[2023] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE LAING JA (AG)

PARISH COURT CIVIL APPEAL NO COA2022PCCV00010

BETWEEN	**ANIKA BROWN**	**APPELLANT**
AND	**MARLON PENNICOOKE**	**RESPONDENT**
AND	**THE ADMINISTRATOR-GENERAL FOR JAMAICA**	**INTERESTED PARTY**

Andrew A Irving for the appellant

Neco G Pagon for the respondent

Ms Sheika Lawrence for the Administrator-General for Jamaica

14, 19 June, 13 and 28 July 2023

Land – Recovery of possession - Claim by tenant-in-common of undivided share in property against person alleging possession with permission of the Administrator-General for Jamaica the other co-tenant pursuant to instrument of administration

Practice and procedure – Setting aside default judgment -Whether the applicant satisfied the threshold

Evidence – Whether in the interests of justice an appellate court can consider information provided to it which was not before the court below and which does not satisfy the criteria for fresh evidence

BROOKS P

[1] I have read, in draft, the comprehensive and convincing judgment of Laing JA (Ag). I agree with his reasoning and conclusions. I note his suggestion that the parties and their counsel should explore a negotiated solution to the issue of occupancy. That is

infinitely more desirable than the proposed use of the Partition Act (hinted at by Mr Irving for the appellant), which would only mean more costs and an extended period of dissatisfaction for all parties.

P WILLIAMS JA

[2] I, too, have read, in draft, the judgment of Laing JA (Ag). I agree and I have nothing else to add.

LAING JA (AG)

[3] This is an appeal brought by Anika Brown ('the appellant') challenging an order, made on 30 November 2021, by Her Honour Miss Monique Harrison, judge of the Parish Court of Saint Catherine ('the learned judge') by which she refused an application to set aside a default judgment. The default judgment was granted by Her Honour Ms N Creary-Dixon on 6 November 2020, after the appellant did not appear in court on that date, which was the date fixed for the hearing of the matter. By the terms of the default judgment, the appellant was ordered to quit and deliver up premises, located at Lot 81, 7 West Greater Portmore, Saint Catherine ('the property'), to the respondent, on or before 30 November 2020.

Background/history

[4] The default judgment was a consequence of a plaint note that the respondent filed in the Saint Catherine Parish Court, on 14 January 2020, seeking to recover possession of the property. At the time he filed the plaint, the respondent was the holder of 25% interest in the property, and Marcel Manahan, then deceased, held the remaining 75%. The appellant avers that Marcel Manahan ('the deceased') was her common-law spouse and the father of her child ('the minor').

[5] After the appellant received the default judgment on 26 November 2020, she filed a notice of application in the Saint Catherine Parish Court on 27 November 2020. She sought to set aside the default judgment ('the Application') and requested permission to

defend the claim and, a stay of execution pending the hearing of the Application. The grounds of the Application in summary were that:

a. the appellant was unaware of the matter being adjourned to 6 November 2020;

b. the appellant had a real prospect of succeeding in the substantive claim because, the deceased and the respondent owned the property in equal shares, the appellant who is the mother of the deceased's child lives at the property with the child and the Administrator-General obtained a grant of administration in January of 2020 in respect of the deceased's estate; and

c. a stay of the default judgment would be most just.

[6] The appellant relied on two affidavits in support of the Application. An affidavit filed on 27 November 2020 and a supplemental affidavit filed on 6 July 2021. In providing an explanation for her absence from court on 6 November 2020, the date of the hearing when the default judgment was granted, she explained that she attended court on 18 February 2020 when the matter was first before the court, but the respondent was absent on that occasion. The matter was adjourned until 30 April 2020, but she failed to attend on that date because of the Covid-19 pandemic and she was not aware of any other court dates.

[7] She also averred that the Administrator General of Jamaica ('the Administrator-General') obtained a grant of administration of the deceased's estate on behalf of the minor in January 2020 and that the minor, who resides with her at the premises, and herself are beneficial owners thereof. She advanced the position that she was entitled to possession of the property, firstly, in her personal capacity, since she was claiming an equitable interest as the spouse of the deceased. Secondly, by virtue of her capacity as the mother of the minor, who was also entitled to be in possession of the property. She noted that section 27 of the Child Care and Protection Act imposes a duty on every person

responsible for the maintenance of a child "to provide the child with adequate food, clothing, lodging and health care appropriate to the age and neds of the child". It was not disputed that the reference to January 2020 was incorrect, and the instrument of administration was in fact obtained on 6 March 2020.

