

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2024/CLE/gen/00616

IN THE MATTER OF Property comprised in an Indenture of Mortgage dated the 21st day of November A.D., 2014 between **DAVID THOMPSON** and **TANIQUE INEZ THOMPSON** and **SCOTIABANK (BAHAMAS) LIMITED** and of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 12234 at pages 314 to 331.

AND IN THE MATTER OF Property comprised in a Further Charge dated 21st day of September A.D., 2015 between **DAVID THOMPSON** and **TANIQUE INEZ THOMPSON** and **SCOTIABANK (BAHAMAS) LIMITED** and of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 12412 at pages 75 to 79.

IN THE MATTER of the Conveyancing and Law of Property Act, Chapter 138 of the Statute Laws of The Bahamas

AND IN THE MATTER of Part 62, Section I of the Civil Procedure Rules.

B E T W E E N

SCOTIABANK (BAHAMAS) LIMITED

Claimant

AND

THE ESTATE OF DAVID THOMPSON

First Defendant

AND

TANIQUE THOMPSON

Second Defendant

Before: Assistant Registrar Jonathan Deal

Appearances: Eugenia Butler for the Claimant

Wilver Deleveaux for the Second Defendant

Hearing dates: 14 January 2025, 7 February 2025, 14 February 2025 (Claimant's supplemental written submissions)

RULING

ASSISTANT REGISTRAR DEAL

[1.] This is a ruling on an application by the Claimant by Notice of Application filed on 23 October 2024 for an Order appointing the Second Defendant, the deceased's widow, the personal representative of the estate of the late David Thompson pursuant to **Part 21.7** of the **Supreme Court Civil Procedure Rules, 2022** (the "CPR") for the purpose of this mortgage claim. The application is supported by affidavits filed on 23 October 2024 and 30 January 2025. The Second Defendant filed evidence in opposition to the application on 14 January 2025.

Background

[2.] The Claimant, a mortgagee, seeks to recover the principal balance of \$160,150, interest outstanding in the sum of \$19,338.16, add-on charges in the sum of \$15,254.95, interest on the add-on charges in the sum of \$820.75, and late fees in the sum of \$90 from the Thompsons. The Thompsons' indebtedness allegedly arises from loans made by the Claimant in 2014 and 2015 which were purportedly refinanced, latterly in 2021. The Claimant seeks also to recover possession Lot 473 in the Elizabeth Estates East Subdivision in order to exercise its power of sale.

[3.] Notwithstanding that he passed away in August 2020, no grant of probate or administration of any kind has been extracted with respect to David Thompson's estate. A search of the Cause List at the Probate Registry in August 2024 found that no grant of representation had been issued. The Second Defendant is, pursuant to **Rule 9(a)** of the **Probate and Administration of Estates Rules** (the "PAER"), the person entitled first in priority to apply for a grant of administration. However, by her own admission, she does not wish to be burdened with the estate.

[4.] The Second Defendant is involved in these proceedings personally, as she is a party to the Mortgage and Further Charge. She has filed an Amended Defence disputing the allegations made by the Claimant with respect to the Thompsons' indebtedness. She wishes to have the Claimant account for all payment received respecting the "alleged Mortgage" and Further Charge. She also makes complaint that the Claimant refused or neglected to allow the Thompsons to exercise their right of redemption and invokes **Section 17** of the **Homeowners Protection Act** in an effort to have the "alleged Mortgage" transferred.

[5.] David Thompsons's estate has been sued as the First Defendant, but there is no representative of the estate in this cause. The Second Defendant asserts in her Amended Defence, curiously filed on behalf of "the Defendants", that the Claimant's Statement of Claim "can only proceed against the appointed court representative". The Claimant accordingly seeks the appointment of the Second Defendant to represent David Thompson's estate under **Part 21.7** for the purpose of enabling it to obtain an order for vacant possession. The Second Defendant objects.

