

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SVGHCV1995/0148

BETWEEN:

MABEL CAMBRIDGE

(By her duly appointed Attorney-on-Record Alinda Harry)

-AND-

ALINDA HARRY

CLAIMANTS

- AND -

R. THEODORE L. V. BROWNE

-AND-

LAURA BROWNE

DEFENDANTS

Appearances: Mr. Samuel E. Commissiong for the Claimants, Mr Parnel R. Campbell Q.C. and Mr Jonathan Lewis for the Defendants.

2015: Mar. 19 & 26

Decision

BACKGROUND

[1] **Henry, J. (Ag.):** The claim in this matter was commenced almost 20 years ago.ⁱ In it, Mabel Cambridge deceasedⁱⁱ and Alinda Harry are seeking against Theodore L. V. Browne (an attorney) and his wife, Laura Browne damages for deceit and other reliefs. Ms Cambridge and Ms Harry claim that Mr Browne having “successfully” represented Ms Cambridgeⁱⁱⁱ in recovering land from a third party, influenced her to sell a portion of her property to pay his legal fees. They

also assert that the reported success in the suit was short-lived as the decision was set aside having been obtained *ex parte*. They allege further that Mr Browne acting as their agent arranged for sale of the property to his mother and soon after purchased it from her and subsequently transferred it to his wife and himself. Mrs Browne is sued as joint owner of the subject land.

- [2] Based on those assertions, they seek a declaration that Mr Browne in breach of his fiduciary duty as their agent for sale was the *de facto* purchaser when he arranged the sale to his mother. Ms Cambridge has since died and no order has been made appointing anyone to represent her estate in these proceedings although in 2001 Alinda Harry applied for an order to that effect. The application was never heard. This matter was set down for trial on two occasions prior to March 19, 2015^{iv} but had to be aborted due to counsel's illness and failure to locate the file respectively. In the absence of the file, the court fixed a new trial date in anticipation of the court office locating it by that date. It was located just in time for the March 19 trial date, both counsel during the intervening period having assisted with provision of trial bundles and other relevant documentation. Mr and Mrs Browne filed written submissions^v in which they raise the issue of Ms Harry's capacity to seek the reliefs, presumably in respect of Mabel Cambridge's estate. Ms Harry filed written submissions the day before the hearing.

ISSUE

- [3] The sole issue to be decided is whether a new party should be substituted for Mabel Cambridge.

ANALYSIS

Should a new party be substituted to represent Mabel Cambridge?

- [4] The court is vested with very wide discretion to add a new party to proceedings, where the existing party's interest or liability has passed to the new party.^{vi} The court may exercise this discretion if it can more effectively resolve the issues by substituting a new party or where the existing party's interest or liability has passed to the new party.^{vii} It is trite law that a person's interests and liabilities pass to her personal representative when she dies. It is accepted by the parties that Mabel Cambridge's interests and liabilities have passed to her personal representative. This is accordingly an appropriate case in which the court may appoint a new party to replace Ms Cambridge.
- [5] The assertions Mabel Cambridge has made against Mr and Mrs Browne in this claim, if proved on a balance of probabilities could result in her estate being awarded one or more of the reliefs claimed. Her claim is founded on the common law action of deceit and undue influence as outlined in the statement of claim and particularized in Alinda Harry's witness statement. The issues raised are serious ones which Mabel Cambridge evinced an intention to pursue by filing the claim. Mr and Mrs Browne filed a defence in which they deny the allegation of deceit.^{viii} Mabel Cambridge's claim raises a genuine cause of action against the Brownes which constitutes a good and arguable case. Unless an order is made substituting a new party to represent her estate, her claim will have to be dismissed for want of prosecution and the court would not be in a position to resolve all the issues in the claim as it now stands. Such an outcome would be unjust and contrary to the overriding objective as it would deprive Ms Cambridge's estate the opportunity to ventilate and have those issues resolved.
- [6] The court is also empowered with or without an application, to appoint someone to represent a deceased person's estate if it appears that the deceased was interested in the proceedings but has no personal representative.^{ix} The appointee must be someone who has no adverse interest to the estate and can fairly and

competently conduct the proceedings.^x It appears from the pleadings in the instant case that Mabel Cambridge deceased has no legal representative, the executor of her will having passed away.^{xi} There is no evidence that the executor has been replaced. In those circumstances, the rules of court prohibit her estate from taking any step in the proceedings apart from applying to have a representative appointed, until the court has appointed someone to represent her estate.^{xii} Even more significantly, Mr or Mrs Browne may apply to have her claim struck out if no application is made for the appointment of a substitute claimant in her place.^{xiii} They have not made such an application nor has an application been made by Ms Cambridge's personal representative for a substitute claimant to be appointed.

[7] The fact that an order substituting a claimant to represent Ms Cambridge's estate has not been made is not attributable to any negligence or default of her estate's, the executor of her will having died after her own demise without administering her estate it seems. In fact, an application was filed, albeit not by her estate, over 13 years ago. It is not clear why it was never disposed of, but that apparent oversight by the court should not prevent her estate from pursuing this claim and having the issues ventilated. Such an order would not prejudice Mr and Mrs Browne's case as they would have had notice that this matter was presented to the court for consideration since 2001 and their defence is before the court. In all the circumstances, this is a case where it is just to make an order substituting someone to represent Mabel Cambridge's estate.