[8] The learned judge did not find any merit in the position advanced by the appellant and refused the Application. The appellant, being aggrieved, has appealed to this court by filing her notice of appeal on 10 December 2021 and an amended notice of appeal on 28 March 2023. The grounds upon which the learned judge's decision is being challenged are:

> "…
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> a) The [learned judge] erred in law in finding that the Appellant did not have an arguable defence despite the fact that pursuant to Instrument of Administration dated March 6, 2020 obtained by the Administrator General for Jamaica (Administrator of the Estate of Marcel O'Neil Manahan) 75% of the premises was vested in the Administrator General for Jamaica who had approved of the Appellant/Defendant and her daughter remaining in possession of 75% of the premises.
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> b) The [learned judge] erred in law and wrongfully exercised her discretion when she refused to set aside the default judgment irregularly obtained for the Appellant/Defendant to quit and deliver up possession of all the said premises although the Respondent/Plaintiff was the registered proprietor of only 25% of the said premises.
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> c) The [learned judge] erred in law in finding that the Appellant/Defendant did not have an arguable Defence to a claim for Recovery of Possession under Section 89 of the Judicature (Resident Magistrate) Act now Judicature (Parish Court) Act although the Administrator General for Jamaica had consented and approved of the Appellant/Defendant and her daughter being in possession of the said premises.
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> d) The [learned judge] erred in law and wrongfully exercised her discretion not to grant the Appellant's Application to Set Aside Default Judgment."

[9] On 13 December 2021, the appellant filed a notice of application for a stay of execution which was heard by a single judge of this court on 4 January 2021. The single judge granted the application and directed that the Administrator General be joined as an interested party. The hearing of the appeal was adjourned until 19 June 2023 to permit the Administrator-General to file and serve written submissions.

The proceedings on 19 June 2023

The appellant's submissions

[10] On 19 June 2023, Mr Irving commenced his submissions by relying on section 89 of the Judicature (Parish Courts) Act. This is the section pursuant to which the respondent applied for the order for recovery of possession of the property against the appellant. Mr Irving submitted that it is a complete defence for the person against whom an order for recovery of possession is sought under this section, to establish that he is in occupation with the consent of a person who is lawfully in possession. He invited the court to note that, on 6 March 2020, the Administrator-General was granted an Instrument of Administration of all the real and personal property of the deceased and argued that the appellant was in possession of the property with the consent and approval of the Administrator-General. Counsel argued that section 89 precludes the granting of an order of possession in such circumstances and on 6 November 2020 there was no basis upon which the default judgment could have been made to grant possession in favour of the respondent who was a holder of 25% interest in the property.

[11] Counsel further submitted that, on the hearing of the Application, the learned judge was advised, orally, that the Administrator-General had consented to the appellant's occupation of the property. Counsel conceded that his written submissions before the learned judge and in particular para. 6 thereof, did not make such an assertion, but said that it was advanced in his oral expansion of those submissions. He advised the court that Ms Geraldine Bradford, who was representing the Administrator-General, indicated to the learned judge on one of the dates of the hearing of the Application that the Administrator-General consented to the occupation of the property by the minor child.

Mr Irving was directed by this court to the learned judges' reasons for decision and the absence of any reference to a representative of the Administrator-General being present at the hearing of the Application or indication that she was told that such consent was given. He advised the court that Ms Bradford made extensive submissions of which the learned judge made a note, but counsel accepted that the learned judge's notes do not reflect this.

[12] Mr Irving indicated that although there was no evidence disclosed in the record of the Administrator-General's consent, he did not make an application to adduce such evidence before this court because in his view the Administrator-General did make those submissions and that was permissible because the Parish Court is not a court of pleadings. Mr Irving posited that the learned judge was aware of the status of the Administrator-General as an interested party in the estate of the deceased because that was the only basis on which the Administrator-General could have been present and permitted to make submissions.

[13] Mr Irving further submitted that, because the Administrator-General had been granted an Instrument of Administration in respect of the deceased's estate prior to the date of the default judgment, the judgment was not properly entered because the Administrator-General should have been joined as party to the claim for recovery of possession by the respondent. He posited that the respondent should have been aware of the Instrument of Administration because he would have been served with it in the usual course and being aware of the Administrator General's interest, he ought to have joined her.

The respondent's submissions

[14] Mr Pagon, for the respondent, in his response, advised the court that his notes of the default judgment proceedings indicated that the judge heard evidence from the respondent. He submitted that the issue of the permission of the Administrator-General approving the appellant and her daughter remaining in possession of the property was never argued in the court below, neither was the position advanced that the judgment in

default was irregularly obtained. What was advanced he said, was the argument that the appellant had a beneficial interest in the property.

[15] Mr Pagon challenged the assertion made by Mr Irving that the representative of the Administrator-General had indicated to the learned judge that the Administrator-General consented to the minor's occupation of the premises. Counsel maintained his position as stated at para. 10d) in his written submissions, that at the hearing of the Application, "no submissions were advanced by the Administrator-General since they were never a party to the proceedings and never applied to be joined as such until the appeal".

The preliminary orders

[16] The court noted that at para. 11 of the submissions of the Administrator-General, filed on 16 June 2023, the Administrator-General submitted that:

> "…notwithstanding the fact that the[Administrator-General] was not [a] party to the proceedings, the learned judge was at all material times aware of her interests in the matter in that no objections were proffered on behalf of the estate for the minor child and the mother to remain and occupy the subject property, of which she holds the legal interests and that which was needed for the benefit of the minor child."