The Claimant's Submissions

[6.] Counsel for the Claimant submitted that **Part 21.7** empowers the Court to make an order appointing a person to represent a deceased's estate in circumstances where they have no personal representative and the Court can make an order under the provision of its own motion. Counsel submitted that a formal grant of representation is not a prerequisite to the Second Defendant being appointed David Thompson's personal representative and the Court can dispense with the need for a grant of probate or administration, citing **Majorie Knox v Eric Deane** BB 2019 HC 5.

[7.] Mrs. Butler submitted that, when appointing a personal representative under **Part 21.7**, the Court must be satisfied that the representative has no interest that is adverse to the estate concerned and that the representative is competent and can act fairly. Mrs. Butler submitted that, in this case, there is no compelling evidence why the Second Defendant should not be appointed personal representative. She has not presented a claim adverse to the estate and she is sufficiently competent to act in the capacity as personal representative.

[8.] Counsel for the Claimant submitted that the overriding objective of dealing with cases justly and at proportionate cost would be facilitated by appointing the Second Defendant as she is jointly and severally liable pursuant to Clause 6 of the Thompsons' Indenture of Mortgage dated 21 November 2014. The Claimant could therefore, on Counsel's submission, obtain its order for vacant possession against the Second Defendant even if David Thompson or his estate were not a party to the proceedings.

[9.] Mrs. Butler submitted that the Second Defendant is only seeking to avoid being appointed personal representative to protract the proceedings and remain in the mortgaged property, which is unconscionable, and that she has shown no effort to satisfy the Thompsons' debt. Mrs. Butler submitted that the Second Defendant is David Thompson's next of kin and is the most likely person to be appointed the personal representative of his estate, should his estate be probated. Mrs. Butler did not assert that the Second Defendant had already constituted herself an executor de son tort.

[10.] Counsel for the Claimant submitted in response to the Second Defendant's suggestion that the Claimant adopted the wrong procedure that **Section 11** of the **Probate and Administration of Estates Act** ("PAEA") and **Part 21.7** are "synonymous". **Part 21.7** of the CPR empowers the Court to make an order appointing a person to represent a deceased person's estate in circumstances where the deceased person has no personal representative at the time of the appointment.

[11.] Mrs. Butler addressed three cases the Court raised with counsel at the hearing of the application on 7 February 2025 in written submissions dated 14 February 2025, to wit, **Firth Finance and General Limited v McNarry** [1987] N.I. 125, **Nathalie Parks & Anr v BAF Financial Insurance (Bahamas) Ltd** 2017/CLE/gen/1424 ((9 May 2024) and **Roger Mervin Springer v Administrator Ad Litem of the Estate of Alfred Kinsale) v Delma Henry & Others** Claim No. CV2022-03693 (5 July 2023). Mrs. Butler did not attempt to distinguish the authorities.

[12.] In her written submissions dated 14 February 2025, Counsel for the Claimant invited the Court to:

- (i) appoint David Thompson's son, David Thompson Jr., or the Claimant's nominee, Chante Hanna, a Field Adjuster employed by the Claimant, if the Court concludes it cannot appoint the Second Defendant under **Part 21.7** because she refuses to act;
- (ii) permit the Claimant to amend its fixed date claim form, if it concludes that **Part 21.7** is only appropriate where there were already subsisting proceedings at the time of the deceased's death and the correct procedure was for a preliminary application to be made to appoint an administrator *ad litem*;

- (iii) make an Order for Vacant Possession against the Second Defendant on account of the Second Defendant being named as a Mortgagor in the Thompsons' Indenture of the Mortgage and the Claimant having authority to seek recourse from the Thompsons jointly or severally (**AIB Group (UK) plc v Martin** [2002] 1 All ER (Comm) 209); and
- (iv) award the Claimant costs for the proceedings.

The Second Defendant's Submissions

[13.] Counsel for the Second Defendant confirmed from the bar table that David Thompson's estate had not been probated and said (again from the bar table) that this was because there was "nothing in the estate to be probated". Counsel confirmed that the Second Defendant did not wish to be appointed David Thompson's personal representative but she had no objection to the Claimant appointing someone else. Her position was, in short, that the Claimant can appoint anyone they wish, but they must find someone else.

