel given that nowhere on the face of the record of the proceedings is Corbeck White, in her capacity as representative of the estate, named as a party and she was not added as a party by the court?

[34] It seems to me that it could be safely argued that Corbeck White, in her capacity as the representative of the estate of Berthram White, has unequivocally surrendered to the jurisdiction of this court as the respondent by actively taking steps in the

proceedings as such. This she has done because of the order she had sought and obtained from Lindo J (Ag) in March 2014 that she be appointed to continue proceedings on behalf of the estate of Berthram White. Also, having applied to become the representative for the purposes of the litigation, she also applied for and obtained the order from Lindo J (Ag) that the order of Harris J (Ag), should stand. This order from Lindo J would be of material benefit to the estate if it were allowed to stand. It, however, is the subject of appeal and so Corbeck White, as the representative for the conduct of the proceedings, would have had a legitimate interest in the proceedings for permission to appeal as well as in the substantive appeal. This is, undoubtedly, her reason for taking part in the proceedings without having made any application to be joined as a party to the appeal in her capacity as representative of the estate. Having surrendered to the jurisdiction of the court in this way, that is to say, by filing submissions as the respondent, and objecting to the intervention of the third parties in the proceedings, she could be taken as waiving her right to now complain that there is no respondent to the appeal.

[35] In any event, it would be safe to say, in my view, that the order of Lindo J (Ag) that appointed Corbeck White to continue proceedings on behalf of the estate of Berthram White, would have settled, from then on, the relevant parties with respect to all proceedings relating to the claim commenced by Berthram White. So, by the time the proceedings for permission to appeal were initiated, the proper standing of the parties in the case would have been established as a matter of substance; that is to say, that Berthram White is no longer claimant or judgment creditor, as the case may

be, but rather his estate represented by Corbeck White. It means that on any view of all the relevant circumstances, the estate of Berthram White, which is represented by Corbeck White, ought properly to be a party to the appeal as the respondent.

[36] Counsel for the appellant has explained that the appeal was brought in the name of "Berthram White (by next friend Corbeck White)" as respondent because the orders in respect of which the appeal is brought were made in the matter that had named "Berthram White (by next friend Corbeck White)" as claimant, and because Corbeck White did not have the capacity to obtain the orders she did. While counsel's view may be understandable in the circumstances, it cannot be accepted as correct given that Berthram White is no longer alive and Corbeck White was appointed the representative to carry on proceedings relating to the enforcement of the judgment on behalf of the estate since March 2014. This would have been before the application for permission to appeal was filed. So the orders of Lindo J (Ag) that predated the appeal would have, effectively, resulted in a change of the claimant/judgment creditor, as a matter of substance.

[37] Furthermore, this court at the time the permission to appeal was granted would have been mindful that Berthram White was dead and that Corbeck White was subsequently appointed representative of the estate. In the light of all that evidence and the known history of the proceedings in the Supreme Court, the court, nevertheless, granted the appellant permission to appeal the orders in question. So, regardless of the fact that the appellant's application was brought in the name of

"Berthram White (by next friend Corbeck White)", the order of the court is, in substance, permission to appeal all the impugned orders that were made in the claim in respect of which Corbeck White was appointed to carry on proceedings on behalf of the estate of Berthram White.

[38] There is, therefore, in substance and in effect, no appeal brought against anyone who is dead, and no permission to appeal was granted in respect of any matter in which there is no proper respondent, even if on the face of the record it appears to be so. I would view it as a regrettable oversight on the part of the court at the time of granting the permission to appeal not to have brought the record in line with the true facts.

[39] In my view, the filing of the application for permission to appeal, as well as the appeal itself in the names of the original parties to the claim in which the orders were granted, is a matter that goes to form rather than to substance in the peculiar circumstances of this case. As such, it does not go to the root of the appeal and the jurisdiction of the court to entertain the appeal because prior to the appeal, the court below had appointed Corbeck White as representative of the estate of Berthram White to conduct enforcement proceedings relating to the claim that was commenced by Berthram White. The appeal has emanated from those proceedings.

[40] At best, the filing of the application for permission to appeal in the name of Corbeck White, as next friend, is an error that would amount to nothing higher than a mere irregularity. The law is well settled that an irregularity can be waived as well as it

can be rectified. Indeed, it could well be argued that Corbeck White, by "entering" her name as respondent on the record, with the assistance of counsel, and making submissions in that capacity, could be taken as having waived any irregularity with the appeal being brought in the wrong name. However, even if it is not accepted that she had waived the irregularity, the irregularity can be rectified. It follows from all this that the appeal would not be rendered a nullity simply because "Berthram White (by next friend Corbeck White)" was stated on the record to be the respondent to the appeal.