There was, however, no evidence on the record to support these submissions.

[17] The court also noted that, although Mr Pagon advised the court that his notes disclosed that Her Honour Ms N Creary-Dixon heard evidence from the respondent, it was not reflected in the recital, or in the body of the order of 6 November 2020, whether Her Honour Ms N Creary-Dixon heard any evidence before granting the default judgment.

[18] Considering the undesirable situation in which counsel were purporting to give this court an account of certain events which transpired before the judges of the Parish Court, we formed the opinion that it was prudent to have evidence placed before us which could assist in the resolution of the dispute between the parties as to the procedural

history of the matter. Accordingly, we adjourned the hearing of the appeal and ordered the parties to provide evidence which was relevant to this factual dispute. The deputy registrar was also directed to request that Her Honour Ms N Creary-Dixon provide us with any notes that she may have taken of the proceedings on 6 November 2020.

[19] Pursuant to these orders, this court received the notes of evidence taken by Her Honour Ms N Creary-Dixon at the hearing of the claim for recovery of possession on 6 November 2020. The court also received an affidavit of Ms Geraldine Bradford, counsel in the Administrator-General's Department, filed on 29 June 2023, in which she stated that she was duly authorised to depone to the affidavit on behalf of the Administrator-General. Mr Irving also filed and served an affidavit in which he made assertions in respect of the Administrator-General's involvement and the submissions that he had made to the learned judge.

The continued hearing on 13 July 2023

The appellant's submissions

[20] Mr Irving, in developing his submissions, relied on the decision in the case of **Boucher v Gayle** [1960] 2 WIR 457 in which this court identified the factors which a magistrate (now referred to as a judge of the Parish Court) should consider in deciding whether to set aside a default judgment. Mr Irving submitted that these factors are as follows:

> "a) The reason for the failure of the appellant to appear when the case was heard;
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> b) Whether there had been undue delay in making the application so as to prejudice the respondent;
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> c) Whether the respondent would be prejudiced by an order for a new trial so as to render it inequitable to permit the case to be re-opened and;
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> d) Whether the appellant's case was manifestly unsupportable."

[21] Mr Irving addressed these matters *seriatim*. The gravamen of his submissions was that the learned judge improperly exercised her discretion in not setting aside the default judgment, in that she misunderstood the law in relation to the effect of the Administrator-General's consent and consequently, wrongfully applied the law to the facts.

[22] Counsel asked this court to observe the procedural history leading up to the judgment summons, from the backing of the plaint note that, the matter first came up on 18 February 2020. On that date Mr Hunter from the Administrator-General's Department was present and so was Mr E Ferguson for the appellant. The matter was fixed for mention on 30 April 2020 and instructions given for the clerk of court to contact the respondent. On 30 April 2020 there was no sitting of the court because of the Covid-19 pandemic and the matter was fixed for 30 July 2020 for mention. On 30 July 2020, Mr Pagon and the respondent were present, and the appellant was absent. The matter was fixed for the hearing of the default judgment on 6 November 2020.

[23] Mr Irving submitted that, in those circumstances, the appropriate course was for there to have been an order that a notice of adjourned hearing be served on the appellant for her to attend the hearing on 6 November 2020. That not having been done, in the context of the pandemic and the disruption occasioned thereby, the appellant had a good reason for her failure to attend on 6 November 2020. Accordingly, Mr Irving argued that the learned judge erred in her conclusion that the appellant did not have a good reason for her non-attendance.

[24] On the issue of prejudice, Mr Irving submitted that there was no prejudice to the respondent and there was no basis for the learned judge's reference to the respondent being out of possession.

[25] Mr Irving in making his submissions on the merit of the appellant's defence concentrated on the fact that the Administrator-General obtained the Instrument of Administration in respect of 75% interest in the property on 6 March 2020 and the

assertion that the appellant's possession was with the consent of the Administrator-General.

The respondent's submissions

[26] Mr Pagon, in his response, relied on the case of **Leeman Vincent v Fitzroy Bailey** [2015] JMCA Civ 24 ('**Vincent v Bailey**'), in which McDonald Bishop JA (Ag) (as she then was) cited with approval **Boucher v Gayle** and identified three factors which a magistrate should consider on an application to set aside a default judgment.

[27] Mr Pagon supported the conclusion reached by the learned judge that the reason given by the appellant for not having attended the hearing on 6 November 2020 was not satisfactory. He submitted that if the respondent was deprived of the fruits of the default judgment, that would amount to prejudice.

[28] Mr Pagon concentrated his submissions on whether the appellant's case had any merit. In this regard, he placed heavy reliance on the cases of **Rutherford Miguel Leiba v John Thompson (Administrator of the Estate of Hubert Leston Thompson , Deceased) and in his personal Capacity** (1994) 31 JLR 138 and **Eric Hamilton v Alric Brown** (unreported) Supreme Court, Jamaica, Suit No CL 2002/H054, judgment delivered 1 October 2003, in support of the proposition that in a tenancy in common, each of the co-owners has the right to occupy the whole of the property in common with the others.