[14.] Mr. Deleveaux submitted that the Claimant had a duty to seek letters of administration with respect to David Thompson's estate through **Section 11** of the **PAEA** and not **Part 21.7**. Mr. Deleveaux submitted, somewhat inconsistently, that the **CPR** "merely restates" **Section 11** of the **PAEA**. Relying on **Section 45** of the **PAEA**, Mr. Deleveaux submitted that the proper party to this action on behalf of David Thompson is his personal representative. Mr. Deleveaux submitted that the Claimant could only request "leave to commence letters of administration" at this stage.

[15.] Counsel for the Second Defendant submitted that the Claimant could not sever the proceedings to proceed only against the Second Defendant because the Claimant had brought the proceedings "collectively" and "matters should proceed collectively where there are joint proceedings". Counsel rejected the suggestion that the Second Defendant was trying to delay to remain in the mortgaged property. Counsel mentioned that there is a third party who wishes to take over the Mortgage but did not attempt to substantiate this with details or evidence.

[16.] Mr. Deleveaux submitted that the Claimant's application must fail as there is no authority by which the Second Defendant can be compelled to act as personal representative and because the application was made "pursuant to wrong law". Mr. Deleveaux sought the Second Defendant's costs.

Discussion and analysis

[17.] Pursuant to **Part 11.14** of the **CPR**, an applicant is, in the absence of permission, "bound by the reliefs set out in her application": **Claudette Joseph v Dr. Keith C. Mitchell** GDAHCVAP2021/0006 (11 January 2022) per Thom JA at [14]. No permission was sought by the Claimant to seek the additional reliefs pursued in its supplemental written submissions, and none was granted. I therefore concentrate my attention on the relief sought in the application notice, viz. the appointment of the Second Defendant to represent David Thompson's estate.

Preliminary discussion – Part 21.7 of the CPR

[18.] **Part 21.7** enables the Court to make an order appointing a person to represent the estate of a deceased person in any proceedings in which it appears that a deceased person was interested in the proceedings but has no personal representative. **Part 21.7(1)** provides:

“(1) If in any proceedings it appears that a deceased person was interested in the proceedings then, 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.”

[19.] **Part 21.7** performs the same function under the **CPR** that **Order 15, Rule 16** did under the **Rules of the Supreme Court (“RSC”)**, though there is no longer clear power to proceed in the absence of a representative. Its legislative history can be traced to **Section 44** of the **English Court of Chancery Procedure Act 1852** (15 & 16 Vict, c. 86) and, later, to **Order 15, Rule 46** of the **English Rules of the Supreme Court 1883** and **Order 15, Rule 15** of the **English Rules of the Supreme Court 1965**.

[20.] **Section 44** of the **Court of Chancery Procedure Act 1852** and **Order 15, Rule 46** were regarded by Scott LJ in **Lean v Alston** [1947] 1 KB 467 (at pages 470 to 471) as statutory expressions of an inherent power possessed by the Court of Chancery and the Chancery Division to appoint a person to represent any particular interest in any proceedings before the court.

[21.] **Part 21.7(2)** provides that a person may be appointed a representative of a deceased person in the discretion of the Court under **Part 21.7(1)** if that person:

- (i) can fairly and competently conduct proceedings on behalf of the estate of the dead person; and
- (ii) has no interest adverse to that of the estate of the deceased person.

[22.] **Part 21.7(3)** specifies that an order pursuant to **Part 21.7(1)** may be made by the Court acting on its own initiative or upon an application.

[23.] **Part 21.7(5)** confirms that a decision in proceedings in which the Court has appointed a representative under **Part 21.7(1)** binds the estate to the same extent as if the person appointed were an executor or administrator. **Part 21.7(5)** implies that a person appointed under **Part 21.7(1)** is strictly not a personal representative. That conclusion is supported by persuasive authority, e.g., **Stephanie Piggott v David Aulton (Deceased)** [2003] EWCA Civ 24 per Arden LJ at [21].