[8] On her death, Ms Cambridge's interest and liability passed to her executor who has since died. No other personal representative has been appointed. In the absence of such a representative, the claim by Mabel Cambridge deceased will fail. The pleadings disclose a good and arguable case as between Mabel Cambridge's estate and Mr Browne in relation to undue influence and the common law tort of deceit and marginally between Mabel Cambridge's estate and Mrs Browne. The court may make an order appointing a representative of a decedent's estate of its own volition or pursuant to an application by an existing party or a

person who wishes to be substituted.^{xiv} In both instances, the court must exercise its discretion judicially and in doing so must consider the overriding objective^{xv} which is to deal with cases justly.

[9] Mindful of the factual matrix and all of these factors, I have concluded that the interests of justice require that this is a fitting case in which the court of its own volition should appoint a representative to represent Mabel Cambridge's estate pursuant to Civil Procedure Rules 2000 ("CPR") Parts 19.3 (1), 19.2 (5) (a), 21.7 (1) and (3). I so hold.

[10] Alinda Harry's claim against Mr and Mrs Browne arise of the same facts as Ms Cambridge's claim. In fact they are seeking identical remedies. Ms Harry's case is not adverse to Ms Cambridge's and they appear compatible. In addition, the record discloses that Ms Harry represented Ms Cambridge as her attorney on record which suggests that Ms Cambridge trusted her to represent her interests. There is nothing in the record from which the court can infer that Ms Harry is incapable or disinclined to represent Ms Cambridge's estate in the instant claim. There is no information before the court indicating whether a personal representative has been appointed to represent the estate of Ms Cambridge's executor. Further the court does not know whether such person would be willing and competent or disqualified from being so substituted. The court is accordingly inclined to appoint Ms Alinda Harry to represent Ms Cambridge's estate but notes that her written consent is required.^{xvi}

ORDER

[11] It is therefore ordered as follows:

1. Alinda Harry be and is hereby substituted in these proceedings as personal representative for the claimant Mabel Cambridge, pursuant to Civil Procedure

Rules, 2000 Parts 19.3 (1), 19.2 (5) (a), 21.7 (1) and (3), on condition that she files a written consent to this appointment, at the court office on or before April 9, 2015.

2. This matter is adjourned to April 13, 2015 for the court to give such directions as may be necessary.

3. No order as to costs.

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Esco L. Henry
HIGH COURT JUDGE (Ag.)

ⁱ On April 20th, 1995 by specially endorsed Writ of Summons under the pre-2000 rules of court.

ⁱⁱ Through Alinda Harry, her duly appointed Attorney on record.

ⁱⁱⁱ In 1992

^{iv} March 3, 2014 and February 17, 2015.

^v On March 13, 2015, pursuant to an order made on February 17, 2015 (at the adjourned hearing), for parties to file on or before March 12, 2015, a single statement outlining the factual and legal matters in issue, the chronology of relevant events, legal contentions by the respective parties in respect of each issue with applicable legal authorities in respect of each.

^{vi} CPR 19.2 (5) and (7) 19.3 (1) (2), (3) and (4) which provide respectively:

“19.2 (5) The court may order a new party to be substituted for an existing one if the –

- (a) court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or
- (b) existing party’s interest or liability has passed to the new party.

(7) The court may not add a party (except by substitution) after the case management conference on application of an existing party unless that party can satisfy the court that the addition is necessary because some change in circumstances which became known after the case management conference.”

“19.3 (1) The court may add, substitute or remove a party on or without an application.

(2) An application for permission to add, substitute or remove a party may be made by –

- (a) an existing party; or
- (b) a person who wishes to become a party.

(3) An application for an order under rule 19.2 (5) (substitution of new party where existing party’s interest or liability has passed) may be made without notice but must be supported by evidence on affidavit.

(4) A person may not be added or substituted as a claimant unless that person’s written consent is filed with the court office.”

^{vii} Ibid. at CPR 19.2 (5) (a) and (b).

^{viii} On December 1st, 2005.

^{ix} CPR 21.7 (1), (2) and (3) which provide:

“21.7 (1) If in any proceedings it appears that a deceased person was interested in the proceedings but the deceased person has no personal representatives, the court may

make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.

(2) A person may be appointed as a representative if that person –

(a) can fairly and competently conduct proceedings on behalf of the estate; and

(b) has no interest adverse to that of the estate;

of the deceased person.

(3) The court may make such an order on or without an application.”

^x Ibid. at sub-rules (a) and (b).

^{xi} Paragraph 7 of Alinda Harry's Witness statement filed on April 14, 2005.

^{xii} CPR 21.7 (4) which states:

“(4) Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.”

^{xiii} CPR 21.9 (1) which provides:

“21.9 (1) If a claimant dies and the claimant's personal representatives do not apply for an order under rule 19.3 to be substituted as claimants, the defendant may apply for the claim to be struck out.”

^{xiv} Ibid. at Rules 19.3 (1) and 21.7 (3).

^{xv} See **Fok Hei Yu and John Howard Batchelor v Basab Inc. et al BVIHCMAP2014/0010 per Dame Janice M. Pereira CJ. at para. [11]** where commenting on the court's exercise of its discretion under Civil Procedure Rules 2000, Part 19.3, she said:

“While rule 19.3 states that the court may add, substitute or remove a party and sets out, among other things, the procedure for so doing, and while it is also true that the discretion given to the court is in the widest terms, it is also true and trite law that a discretion must be exercised judicially. In other words there must be a basis warranting the exercise of the discretion.

See also CPR 1.2 which states:

“1.2 The court must give effect to the overriding objective when it –

(a) exercises any discretion given to it by the Rules; or

(b) interprets any rule.”

^{xvi} Ibid. at CPR19.3 (4).