[29] Mr Pagon emphasized the point that on 29 July 2021 when the Application was heard, the only evidence produced before the learned judge by the appellant was contained in her affidavit filed on 27 November 2020 and her supplemental affidavit filed on 6 July 2021. Counsel urged the court to note that absent from these affidavits is any assertion that the appellant's occupation of the premises was with the consent of the Administrator-General. Mr Pagon maintained that the Administrator-General's representative did not indicate that the Administrator-General consented to the appellant's occupation of the property and if those submissions had been made, he would

have objected. Counsel noted that the respondent was permitted to bring that claim against the appellant only, and if the Administrator-General was interested in participating she should have applied to be joined as an interested party. However, that was not done before the learned judge.

[30] Finally, counsel submitted that to the extent that the appellant's position before the learned judge was that the appellant and/or the minor had an interest in the property, that argument was flawed. That, counsel said, was because a beneficiary has no legal or equitable interest in the assets of a deceased person's estate but only has a *chose in action* in the unadministered estate which does not support a right of possession, and this position is supported by the case of **George Mobray v Andrew Joel Williams** [2012] JMCA Civ 26.

The Administrator-General's submissions

[31] Ms Lawrence submitted, on behalf of the Administrator-General, that the Administrator-General is empowered under section 12 of the Administrator-General's Act to administer the estates of persons dying intestate where there is a minor beneficiary. By virtue of section 16 of that Act, the interest of the deceased, was vested in the Administrator-General when the Instrument of Administration was issued on 6 March 2020 appointing the Administrator-General as administrator for the estate.

[32] It was submitted that the Administrator-General and the respondent are co-owners of the property, and both enjoy unity of possession. Accordingly, one co-owner cannot oust the other and "the Respondent's entitlement to occupy the subject property, cannot be considered absent the interests of the other legal title owner". It is noteworthy that the learned judge did not make mention of the Administrator-General's stance on the appellant occupying the property.

Discussion and analysis

[33] There is a prescribed ambit within which this court must operate in conducting a review of the decision of the learned judge. The test as laid down in the case of **Hadmor Productions Ltd and Others v Hamilton and Another** [1982] 1 All ER 1042 ('**Hadmor**') has been followed in numerous decisions of this court including, **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1. In order to set aside the orders of the learned judge, based on the exercise of a discretion, this court would have to find that she misunderstood the law or the evidence before her, or that the order which is the subject of this appeal is "so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it".

[34] Section 186 of the Judicature (Parish Courts) Act, ('the Act'), provides for the entry of judgment by default and the setting aside of such judgment. It is in the following terms:

> "If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Magistrate, upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended:
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> **Provided always, that the Magistrate in any such cause, at the same or any subsequent Court, may set aside any judgment so given in the absence of the defendant** and the execution thereupon, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose." (Emphasis supplied)

[35] A judge of the Parish Court has the discretion to set aside a default judgment. **Clive Roye v Joyce Ellis** [2017] JMCA Civ 30, was a case involving the exercise of a judge of the Parish Court's discretion pursuant to section 130 of the Act, but in my view,

it supports a similar test in respect of the exercise of the discretion of the learned judge pursuant to section 186 of the Act in the case under consideration. Brooks JA (as he then was) at para. [23] made the following observation:

> "The discretion is, however not absolute, as Mr Adedipe rightly contended. It is required to be exercised judicially, and therefore not capriciously or arbitrarily. It is for this reason, that this court is permitted by law, to interfere with the exercise of the discretion of the learned judge that is conferred on her by the section where it is clear that she relied on a wrong principle of law, incorrectly applied a correct principle, or failed to consider relevant factors; or if the decision, if left undisturbed, will lead to injustice."

It is in this context that I will analyse the decision of the learned judge.

[36] In **Vincent v Bailey**, McDonald-Bishop JA (Ag) (as she then was) identified the requirements that a magistrate's court should consider on an application to set aside a default judgment under section 186. These are as follows:

> i. The reason for the defendant's failure to appear when the case was listed to be heard;
>
> ii. The possible prejudice to the plaintiff as a party who had secured a regularly obtained judgment, if the judgment were to be set aside and a new trial ordered; and
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> iii The prospect of success of a defendant who was applying for a new trial.

In my view, these are the same factors identified in **Boucher v Gayle** on which Mr Irving relied, save that in **Vincent v Bailey** the prejudice considerations are amalgamated into one factor, and to that extent, counsel in their submissions were agreed on the applicable law.