[24.] In contrast to the position under **Part 21.7**, a person issued a grant *ad litem* under **Section 11** of the **PAEA** is “as much an administrator as any other administrator” (to borrow the words of Hutley JA in **Government Insurance Office v Johnson** [1981] 2 NSWLR 617 at page 625). However, the grant of representation is limited, for the purpose of litigation only, and temporary.

[25.] **Part 21.7**, where it can be properly invoked, is intended to alleviate the need for a formal grant of representation and the joinder of a personal representative: **Majorie Ilma Knox v Eric Lain Deane** BB 2019 HC 5 citing **Re Berti** [2001] EWCA Civ. 2079. In the latter case, Walker

LJ observed at [5] that **Part 19.8** of the **English Civil Procedure Rules 1998** gave the court “quite wide” powers to dispense with the need for a formal grant of probate or administration.

*Should the Second Defendant be appointed to represent David Thompson's estate pursuant to **Part 21.7**?*

[26.] There was no suggestion by or on behalf of the Second Defendant that she has an interest adverse to that of David Thompson's estate or that she is, for want of capacity or competence, incapable of fairly and competently conducting these proceedings on behalf of David Thompson's estate. However, the central issue is that the Second Defendant is unwilling to represent the estate.

[27.] **Part 1.2** of the **CPR** informs the approach that the Court must take in exercising any of the powers and discretions conferred by the **CPR** and when interpreting the **CPR**:

“(1) The Court must seek to give effect to the overriding objective when –

- (a) exercising any powers under these Rules;
- (b) exercising any discretion given to it by the Rules; or
- (c) interpreting these Rules.

(2) These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.”

[28.] **Part 21.7** is silent on whether a person can be appointed to represent a deceased person's estate against their will. **Part 21.7(2)** does not prescribe being willing to act as one of the conditions that must be met before a person can be appointed, there is no requirement in **Part 21.7** for an applicant to file evidence of the intended representative's consent, and the power of the Court to make an order of its own initiative under **Part 21.7(1)(3)** is not conditioned upon there being a willing appointee before the Court. These considerations together suggest that the Court can appoint a person under **Part 21.7** without their consent. However, there is a long line of English case law against that practice.

[29.] Under the **Court of Chancery Procedure Act 1852**, the Court of Chancery declined to appoint a person to represent a deceased person's estate if they did not consent to act. Thus, in **The Prince of Wales & Association Company v Palmer** (1858) 53 ER 768, the Master of the Rolls, Sir John Romilly, discharged the appointment of a widow to represent her husband's estate when she declined the office. The headnote of the reported decision states that a person could not be appointed to represent an estate under 15 & 16 Vict, c. 86 without his consent. Sir John Romilly took the same position in **Hill v Bonner** (1858) 26 Beav 372 when the intended appointee objected to their appointment. **Joint Stock Discount Company v Brown** (1869) LR 8 Eq 376 is a decision of Sir James VC in the same vein.

[30.] A similar practice was adhered to in England under the **Rules of the Supreme Court**. In **Re Curtis and Betts** [1887] WN 126, the first instance court had, without their assent, appointed the executors of one Curtis to represent the estate of one Betts in the taxation of a bill of costs. The

English Court of Appeal held that it was “wrong to appoint a person who was unwilling to act”. That proposition was affirmed fifty years later by the English Court of Appeal in **Pratt v London Passenger Transport Board** [1937] 1 All ER 473. The headnote of the reported decision reads: “...there is no power under RSC, Ord. 16, r. 46 to appoint a person against his will...”.