[41] In treating with the preliminary objection in this regard, I consider it necessary to also point out that the overriding objective that is contained in Part 1 of the CPR is applicable to appeals in this court by virtue of the CAR, rule 1.1(10)(a). As the rules stipulate, the overriding objective of dealing with the case justly includes saving expense and ensuring that the case is dealt with fairly and expeditiously. It would certainly be a waste of time, resources, expenses and costs for this court to strike out the appeal simply for the name of the respondent to be changed on the face of the record. The rules have also made it clear that it is the duty of the parties to the litigation to help the court to further the overriding objective. The position taken by the respondent in making this preliminary objection to the appeal at this stage of the proceedings would not be in fulfillment of that obligation to assist the court in furthering the overriding objective.

[42] Having established that there is an irregularity, which can be rectified, the question now is whether the record should be amended to state the proper respondent

to the appeal without anapplication having been made by the appellant for this court to do so.

[43] In so far as is relevant, rule 2.15(a) of the CAR provides that in relation to civil appeals, the court has all the powers set out in rule 1.7 and "in addition **all the powers and duties of the Supreme Court**" which includes the case management powers. Furthermore, rule 1.7(2)(m) and (n) provides that this court, as part of its general case management powers, may, among other things, take any step, give any other direction or make any order for the purpose of managing the appeal and furthering the overriding objective.

[44] There is no question that the rectification of the irregularity is necessary for the purpose of managing the appeal and furthering the overriding objective. In Part 19 of the CPR, the Supreme Court has the power to add, substitute or remove a party on or without an application, if it is desirable that any of those steps be taken in order for the issues before the court to be resolved. There is no question too that the court has the power to correct the name of a party to proceedings. So, given that this court has all the duties and powers of the Supreme Court in civil appeals, to include the case management powers, there is no question that this court can make such amendment to the name of the respondent on the record as the court thinks necessary for the purpose of managing the appeal and furthering the overriding objective.

[45] Further, there is no requirement that an application has to be made and submissions entertained on the point in order for the amendment to be done, because

the ultimate and pivotal question is whether any party is likely to be prejudiced by the amendment. There is nothing in the circumstances that would suggest that a change of the name of the respondent on the record could prejudice either the appellant or the estate of Berthram White that Corbeck White now represents.

[46] Consequently, I would order that the record be amended to reflect the respondent as being "Corbeck White (in her capacity as representative of the estate of Berthram White, deceased)" instead of "Berthram White (by next friend Corbeck White)".

[47] For all the foregoing reasons, I would hold that the preliminary objection to the hearing of the appeal, on the ground that there is no respondent against whom the appeal is brought and in respect of whom permission to appeal was granted, is unsustainable.

[48] There is no procedural defect in the appeal as contended by the respondent that could render the appeal a nullity.

Whether the appellant has locus standi to bring the appeal

[49] The argument that the appellant does not have the locus standi to bring the appeal because he does not own the property, which is the subject matter of the order for sale granted by Harris J (Ag), also lacks merit. The appellant is a proper person because he was sued as a defendant in the claim, judgment was entered against him and enforcement proceedings were initiated against him for recovery of the judgment

debt. Consequently, an order on judgment summons was made against him by Master Lindo in 2011 for him to liquidate the judgment debt. This order directly and personally affects him.

[50] In addition, the notice of application, which was filed by the respondent for sale of the property and upon which the impugned order of Harris J (Ag) was subsequently made, stated that the application was for sale of the property belonging to the appellant and an order was sought for the proceeds of the sale to be used to offset the debt owed by the appellant. There was also an order that he deliver up possession of the property and for furniture owned by him to be sold to satisfy the judgment debt. These orders also touch and concern the appellant directly.

[51] As long as those orders subsist, the appellant is personally and directly affected by them as well as bound by them. The appellant is thus a necessary party to the appeal to have the orders made against him, in enforcement of the judgment, set aside, regardless of the fact that he is not registered as proprietor of the property ordered to be sold. He has more than sufficient interest in the appeal to ground the necessary locus standi.

[52] Attention is now turned to the second limb of the objection that the appellant has no standing to appeal because the default judgment still subsists and that he had not taken any part in the enforcement proceedings below. I find that those arguments are also difficult to accept as a basis on which to strike out the appeal for the reasons discussed below.

[53] It is clear, as argued by counsel for the appellant, that the proceedings on appeal are not challenging the default judgment. The default judgment is valid, it having not been set aside, and as such remains binding on the appellant in favour of the respondent for all intents and purposes. It is the method of enforcement of that judgment that is under challenge on appeal. There is thus no need for this court to consider the default judgment and we are not asked to do so. It cannot, at all, be accurate to say then, as contended by the respondent, that the appellant is bringing new litigation to circumvent the default judgment.

[54] Section 10 of the Judicature (Appellate Jurisdiction) Act, provides:

> "Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid, have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement ofthe Federal Supreme Court Regulations, 1958."