[37] In analysing these principles, the question as to whether the default judgment was regularly obtained is an important consideration which requires scrutiny. In **Peter Holmes v Bryan Gray** [2019] JMCA Civ 11 ('**Holmes v Gray**'), on an application to set aside a default judgment, the court explored the importance of whether a default judgment had been properly entered and at paras. [36] and [37] and made the following observations:

> "[36] Although this appeal arose from the refusal of the learned Parish Court Judge to set aside the default judgments that had been entered, in my view, implicit in an application to set aside the [sic] default judgment, is the question as to whether the default judgments had been properly entered in the first place.
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> [37] A default judgment incorrectly entered in breach of the Act can be set aside as of right without the need to prove that the applicant had a good excuse for being absent or has applied to set aside the judgment at the earliest opportunity. For these reasons, this ground of appeal succeeds."

[38] I am of the view that this approach of examining the circumstances of the entry of the default judgment in order to determine whether it was properly entered, is apt in the instant case. Accordingly, I will commence my analysis with a review of the circumstances surrounding the entry of the default judgment.

Was the default judgment regularly obtained?

[39] In exploring the procedure for the entry of a default judgment, guidance may be obtained from decided cases. In **Tracy Taylor v Rudolph Melliphant** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil Appeal No 14/2008, judgment delivered 12 December 2008 ('**Taylor v Mellipant**'), the claimant sought an order for possession of property against the defendant. He alleged, *inter alia*, that the tenancy had been terminated by a notice to quit and that the defendant was a tenant at will. The defendant filed a special defence. On the return day when the matter came up for hearing, the Resident Magistrate (as a Parish Court Judge was then known), examined the plaintiff's registered title and proceeded to make the order for possession of the land.

One of the grounds on which the defendant appealed the decision was that the Resident Magistrate erred in law in entering judgment against the defendant/appellant without a trial, without hearing or receiving any evidence and without there being an admission on the part of the defendant.

[40] The court considered, in particular, section 184 of the Act which provides that:

> "184. On the day in that behalf named in the summons, the plaintiff shall appear, and thereupon the defendant shall be required to answer by stating shortly his defence to such plaint; and on answer being so made in Court, the Magistrate shall proceed in a summary way to try the cause, and shall give judgment without further pleading, or formal joinder of issue."

[41] Harrison JA opined that the words "in a summary way to try the cause", referred to section 184 of the Act, must be construed to mean that the magistrate must carry out an examination upon oath of witnesses as envisaged by section 183 of the Act. He reinforced the point that there needs to be a hearing except where one is expressly excluded, observed that although a magistrate is authorised by section 187 of the Act to enter judgment for a plaintiff when a defendant attends the hearing and admits the claim, if the admission does not relate to the entire claim, judgment cannot be entered upon such admission and the magistrate must "proceed in a summary way to try the cause" before pronouncing judgment.

[42] **Taylor v Melliphant** confirms the need for the Parish Court Judge to consider a plaint in a summary way before granting default judgment. There is no mention in the reasons of the learned judge that she considered the circumstances surrounding the grant of the default judgment in order to ascertain whether it had been regularly obtained. However, that is no longer material because this court has now been provided with the notes of evidence of Her Honour Ms N Creary-Dixon which confirms that she did observe the required process of trying the case in a summary way before entering the default judgment. In these circumstances, I am of the opinion that the appellant is not entitled

to have the default judgment set aside as of right, without the need to satisfy the requirements identified in **Vincent v Bailey**.

The reason for the failure to attend

[43] The learned judge referred to **Vincent v Bailey** and performed an evaluation of the evidence against the factors which were identified in that case. She found that the reason proffered by the appellant that her absence was due to her being unaware of "another" court date was "not satisfactory", because the appellant could have consulted the court's office or the Court Administration Division in order to obtain the new date and the respondent "clearly did what was necessary to obtain the date and was present on November 6, 2021".

[44] The appellant was present on 18 February 2020, the first date that the plaint was mentioned, and the respondent was absent on that date. There is no evidence of how he became aware of the 30 July 2020, which was the next court date following the non-sitting of the court on 30 April 2020. Mr Irving, hypothesised in his written submissions that "It appears that the court office/clerk of court had a telephone number for the plaintiff and contacted him about the new date, but no such courtesy was provided to the Appellant". I found that this statement by counsel was based on pure conjecture without any evidential basis, and I did not place any weight on it. However, by attending on 30 July 2020, the respondent became aware that the matter was fixed for default judgment on 6 November 2020, and it is in this context that one has to assess the appellant's explanation for her absence on 6 November 2020.

[45] The Covid-19 pandemic created challenges for the administration of justice on an unprecedented scale. However, at its core, the issue raised in this case is not specific to the circumstances resulting from the Covid-19 pandemic, but is more general and relates to whether a litigant in the Parish Court (and in particular a defendant as in this case) has a duty to ascertain the date to which his matter has been adjourned, where the court did not sit on the previously scheduled date as a result of an unusual disruption. It is of course prudent for a litigant in such a case to take appropriate steps to obtain the

adjourned date or any further date. However, I have reservations in concluding that there is a duty to do so, and that as a consequence of not having done so, the litigant would not be able to rely on his ignorance of the new court date as providing a good reason for his non-attendance on an adjourned hearing. For this reason, I disagree with the conclusion of the learned judge that the appellant did not provide a good reason for her non-attendance on 6 November 2020; when the default judgment was entered. I have noted, however, that the learned judge expressly acknowledged that her finding in this regard was not determinative of the application.