[31.] **Pratt v London Passenger Transport Board** [1937] 1 All ER 473 concerned two appeals. In the first appeal, the London Passenger Transport Board, sued by a person injured in a road traffic accident, attributed fault for the accident to a third person, one Mr. Connitt, who had died in the accident. The plaintiff applied under **Order 16, Rule 46** for an order that the Official Solicitor should represent the deceased’s estate and be added to the record as a defendant. The Official Solicitor had consented to act, but only if his appointment was made by the Probate Division and his costs were paid. The order prayed for under **Order 16, Rule 46** was granted without his consent. In the second appeal, the deceased was a defendant, and not a third party, but otherwise the material facts were the same. The English Court of Appeal (Greer, Slesser, Scott LJJ), allowed both appeals.

[32.] In delivering the leading judgment, Greer LJ stated at page 476:

“I think it is right, apart from authority, that this rule does not apply except in the case of the consent of the person who is put forward as the person to be appointed to represent the estate of the deceased. There is authority in the case of *Re Curtis and Betts* for that statement of the law, if authority be needed, but I think it jumps to the eye that it was not intended to do the injustice, which it is suggested it might cover, that it would bring about if anyone was appointed without his consent.”

[33.] Slesser LJ stated at page 477 in his concurring judgment:

“I am of the same opinion. RSC Ord 16, r 46, does not say whether the court or judge, if the court is of opinion that a person ought to be appointed, may appoint a person in invitum without having obtained from that person his consent to represent the estate, but, in my opinion, it would be contrary to all principles of justice, and indeed contrary to decided authority, such as there is, to hold that that power to appoint such person to represent the estate could be made against the will and without the consent of the person sought to be appointed.”

[34.] Scott LJ said at pages 479 to 480:

“In my view it is impossible to apply the rule where that consent is not given ... It has been suggested in the course of the argument that possibly the same result as was intended by the order in this case under r 46 might be achieved, and more successfully achieved, by an order of the Court of Probate for a limited administration ad litem and the appointment of a limited administrator for that purpose. That question again is not before the court, and I therefore express no opinion as to whether such an order could properly be made, but in my view for practical purposes neither one nor the other is possible without consent, and therefore no procedure can regularly be employed unless a person is willing to consent, and he will not consent in a normal case unless he is protected adequately against the financial risks involved in his appointment for the purpose of the litigation.”

[35.] **The Supreme Court Practice** (i.e. the “White Book”) commentary on **Order 15, Rule 15** accepted that there was no jurisdiction under **Order 15, Rule 15** to appoint a person who was unwilling to act. **Note 15/5/3** in the **Supreme Court Practice 1979** provided:

“Or may by order appoint some person’ – (Seton, p.120 (2) and (3).) A person so appointed need not be added as a defendant (Neal v. Barrett [1887] W.N. 88; and see Scott v. Streatham, etc., Co., infra). The consent of the person to be appointed must be obtained, but subject to such consent the court can appoint any person of its own selection (Lean v. Alston [1947] K.B. 467, C.A.)

There is no jurisdiction to appoint a person, including the Official Solicitor, who is unwilling to act (Pratt v. London Transport Board [1937] W.N. 43, C.A.) or to appoint a person to represent the estate of a deceased person who was the only person liable (Re Curtis and Betts [1887] W.N. 126, C.A.). ...”

[36.] No Bahamian decision was brought to my attention in which both **Order 15, Rule 16** and **Pratt v London Passenger Transport Board** were considered, but **Pratt v London Passenger Transport** has been followed in a number of other common law jurisdictions. It was followed in Ontario in **Re Martin v McAuley Estate** [1947] OJ 588, in British Guiana in **Gillian Wong v Cheddie** [1963] LRBG 184, in New South Wales in **Re J Hart, deceased; Smith v Clarke** [1963] NSW 627, in Northern Ireland in **Firth Finance and General Limited v McNarry** [1987] NI 125 and in the Northern Territory of Australia in **Territory Insurance Office v Creedon** (1987) 89 FLR 257.