[55] There is nothing in the statute or the rules of court, and nothing has been brought to the attention of this court, to say that a person who was absent when an order for the enforcement of a judgment was made against him, in circumstances such as these, cannot appeal that order. So, it would seem that there is nothing in law that would serve to preclude the appellant from directly appealing the orders made against him, although he was absent from the hearing at which the orders were made.

[56] Furthermore, and even more importantly, the appellant, before filing the appeal, had sought permission from this court to bring his appeal and the court proceeded to grant the permission with all these facts having been disclosed. It means that this court, in granting permission, would have already found that the appellant, although absent from the proceedings in which the orders were made, has a viable appeal with a prospect of success that should be heard on its merits by the court. At the end of it all, there is nothing expressly stipulated by statute or rules of court that have been brought to our attention that would bar the court from hearing the substantive appeal, once the requisite permission to do was given by the court and there is no proper and compelling basis for the permission to be set aside.

[57] The respondent's preliminary objection to the hearing of the appeal on the ground that the appellant has no locus standi to bring the appeal is, therefore, not upheld.

The respondent's objection to the third party application to intervene in the appeal

[58] The respondent's preliminary objection to the application of three of the registered proprietors of the property to intervene in the appeal is based on various grounds, which will not all be detailed for present purposes but which have all been taken into account in resolving the issue. It is considered sufficient to merely highlight the major aspects of the submissions that have been advanced to ground this aspect of the objection.

[59] The core arguments, in summary, are as follows. The court has no discretion to grant leave to these applicants to intervene because there is no specific rule regarding intervention by a third party in the CAR. The procedure for intervention is governed by part 19 of the CPR, which is not applicable to an appeal in this court (see rule 1.1(10) of the CAR). Furthermore, the registered proprietors have not intervened in the Supreme Court proceedings and they have provided no legal basis that would justify the relief being sought in the application. They have no legal standing to become co-appellants with the appellant as they have never sought or obtained permission to appeal in the court below, nor permission to appeal out of time in this court or any other court. The application should therefore be denied.

Discussion and ruling

[60] It is, indeed, clear on the record that the registered proprietors of the property were not parties to the substantive claim or were in any way connected to the enforcement proceedings in the Supreme Court. It is indisputable, however, that they would have been interested third parties to the application for sale of the property but despite that, the application for sale of the property was never served on them. They were, therefore, not given the opportunity to be heard on the application pertaining to the sale of the property and as such would not have been in a position to intervene.

[61] The effect of the order made by Harris J (Ag), and which was, purportedly, validated by Lindo J (Ag), is to effectively deprive the third party applicants of their vested interests in the property without any notice or without an opportunity given to

them to be heard. This is, in itself, a breach of the principles of natural justice, which cannot be sanctioned by this court.

[62] Furthermore, section 28A(1) of the Judicature (Supreme Court) Act stipulates:

> "The Court may, on the application of the person prosecuting a judgment or order for the payment of money, make an order for the sale of **the land of a judgment debtor**." (Emphasis supplied)

[63] In this case, on the face of the certificate of title, the property is not owned by the judgment debtor, the appellant, and was not owned by him at the time the order was made. It follows then that an enquiry as to the legal and beneficial ownership of the property was required before any order could have been made that the property be sold to satisfy the judgment debt. Such a hearing, of necessity, and in the interests of justice, would have had to be on notice to the registered owners so that they could be given an opportunity to be heard.

[64] In this regard, part 55 of the CPR makes provision for sale of land by order of the court pursuant to section 28A. Rule 55.2(2) specifies the evidence that must be placed before the court in an application for sale of land. The rule stipulates that, inter alia, the full names and addresses of all persons who, to the knowledge or belief of the applicant, have an interest in the land must be included in the evidence. Also, the rule stipulates that the nature and extent of each such interest should be disclosed. Rule 55.2(4) provides that the application and copies of the evidence in support must be served in accordance with Part 5 on the judgment debtor as well as on "every person who has an interest in the land".

[65] The rule also goes further to provide that the court, on hearing the application, may direct that notice be given to any person who appears to have an interest in the land but has not been served with the application and adjourn the application to a fixed date (see rule 55.3(a)).

[66] So, it is only fair and just that in circumstances as obtained in this case, where the property ordered to be sold is not registered in the name of the judgment debtor, that the registered proprietors must be regarded as interested third parties in all proceedings touching and concerning that property, which would include this appeal. The certificate of title was brought to the attention of Lindo J (Ag) and so it would have been clear that the registered proprietors were these applicants and their minor co-tenant, yet no notice of the proceedings was served on them before Lindo J (Ag) sought to validate the order for sale of the property. There is no way that this court could ignore their standing as third parties who are directly affected by the order and rule that they have no locus standi to intervene in the appeal.