Delay and prejudice

[46] The learned judge found that there was no undue delay in filing the Application and that conclusion was manifestly reasonable.

[47] Regarding the matter of prejudice, the learned judge observed that the respondent was not in possession of the property and would remain out of possession if the Application was granted. She stated that any prejudice to the respondent if the judgment was set aside and he succeeded at trial could be compensated with costs. However, the learned judge also acknowledged that the judgment is something of value of which the respondent should not be deprived without good reason. It is, therefore, not clear whether the learned judge concluded that this deprivation of the judgment was sufficient prejudice which rendered it "inequitable to permit the case to be re-opened". On the facts of the case, had the learned judge reached such a conclusion, it would have been a reasonable one, because (contrary to her conclusion) if the default judgment were set aside, a favourable cost order would not provide compensation to the respondent for mesne profits consequential on losing the benefit of a judgment for possession of the property which is likely to be more than the value of any costs order, due to the limitation of the scope and quantification of cost orders.

Merit

[48] The learned judge performed a detailed analysis of the issue of whether the defence of the appellant had merit and concluded that based on the authorities by which she deemed herself bound, the appellant's defence is not an arguable one. The reasons were that the appellant was the sole subject of the order for possession and her responsibility to provide lodging for her child under The Child Care and Protection Act did not assist her case. The learned judge concluded that the appellant only had a mere expectation of an order under The Property (Rights of Spouses) Act, that she was the spouse of the deceased, because no declaration in her favour had yet been obtained.

[49] The learned judge opined that based on the definition of spouse under The Intestates' Estates and Property Charges Act and the table of distribution it was "likely that the [appellant] would be regarded as a beneficiary in the deceased's estate and entitled to a share in the residuary estate". However, the learned judge noted that "[t]he authorities indicate that a beneficiary's chose in action does not rise to the level of an equitable interest and is not sufficient to defeat a proprietor's registered title and overcome such a proprietor's action for recovery possession".

[50] Where a tenancy in common exists, each co-owner holds a quantified proportion of the legal and or beneficial interest in the property, (in this case 75:25), which may be disposed of by, a transfer *inter vivos*, will, or on an intestacy. However, that quantified proportion is undivided and cannot be interpreted to mean a specific area of the property which could be deemed to correspond to the quantified proportion. As Wolfe JA (as he then was) explained in **Leiba v Thompson** at page 187 C, "The term 'undivided' is self-explanatory. What it means is that the interest of the parties has not been allocated in terms of acreage. The interest is an undivided share in the entire estate". The learned judge explained that as co-owner a party could dispose of an "undivided share", but he has no interest in the land which can be quantified, so as to dispose of a specific portion of the relevant property without the consent of the other co-owner.

[51] Where the interest of a deceased tenant in common is subject to transfer on an intestacy, such interest is not vested immediately on the death of the deceased co-owner. In **Mobray v Williams**, this court reinforced the applicability of the principle that a beneficiary's interest and right to share in the property of a deceased person, only arises after the residue has been ascertained. Harris JA at para. [31] of the judgment adopted the proposition as stated by Viscount Findlay in, **Dr Barnado's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts** [1921] 2 AC 1, where he said at page 11:

> "The legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the property properly administered and applied for his benefit when the administration is complete."

[52] It is uncontested that the estate of the deceased had not been administered by the 6 November 2021 date of the Application. Accordingly, there was no determination as to whether there was a residue, and consequently, there was no interest which had been identified or which had been vested in the appellant. The submissions of Mr Irving before the learned judge that the appellant had an interest in the property by virtue of her being a spouse of the deceased were therefore unsustainable.

Was the position of the Administrator-General material?

[53] The respondent's action for recovery of possession was brought under section 89 of the Judicature (Parish Court) Act, which provides for claims by owners of land against persons in possession without any title or right to possession. It is sometimes referred to as the 'squatters' section (see **Francis v Allen** (1957) 7 JLR 100). The claim for recovery of possession was against the appellant only, and for the reasons indicated above, the appellant did not have an interest in the property on the day of the Application.