[37.] For completeness, there are recent decisions which have held that lack of consent is not an absolute bar to appointing a person to represent a deceased person’s estate but only a relevant factor. Such was the view taken by Master Bell in the Northern Ireland High Court in **Steven Turner v Patrick Kearney** [2010] NIMaster 10, by the Malaysian High Court in **Glen Lau Lian Seng v Personal Representative of Jeswant a/l Natarajan, Deceased** [2017] MLJU 824 and by the Singapore High Court in **Maybank Singapore Limited v Personal representatives of the estate of Khoo Gek Hwa Christina, deceased** [2022] SGHCR 7. I have not overlooked the existence of these decisions.

[38.] For my part, I consider that the approach in **Pratt v London Passenger Transport Board** should be followed. It is not a proper exercise of discretion under **Part 21.7** to appoint an unwilling person to represent the estate of a deceased person in litigation. A person appointed to represent the estate of a deceased person likely owes a duty to act in the best interests of the estate as a whole for the purpose of the proceedings: **Bourlakova v Bourlakova** [2024] EWHC 1937 (Ch) per Smith J at [28]. It would not be just to impose the burden and potential expense of that responsibility on someone who is unwilling to assume it.

[39.] Thus, assuming in the Claimant’s favor that **Part 21.7(1)** can be relied upon in principle to appoint someone to represent David Thompson’s estate in these proceedings, I accept the Second Defendant’s submission that she cannot be compelled to act in that capacity against her will. The Second Defendant’s refusal to act is fatal to the Claimant’s application to have her appointed to represent the estate in this litigation.

Conclusion

[40.] For the foregoing reasons, the Claimant’s application is dismissed. **Part 72.26(2)** stipulates that, as a general rule, the unsuccessful party on an application should pay the costs of the successful party. I am of the view that the general rule should be applied. The Claimant failed to confirm that the Second Defendant was willing to act before seeking to have her appointed and

persisted in trying to have her appointed over her objections once it was clear she was opposed to the appointment. The Claimant shall pay the Second Defendant's costs of the application, fixed in the sum of \$1500.

Postscript

[41.] In **Nathalie Parks and Lashawn Parks (Court Appointed Personal Representatives of the Estate of Livingstone Richard Parks, who was the Administrator of the Estate of the Late Lavard Ashley Parks) v BAF Financial Insurance (Bahamas) Ltd.** 2017/CLE/gen/1424 (9 May 2024), Fraser Snr J construed **Part 21.7(1)** in the following way at [22]:

“I interpret this rule as granting the Court power to appoint an individual to pursue proceedings before the Supreme Court where the initial litigant passes away and there is no named personal representative to pursue/defend the action on behalf of the deceased. I have already appointed the Claimants to act on behalf of Livingstone Parks in the proceedings. Accordingly, I fail to see the relevance of the rule to this application.”

[Emphasis added]

[42.] In **Roger Mervin Springer v Administrator Ad Litem of the Estate of Alfred Kinsale) v Delma Henry & Others** Claim No. CV2022-03693 (5 July 2023), a decision of the High Court of Trinidad & Tobago, the claimant sued “the Estate of Aldwyn Hinds” on the basis that the estate had an interest in the litigation. Rampersad J held that the claim against “the Estate of Aldwyn Hinds” was “not only impermissible and impractical but a nullity”. With respect to whether **Part 21.7** could be used to appoint a person to represent the estate, he said at [6]:

“ 6. The use of Part 21.7, in this court's respectful view, is only appropriate where there are already subsisting proceedings, hence the use of the words ‘Where in any proceedings it appears that a dead person was interested in the proceedings...’. A person who dies prior to the commencement of proceedings cannot be interested in the particular proceedings which were commenced after his/her passing. In other words, there cannot be any qualifying interest by the deceased in something which did not exist inter vivos. Clearly, Part 21.7 is inappropriate.”

[Emphasis added]

[43.] These authorities, which were raised with the parties, suggest that **Part 21.7** cannot be used to appoint a person to represent the estate of an intended defendant who predeceases the litigation and that the appropriate procedure is to pursue the appointment of an administrator *ad litem* and to join them to the action. However, it was not necessary for me to reach a firm conclusion on this issue in order to dispose of this application.

Dated this 14th day of March, 2025


Jonathan Deal
Assistant Registrar