[67] Rule 2.15 of the CAR would also be relevant in treating with this objection as well as rule 1.7(m) and (n), as already discussed in paragraph [43] within a different context. It is absolutely clear that this court, as part of its general case management powers, "may direct that notice of any appeal or application be given to any person" or take any other step, give any other direction or make any order for the purpose of managing the appeal and furthering the overriding objective.

[68] It stands to reason then that this court may exercise the power to allow parties to intervene and to add parties to the proceedings, in like fashion as the Supreme Court may do under part 19, if that is necessary to further manage the appeal and to give effect to the overriding objective. Counsel's argument that the court has no power to allow the third party applicants to intervene in the proceedings because part 19 does not apply to this court is, therefore, rejected as a proper basis on which to deny the application. The third party applicants do possess the necessary locus standi to intervene in this court, as they were entitled to do in the court below, by virtue of their legal status as registered owners of the property that was ordered to be sold.

[69] I would also hold that in the circumstances, and contrary to the submissions of counsel for the respondent, the applicants would require no permission to appeal, either from the court below or from this court, in order to intervene as interested third parties in these proceedings. Accordingly, the respondent's objection to the applicants' involvement in the appeal cannot be upheld on any of the bases contended.

[70] The question therefore is not whether they can properly intervene but rather whether they should be allowed to intervene in light of the issues raised on appeal. In considering whether they should be allowed to intervene, it has not escaped attention that the minor who also owns the property with the third party applicants has not applied to intervene in the appeal. Their interest in the property is as joint tenants and so like the applicants, he too would be directly affected by the order made for sale of the property. He too is an interested third party who deserves to have knowledge of the proceedings and who should be given an opportunity to be heard before the property is

sold. So, even without an application from him, the court of its own motion could direct that he be represented for the purposes of these proceedings and be served with notice of the proceedings. This, of course, would warrant an adjournment of the hearing of the appeal, which would translate in further delay.

[71] Having taken all the prevailing circumstances of the case into account along with the grounds of appeal and the respondent's response to them, I think it is sufficient to state that the rights and interests of the applicants and their minor co-tenant to intervene in the appeal are acknowledged as a matter of law. However, I do not see it necessary to allow them to directly intervene in the appeal, given the issues to be resolved between the parties to the appeal and the law applicable to those issues. In the final analysis, there is nothing more that they could add that could usefully assist the court in its deliberations.

[72] In so far as is relevant in treating with this issue, some guidance is obtained from rule 19.2(3) of the CPR, which provides that the court may add a new party to proceedings if:

> "(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue."

[73] Having satisfied myself that no prejudice or injustice would be caused to the registered proprietors if they were not made parties to the proceedings, I would deny

the application for them to intervene in the appeal because it is not necessary or desirable for them to do so. Consequently, I would refrain from granting the order that they be permitted to intervene.

[74] It is to a consideration of the substantive grounds of appeal that I will now turn so that all controversy between the parties to the appeal can be finally and conclusively determined.

Consideration of the substantive appeal

[75] For the purposes of analysis, the closely connected grounds of appeal are conveniently grouped together and considered under broad headings in keeping with the matters raised for resolution. As such, they are not examined in keeping with the sequence set out in the notice of appeal. Against this background, grounds (c), (d) and (e) will first be considered conjunctively.

Grounds (c), (d) and (e)

Whether Corbeck White lacked the capacity to obtain the orders granted by Master Lindo and Harris J (Ag)

[76] In grounds (c), (d) and (e), the appellant contends that the orders of Master Lindo and Harris J (Ag) that were made on 24 October 2011 and 26 July 2012 respectively, are orders that the appellant is entitled to have set aside as a matter of right (*ex debito justitiae)* because Corbeck White lacked the capacity to make the applications on which those orders were made. Those orders were nullities and not mere irregularities, the appellant contends, because at the time the applications were

made and the orders granted, Berthram White was dead, and Corbeck White was not his personal representative or the lawfully appointed representative of his estate for any purpose. Furthermore, when she made the applications, and up to the time that the orders were granted, there was material non-disclosure by her that Berthram White was dead.

[77] The record does show, in keeping with the contention of the appellant, that by the time the relevant enforcement proceedings were initiated, Berthram White was dead and Corbeck White would have known it. Yet, in the affidavit filed in support of the applications, Corbeck White represented herself as next friend of Berthram White and she made no reference to his death. There was, indeed, as the appellant contends, material non-disclosure on the part of Corbeck White of pertinent facts that would have had a bearing on the validity of her applications and their outcome.

[78] A claimant's next friend does not have the authority to carry on proceedings upon the death of the claimant. In other words, the lawful authority of Corbeck White to act as next friend would have terminated upon the death of Berthram White and the existing cause of action would have survived for his estate, which she was not representing at the time. A personal representative or the court appointed representative for the estate of a deceased person stands in a totally different capacity from that of a next friend acting on behalf of a claimant. It means then, that Corbeck White had no legal capacity to carry on proceedings in her standing as a 'former' next friend, which she was.