[54] An important feature of a tenancy in common is unity of possession, the effect of which is that the persons who own the property as tenants in common have an equal right to participate in the enjoyment of the property. The practical operation of this

principle often manifests itself in problems such as those which arose in the case of **Bull v Bull** [1955] 1 All ER 253. In that case, the plaintiff and his mother, the defendant, purchased a property to which the plaintiff contributed a greater share of the purchase price and the property was conveyed in his name, but with the defendant having an equitable interest proportionate to her contribution. They lived together in the house until the plaintiff got married and brought a claim for possession of the rooms occupied by the defendant. The English Court of Appeal found that the plaintiff was the legal owner of the house, but he and his mother were equitable tenants in common entitled in equity to an undivided share in the house in proportion to their respective contributions. Denning LJ made the following observation at page 255:

> "The rights of equitable tenants in common as between themselves have never, so far as I know, been defined; but there is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and to the use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share the injured party can bring an action for an account. If one of them should go so far as to oust the other he is guilty of a trespass (see *Jacobs v Seward (1)* [27 LT 185]). Such being the rights of legal tenants in common, I think that the rights of equitable owners in common are the same, save only for such differences as are necessarily consequent on the interest being equitable and not legal. It is well known that equity follows the law; and it does so in these cases about tenants in common as in others."

[55] In the case at bar, on the grant of the Instrument of Administration to the Administrator-General on 6 March 2020, the interest of the deceased became vested in the Administrator-General. Section 16 of the Administrator-General's Act provides as follows:

> "16. On the grant of letters of administration to the Administrator-General, the property of the deceased shall vest in the Administrator-general, and be assets in his hands for the payment of the debts and liabilities of the deceased, in the same way, and to the same extent in all respects, as such

> property would have vested in and been assets in the hands of any other administrator, if this Act had not been passed …"

[56] The Administrator-General, therefore, became vested with the deceased's 75 % legal interest and was entitled to the possession of the property, and to the use and enjoyment of it in a proper manner along with the respondent. Concomitant with this right, was the right to give permission to the minor to share in the occupation of the property, since it is the protection of the interest of this minor which provides the rationale for the duty imposed on the Administrator-General pursuant to section 12 of the Intestates' Estates and Property Charges Act. A natural and practical extension of any permission to the minor to occupy the property, would be permission to the appellant as the minor's primary caregiver to also occupy the property. Such permission, if given to the appellant, would provide a defence to an action pursuant to section 89 of the Judicature (Parish Courts) Act, because the appellant would not be deemed a squatter in such circumstances.

[57] The proper course which should have been adopted by the Administrator-General in this case if she was consenting to the appellant's occupation was to have applied to the learned judge to be joined to the claim as a party and to give evidence before the learned judge that the appellant had indeed been granted permission to occupy the property. In such circumstances, the appellant would not be a squatter, and this would have easily disposed of the claim under section 89 of the Judicature (Parish Courts) Act.

Was any evidence presented to the learned judge that the Administrator-General gave permission for the minor and/or the appellant to occupy the property?

[58] I noted Mr Irving's concession that his written submissions before the learned judge did not expressly assert that a ground of the defence was that the occupation by the appellant was with the permission of the Administrator-General. Before this court, counsel admitted that there was no evidence before the learned judge in this regard and this was consistent with the position advanced by Mr Pagon. Mr Irving changed tack and instead sought to argue that the consent of the Administrator-General was communicated

to the learned judge by counsel who was watching proceedings on behalf of the Administrator-General. In his affidavit filed 30 June 2023, Mr Irving averred as follows:

> "4. That the application to set aside default judgment was next set down for hearing on July 29,2021. The Parish Court Judge at this hearing was Her Honour Miss Monique Harrison and the Administrator General stated their position as to whether the Appellant should remain in possession of the relevant premises. There was no objection from the learned Parish Judge or counsel for the plaintiff to the representative of the Administrator General Department stating their position.
>
> 5. That I submitted at this hearing inter alia that the Administrator General consented to and approved of the minor child remaining in possession of the premises. I further submitted that the Defendant/Appellant had custody, care and control of the minor child and that the Administrator General had no objection to the Defendant/Appellant staying in possession of 75% of the premises in her capacity as mother of the child pending the administration of the estate. The Defendant/Appellant was therefore lawfully in possession of 75% of the premises. I relied on section 28(1) of the Child Care and Protection Act."

[59] In, my opinion, these averments in Mr Irving's affidavit are not sufficient to establish that there was any express communication from counsel representing the Administrator-General that the Administrator-General gave her consent to the appellant's occupation of the property.

[60] The affidavit of Ms Bradford, filed 29 June 2023, is comprised mainly of statements of information and belief derived from her conversation with Mr Allan Hunter who attended the Parish Court in relation to this matter on behalf of the Administrator-General. Rule 30.3(2) of the Supreme Court of Jamaica Civil Procedure Rules (2002) ('CPR') which, by virtue of rule 1.1(10) of the Jamaica Court of Appeal Rules ('CAR') is applicable to this court, provides that an affidavit may contain statements of information and belief where provided for by the CPR and where the affidavit is for use in an application for summary judgment or any procedural or interlocutory application. This

appeal does not fall within those permissible categories, especially when one considers that the purpose of this court requesting evidence from the parties was to resolve the dispute of fact as to whether the learned judge was advised by the representative of the Administrator-General that the Administrator-General gave her consent for the occupation of the property by the appellant.