[79] There is a high probability that the impugned orders would not have been made if it were disclosed to Master Lindo and Harris J (Ag) that Berthram White had died and that Corbeck White was not yet appointed the representative of his estate to conduct further proceedings. So, even without having any regard to anything else contended by the appellant, there would have been such a material non-disclosure that would have destroyed the very foundation of the applications that were made and the orders granted on them. Even on this basis, without more, the applications would have been fatally flawed and by extension, the orders granted on them.

[80] Counsel for the respondent have advanced the argument that the applications which led to the orders made by Master Lindo and Harris J (Ag) were legitimately made because they were made "within proceedings" that were already commenced by Berthram White and were not part and parcel of "new proceedings" commenced by Corbeck White. Counsel also contend that there is nothing in the rules which would deprive the court of jurisdiction between the time of death of Berthram White and the time the order was made that appointed Corbeck White as the representative to carry on the proceedings because the claim is not terminated by reason of the claimant's death. The court would have the jurisdiction over the claim as long as it is carried on by a person with authority to do so by law, they contend. In counsel's view, the failure to appoint a representative to act on behalf of the estate before further steps were taken in the proceedings does not render the proceedings a nullity but merely an irregularity, which may be cured by the court under the relevant rules of court and which was remedied by the order of Lindo J (Ag) on 19 March 2014, pursuant to rules 19, 21.8,

26.2 and 26.9 of the CPR. For these propositions, counsel are content to rely on **Wilfred Emanuel Forbes and Cowell Anthony Forbes v Miller's Liquor Store (Dist) Limited** [2012] JMCA App 13 and **James Wyllie and Others v David West and Others** SCCA No 120/2007, delivered 13 August 2008.

[81] In treating with these submissions, the first thing that is noted is that there is no question concerning the jurisdiction of the court to entertain further steps in the proceedings upon the death of Berthram White. Indeed, there is no dispute that his claim is not terminated by reason of his death. The critical issue for consideration is whether the person who sought to carry on proceedings, purportedly, in the capacity as his "next friend", after he had died, had the legal authority to do so. The issue in the case, therefore, concerns the capacity or locus standi of Corbeck White at the time the applications and the orders were made and not the legal status of the claim itself.

[82] At the time the two orders in question were made, Corbeck White had not proceeded with the conduct of the case as the duly appointed executor under the will of Berthram White, as an administrator granted letters of administration or as a court-appointed representative for the conduct of the proceedings. It cannot be said then that she was a person authorised by law to carry on the proceedings at the time she did on behalf of the estate. Until a representative was duly appointed to continue proceedings on behalf of the estate, there was no proper claimant/judgment creditor before the court to carry on the proceedings for enforcement of the judgment, even though the claim itself subsisted. Corbeck White would not have had the requisite locus standi in the proceedings at the time she applied for and obtained the orders. Accordingly,

counsel's argument that the orders are legitimately made because they were made "within proceedings" that were commenced by the deceased and that there can be validation of them by the application of the rules of court, has nothing in law to commend it.

[83] This question as to the capacity of Corbeck White to conduct the proceedings in her standing as a former next friend (who she was at best) falls to be determined upon the application of substantive law to the facts of the case. Indeed, the legal effect and consequences of the action of Corbeck White, in carrying on proceedings in the capacity of "next friend" when the claimant was dead, can be better explained and more clearly illustrated by the application of the fundamental principles of the law of succession concerning the conduct of litigation on behalf of a deceased claimant. A brief consideration of this area of the law will serve to dispel this, seemingly, strongly held view of the respondent's counsel that the court can uphold the action taken by Corbeck White to continue proceedings following the death of Berthram White, and before she was appointed the representative to act on behalf of the estate, by simply applying the rules of court.

[84] It is a general principle of law, and one that operates without exception, that an executor derives his title to sue as personal representative of the deceased from the will and not from the grant of probate. However, in order to prove his title to secure judgment, the executor has to obtain the grant of probate. On the other hand, it is also a general principle of law that operates without exception that an administrator derives his title to sue solely from the grant of letters administration. So, any action brought on

behalf of the estate of an intestate person requires the grant of letters of administration to be first obtained before proceedings are issued.

[85] Therefore, it is settled law that an administrator's right to bring proceedings runs from the date of the grant of the letters of administration and so proceedings issued before the date of the grant are invalid. See for instance **Chetty v Chetty** [1916] 1 AC 603 at 608, 609 and **Ingall v Moran** [1944] KB 160. In other words, the subsequent grant of the letters of administration cannot validate the action that was commenced before the grant. In either case, proof of title is required from a personal representative in the conduct of proceedings on behalf of a deceased person.

[86] In positioning Corbeck White, as a court appointed representative for the purposes of litigation, her position would be no higher than that of an administrator who derives his authority from the court through the grant of letters of administration, rather than from an instrument created by the deceased. It would follow on analogous reasoning that Corbeck White's authority to act on behalf of his estate in the conduct of the proceedings would, as in the case of an administrator, be derived solely from the court order made by Lindo J (Ag) in 2014. So her authority to act on behalf of the estate to continue the proceedings would have run from the date of the court order appointing her as the representative of the estate and not retrospectively.

[87] Indeed, it is important to point out within this context that even though Lindo J (Ag) had ruled that the order of Harris J (Ag) should stand, there was nothing on the terms of the order that stated that the appointment of Corbeck White, as

representative, was with retrospective effect. The order was clearly worded to take effect as of the date it was made, that is to say, prospectively. So even if, for argument sake, Lindo J (Ag) could have made an order retrospectively, the order itself that was made by her did not render the appointment retrospective.

[88] It means, therefore, that Corbeck White would have had no title and therefore no standing in law to engage herself in the proceedings as a personal representative or otherwise before she was appointed by the court to do so. So anything done by her purportedly as "next friend" at a time when Berthram White was no longer alive, would have been done without the requisite capacity to conduct proceedings on behalf of the estate or for anyone for that matter. It goes without saying then that the appellant is correct in his contention that Corbeck White would have lacked the necessary capacity when she acted in the proceedings to secure the orders on judgment summons before Master Lindo in 2011 and on the application for sale of the property before Harris J (Ag) in 2012.

[89] The question now is whether her lack of capacity or locus standi has rendered the applications she made to enforce the judgment and the orders granted on them nullities or mere irregularities. The principles applicable to the resolution of this question are, again, best illustrated by case law, which treats with the position of administrators in the conduct of litigation. In **Ingall v Moran**, for instance, the deceased died intestate in a road accident. The deceased's father commenced his action and issued his writ in September 1942 "as administrator", but at the time he did so he had not obtained a grant of letters of administration. He subsequently obtained the grant. The

English Court of Appeal held that the action was incompetent since it was commenced without authority.

[90] Their Lordships opined further that the subsequent grant of letters of administration did not retrospectively validate the writ, and that the writ could not have been amended to validate the plaintiff to sue as administrator. The original writ was said by the court to have been "incurably a nullity. It was born dead and could not be revived". Luxmoore LJ, for his part, noted that the plaintiff's action was incompetent at the date when the writ was issued and that the doctrine of relation back of an administrator's title to his intestate's property to the date of the intestate's death, when the grant had been obtained, could not be invoked to render an action competent which was incompetent when the writ was issued.

[91] This decision was followed in **Finnegan v Cementation Co Ltd** [1953] 1 QB 688 in which the widow of the deceased who was killed in a construction accident commenced proceedings to recover damages in England without first obtaining letters of administration in England, although she had received the grant in Eire. The action failed because she had no title to sue as administratrix in England. Jenkins LJ at page 700 stated:

> "As to the law, so far as this court is concerned, it seems to me to be settled by *Ingall v. Moran* and *Hilton v. Sutton Steam Laundry* and, I may add, *Burns v. Campbell,* **that an action commenced by a plaintiff in a representative capacity, which the plaintiff does not in fact possess is a nullity** and, further, that it makes no difference that the claim made in such an action is a claim under the Fatal Accidents Act which the plaintiff could have supported in a

> personal capacity as being one of the dependants to whom the benefit of the Acts extends." (Emphasis added)

[92] In an even more recent case, **Millburn-Snell and others v Evans** [2011] EWCA Civ 577, Rimer LJ reiterated the principles thus at paragraph 16:

> "I regard it as clear as law, at least since *Ingall*, that an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity. That principle was recognised and applied by this court in *Hilton v. Sutton Steam Laundry* [1946] KB 65(per Lord Greene MR, at 71) and *Burns v. Campbell* [1952] 1 KB 15 (per Denning LJ, at 17, and Hodson LJ, at 18). …"

[93] Looking at the case at bar against the background of these clear and immutable principles of law, it seems safe to conclude that they would apply with full force to the position of Corbeck White who had acted in initiating enforcement proceedings, following the death of Berthram White, before she was appointed representative by the court to act on behalf of the estate. She acted in a representative capacity that she did not possess, in that, she was not a next friend and, in any event, could not have acted as a next friend. It does not matter that she was acting within an existing claim rather than commencing a new claim as counsel for the respondent have argued. In carrying on the proceedings, she had effectively assumed the role of a personal representative for the estate, which, in fact and in law, she was not. The cases cited by counsel for the respondent, **Wilfred Forbes v Miller's Liquor Store (Dist) Limited** and **James Wyllie v David West** are, therefore, found to be wholly inapplicable to the circumstances of this case and so the principles derived from them are of no assistance to the respondent's case on appeal.