[61] Even if one were to accept that statements of information and belief are admissible for purposes of this appeal, there is no positive assertion by Ms Bradford that the learned judge was expressly advised of the Administrator-General's consent to the appellant's possession. Para. 10 of Ms Bradford's affidavit, even with the most liberal interpretation, does not make that assertion and is in the following terms:

> "10. That I was also informed by Mr. Hunter and I verily believe that it was indicated to the Court that as the personal representative of the estate, the Administrator-General for Jamaica's core function was to protect the interest(s) of the minor beneficiary who resided at the property and further that the Department's position was that the minor child should not be disenfranchised by the proceedings. I was also informed that Mr. Hunter indicated to the Court that, in the circumstances, it would be best to keep the child at the only place she calls home, where she was in the care of her mother, Ms Anika Brown, the Appellant/Defendant."

[62] Since there was no cogent evidence before the learned judge that the Administrator-General consented to the appellant's occupation of the property, the appellant did not demonstrate to the learned judge that she had a defence with a real prospect of success. This failure would have provided a sufficient ground for the learned judge to refuse the Application. In the circumstances, the exercise of the learned judge's discretion in refusing to set aside the default judgment cannot be faulted.

[63] However, whereas there was no evidence to this effect before the learned judge, Ms Lawrence has clearly and unambiguously stated before this court that the Administrator-General has consented to the appellant's occupation of the property. In **Associated Gospel Assemblies (by Power of Attorney from Jeremy Karram,**

Executor for the Estate of Albert Teimer Karram, deceased) v Jamaica Co-Operative Credit Union League Limited and another [2022] JMCA Civ 36 this court again confirmed the position held in numerous cases following **Ladd v Marshall** [1954] 1 WLR 1489 that it will exercise its discretion to receive fresh evidence only if the following conditions are satisfied:

> "(1) the evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial;
>
> (2) the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and
>
> (3) although the evidence itself need not be incontrovertible, it must be such as is presumably to be believed or apparently credible."

[64] However, the court made the following observation at para. [30]:

> "Although fresh evidence is admissible at common law and not by virtue of the CAR, there is authority from this court which suggests that the court is not bound in a straightjacket to apply the **Ladd v Marshall** principles, and particularly so, in interlocutory proceedings. For instance, in **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26, the court opined that the inclusion of new evidence is a matter for the discretion of the court. The primary consideration, according to the court, is that justice is done."

[65] In the case before us, although this information relating to the Administrator-General's consent does not meet the fresh evidence criteria as set out in **Ladd v Marshall,** it is a credible representation of the current position of the Administrator-General and is relevant to whether the default judgment should stand, and the appellant prevented from occupying the property on the basis that she is a trespasser. Consequently, counsel's representation to the court of her client's position of consent to the appellant's occupation is relevant to this court's primary consideration to see that justice is done, especially where the interest of a minor is involved. This, in my view,

provides a sufficient basis for the court to accept that the Administrator-General is consenting to the appellant's occupation of the property and on that basis, conclude that the appeal should be allowed, with consequential orders.

[66] It is noted that in **Bull v Bull** at page 255, Denning LJ considered what was to happen where the two tenants in common disagreed on the physical occupation of the property (as in this case) and the learned judge concluded that the house must then be sold, and the proceeds divided between them. That seems to be a prudent solution in this case, or alternatively, one party can purchase the interest of the other subject to a valuation. This, however, is a matter for the parties and their counsel to explore.

Costs

[67] Mr Irving submitted that the appellant being the successful party should obtain costs of the appeal, or in the alterative, that there should be no order as to costs. Mr Pagon submitted where a default judgment is set aside, costs should be awarded in favour of the party who had the benefit of the default judgment, in this case the respondent. There is merit in the position advanced by Mr Pagon. The usual practice is that the defendant to a claim will be liable for the costs of an application to set aside a regularly obtained default judgment. The court always has a wide discretion in matters of cost and will also consider, *inter alia*, the conduct of the parties. I am of the opinion that the appellant, who was the defendant in the court below, should be liable for the costs of the appeal by virtue of which she has managed to have the default judgment set aside. I am fortified in this conclusion having taken into account the conduct of the appellant, in that her success is based on information in respect of the Administrator-General's consent which could easily have been adduced in the court below. The costs awarded should be in the sum of $50,000.00, which is reasonable in the circumstances.

Conclusion and disposition

[68] For the reason stated herein, I am of the opinion that the following orders should be made:

1. The appeal is allowed. The decision of Her Honour Miss Monique Harrison made 30 November 2020 is set aside.

2. The default judgment granted by Her Honour Ms N Creary-Dixon on 6 November 2020 is also set aside.

3. The matter is remitted to the Parish Court of St Catherine for mention on the first return day, hereafter, in order for a trial date to be fixed.

4. Costs of the appeal to the respondent in the sum of $50,000.00.

BROOKS P

ORDER

1. The appeal is allowed. The decision of Her Honour Miss Monique Harrison made 30 November 2020 is set aside.

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