[94] For the foregoing reasons, I would conclude that the steps taken by Corbeck White to conduct further proceedings, consequent on the death of Berthram White and prior to being appointed the representative for the estate, were without lawful authority and, therefore, invalid for all intents and purposes. This rendered the orders made by Master Lindo on 24 October 2011 and Harris J (Ag) on 26 July 2012, respectively, nullities and not mere irregularities. Grounds (c), (d) and (e), therefore, succeed.

Ground (f)

Whether Lindo J (Ag) erred in law in validating the order of Harris J (Ag)

[95] The contention of the appellant on ground (f) is that because the orders of Master Lindo and Harris J (Ag) were nullities, they cannot be waived or rectified and so Lindo J (Ag) fell in error when she ordered on 19 March 2014 that the orders should stand. It must be noted, however, that the order of Lindo J (Ag) did not seek to regularise the order of Master Lindo made on 24 October 2011 as contended by the appellant. She only ordered that the order made on 26 July 2012 by Harris J (Ag) was "to stand". So the material question for consideration is whether Lindo J (Ag) was correct in making the order that the order of Harris J (Ag) should stand.

[96] In support of the argument that the order should be set aside, counsel for the appellant places reliance on **Strachan v Gleaner Co Ltd and Another** (2005) 66 WIR 268, paragraphs [25]-[31], in which the Privy Council highlighted the distinctions between orders, which are often described as nullities and those which are merely irregular. At paragraph [25], Lord Millet, speaking on behalf of the Board, stated:

> "The distinction between orders which are often…described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the Court has a discretion to correct, and those defects which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside 'ex debito justitiae'. …"

[97] When all the circumstances are considered within the framework of the applicable law as discussed above, it becomes quite evident that Lindo J (Ag) was in no position to set the order of Harris J (Ag) right because it was incurably a nullity. Consequently, I accept the contention of the appellant that Lindo J (Ag) erred in law when she ordered that the order made by Harris J (Ag), for sale of the property, should stand. The appeal also succeeds on ground (f).

[98] The appellant's contention that he is entitled to have all three orders appealed against set aside, *ex debito justitiae*, because they are nullities, is accepted as valid in law. He is therefore entitled to the orders he sought on this basis, without more.

[99] This finding is sufficiently substantive and pivotal to be dispositive of this appeal because in light of the finding that the orders made on the application of Corbeck White, as "next friend" for the dead claimant/judgment creditor, were nullities, it would inexorably follow that the appellant should succeed on all six grounds of appeal.

[100] I will, however, briefly state my findings in respect of the remaining grounds of appeal for completeness and, in particular, to simply demonstrate that even if Corbeck White could be said to have had the necessary capacity or locus standi to obtain the orders she did, the appeal would have succeeded, nevertheless, in relation to the order

of Harris J (Ag), which is the subject of grounds (a) and (b). A brief consideration of these two remaining grounds of appeal will now be undertaken in fully disposing of the appeal.

Grounds (a) and (b)

Whether Harris J (Ag) erred in law in making an order for sale of property that is not owned by the appellant

[101] In ground (a), the appellant complained that there was, again, a material non-disclosure by Corbeck White in making the application for sale of the property in that she did not disclose that the appellant was not the owner of the property. The related contention of the appellant in ground (b) is that Harris J (Ag) erred in law when she ordered the sale of the land not owned by the appellant and that that error was contributed to wholly or in part by Corbeck White's material non-disclosure.

[102] It is, indeed, correct, as argued by the appellant, that the court cannot make an order for sale of land against a judgment debtor in respect of land, which is not owned by him or in respect of which he has no interest. Sections 28A-28C of the Judicature (Supreme Court) Act and Part 55 of the CPR make that clear.

[103] The affidavit evidence that was filed by Corbeck White in support of the application for sale of the property, which was put before Harris J (Ag), reveals that it was never disclosed to the court that the property was not owned by the appellant and that it was registered in the names of other persons who were not parties to the proceedings. Indeed, what makes the application rather odd was that although the

appellant was said to be the owner of the property, an order was sought for the certificate of title to be disclosed and handed over to counsel for Corbeck White as part of the order for sale. Disclosure was, therefore, not sought or granted as a preliminary step before the order for sale was made.

[104] So, at the time the order for sale was granted in 2012, there was no proper evidence put before the court to substantiate the assertion of Corbeck White that the property ordered to be sold was, in fact and in law, owned by the appellant and that there was no third party interest in it. The learned judge was only provided with a tear sheet from the Sunday Gleaner, dated 7 November 2010, indicating that the appellant had won the property in a competition held by Courts (Jamaica) Limited. So by 2012, when the application was made for the sale of the property, which would have been two years after the newspaper publication, there was no evidence provided as to the state of the title for the property at the material time. The failure of Harris J (Ag) to insist on proper documentary proof of title to the property, prior to making the order that the property be sold, was a regrettable error that would have rendered the order for sale that she had made in the circumstances, otherwise, objectionable. This would have been so, even if Corbeck White had possessed the requisite capacity to make the application.

[105] The order is also objectionable on the basis that the registered owners were never served with notice of the application and were not given an opportunity to be heard during the enforcement proceedings because their interest, for whatever reason, was never disclosed to the court. This was, indeed, a material non-disclosure that is so

fundamental as to affect the core of the application and the order of Harris J (Ag). It cannot be ignored that the registered owners are protected by the provisions of the Registration of Titles Act and so cannot be stripped of their proprietary interest without a proper basis in law. Sections 68 and 70 of the Registration of Titles Act, undoubtedly, establish the indefeasibility or inviolability of the title of the registered proprietors.

[106] By way of reminder, section 68 provides:

> "...every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, **be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.**" (Emphasis added)

[107] Further, section 70 provides:

> "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, **the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title**..." (Emphasis added)

[108] In the proceedings before Harris J (Ag), no fraud was alleged and proved in respect of the ownership of the property and so there would have been no legal basis for the learned judge to have deprived the registered proprietors of the protection

afforded them by law. It is hard to conceive that Harris J (Ag) would have made the order without notice to the registered proprietors if she had seen the certificate of title. Harris J (Ag) was, therefore, not placed in a proper position to make an informed decision because of the non-disclosure of pertinent facts relating to the ownership of the property.

[109] In all the circumstances, the argument of the respondent concerning fraudulent transfer by way of gift that was raised before Lindo J (Ag) in 2014, and which has been advanced in this appeal as a basis to have the order of Harris J (Ag) stand, cannot avail the respondent. It would be improper as a matter of law for this court to uphold that order in the absence of full ventilation, in the appropriate forum, of the allegation of fraudulent transfer of the property on the part of the appellant. Also, it would be unjust to do so in circumstances where the registered proprietors were not given the opportunity to present their case before they were deprived of their proprietary rights. So, even if Corbeck White was possessed of the requisite capacity to apply for the order that was made by Harris J (Ag), the order, nevertheless, would have to be set aside due to the material non-disclosure of the registered third party interests in the property and the prejudice to those interests.

[110] There is therefore merit in grounds (a) and (b) which provides another formidable basis for the order of Harris J (Ag) to be set aside. This would automatically mean that paragraph 2 of the order of Lindo J (Ag) that is appealed against would also have to be set aside on this basis. The appeal would therefore succeed on grounds (a) and (b), quite independently of the findings in relation to grounds (c), (d), (e) and (f).

Conclusion

[111] In concluding, I would hold that the orders of Master Lindo made on 24 October 2011, Harris J (Ag) made on 26 July 2012 and Lindo J (Ag) made on 19 March 2014 are nullities and should be set aside because of the lack of capacity of Corbeck White in obtaining those orders for enforcement of the default judgment entered in favour of the deceased claimant, Berthram White, against the appellant.

[112] Furthermore, and in any event, the orders of Harris J (Ag) for sale of the property and of Lindo J (Ag), purportedly validating that order, were wrong in law because the property ordered to be sold was not proved to be owned by the appellant as judgment debtor, as the law requires, and no notice of the proceedings was given to the registered owners of the property as interested third parties before the orders were made effectively depriving them, without a hearing, of a vested right which is protected by law. All this would have resulted from a material non-disclosure of pertinent facts concerning the ownership of the property.

[113] In all the circumstances, I would order that the appeal be allowed, the three impugned orders set aside with the costs of the appeal awarded to the appellant.

[114] It does seem to be appropriate that Corbeck White should bear the costs of appeal in her personal capacity and not as the representative of the estate of Berthram White because she had acted without lawful authority in obtaining the orders of Master Lindo and Harris J (Ag), which are the central orders appealed against, and had failed to make material disclosure of pertinent facts, particularly that Berthram White was

dead. She therefore did not purport to act on behalf of the estate in seeking the orders. Furthermore, the disclosure of such a material fact, in all likelihood, would have adversely affected the granting of the orders in her favour. I believe that it would be in the interests of justice that such a costs order be made. I would order accordingly.

MORRISON P

ORDER

(1) The record is amended to state Corbeck White (in her capacity as representative of the estate of Berthram White, deceased) as the respondent.

(2) The application to intervene in the appeal is refused.

(3) The appeal is allowed.

(4) The orders of Master Lindo made on 24 October 2011, Harris J (Ag) made on 26 July 2012 and Lindo J (Ag) made on 19 March 2014 in the Supreme Court are set aside.

(5) Costs of the appeal to the appellant against Corbeck White in her personal capacity to be agreed or taxed.