THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCVAP2025/0007

BETWEEN:

MABEL VENZEN

Appellant

and

[1] HUGHWARD DANIEL
[2] AMELIA DANIEL

Respondents

Before:

The Hon. Mr. Trevor Ward	Justice of Appeal
The Hon. Mde. Paula Gilford	Justice of Appeal [Ag.]
The Hon. Mde. Cadie St. Rose-Albertini	Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Appellant
Mr. Jean Kelsick for the Respondents

2025: October 1;
2026: July 15.

Civil appeal – Interlocutory application – Application to add unadministered estate as defendant to amended counterclaim – Whether learned judge erred in dismissing application to add new party – Whether learned judge conflated Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 ("CPR") Part 19 and CPR Part 21 – Whether learned judge failed to disaggregate issue of joinder from issue of representation of estate – Whether learned judge erred in failing to apply and make findings under CPR 19.2(3) – Whether it was desirable to add estate so that the court could resolve all matters in dispute – Whether there was an issue involving the estate connected to the matters in dispute which made joinder desirable – Whether learned judge erroneously relied on CPR 21.7 and failed to consider CPR 21.4 – Whether an unadministered estate can be joined as a party in the absence of a personal representative or representative order – Whether estate is a legal person capable of suing or being sued in its own name – Rectification of land register – Allegation of fraud – Proprietary consequences for estate – CPR 8.5(2), CPR 19.2(3), CPR 21.4 and CPR 21.7.

In a claim filed on 3rd November 2021, the appellant sought possession of property registered as Block 13/12 Parcel 25 in the St Peter's Registration Section, Montserrat ("the Registered Land"). The Registered Land was occupied by the respondents. The respondents contested the claim and filed a defence and counterclaim on 2nd September 2022. An amended counterclaim was thereafter filed on 20th January 2023. In it, the respondents asserted an entitlement to occupy the Registered Land based on proprietary estoppel, overriding interests, unjust enrichment and constructive trust. The respondents contended that these pleaded bases, if established, would defeat the appellant's claim to possession. They further alleged fraud committed by the appellant and sought an order that the register for the Registered Land, on which the appellant is recorded as proprietor, be rectified by recording ownership in the name of the estate of Matthew Kelly, the appellant's late father ("the Estate").

The amended counterclaim was regularised by an application filed on 27th February 2023 seeking leave to amend or an order deeming it properly filed. No opposition was filed by the appellant, and the application was granted by order dated 30th March 2023. The appellant filed a number of interlocutory applications seeking to challenge the respondents' pleadings. An application to set aside the defence and counterclaim filed on 1st November 2022 was refused. An application to strike out the respondents' statement of case or parts thereof filed on 30th November 2022 was dismissed by order dated 24th July 2023. A further application filed on 31st July 2023 seeking to strike out the portions of the respondents' statement of case containing the allegations of fraud was dismissed by order dated 29th November 2023, and the appellant was ordered to pay the respondents' costs.

By application filed on 8th November 2024, the appellant sought to join the Estate as a defendant to the respondents' amended counterclaim. The Estate was unadministered. There was no personal representative of the Estate before the court. The appellant did not seek the appointment of a representative under Part 21 of the CPR, nor did she place evidence before the court identifying a personal representative, a proposed representative, any person interested in the Estate, the existence or absence of a grant of representation, or any other facts from which the court could assess the practical utility of adding the Estate to the amended counterclaim.

By ruling dated 31st March 2025, the learned judge dismissed the appellant's application to add the Estate as a defendant to the counterclaim. The learned judge reasoned that the Estate was not a legal person and could not be joined simpliciter as a party to the litigation. He further stated that, although the CPR contemplated circumstances in which a representative party may be appointed without an application, there was no material before the court which would enable him to decide who that representative party could be. The appellant appealed against the order in its entirety.

Being dissatisfied with the learned judge's order, the appellant appealed against the order in its entirety. The appellant contended that the learned judge erred by conflating and failing to disaggregate the issue of adding a party to the proceedings under Part 19 of the CPR from the separate issue of representation of that party under Part 21. The appellant further contended that the learned judge failed to make the findings required under rule 19.2(3), namely whether it was desirable to add the Estate so that the court could resolve all matters in dispute in the proceedings, or whether there was an issue involving the Estate which was connected to the matters in dispute and which made it desirable to add the Estate so that the court could resolve that issue. The appellant also contended that the learned judge erred in dismissing the application on the basis that joinder was impermissible under rule 21.7, when rule 21.4 expressly made provision for the appointment of a person to represent the estate of a deceased person.

The issues which arose for determination on the appeal were therefore: (i) whether the learned judge conflated Parts 19 and 21 of the CPR in refusing the joinder application; (ii) whether the learned judge erred by failing to apply and make findings under rule 19.2(3); and (iii) whether the learned judge erroneously relied on rule 21.7 and failed to consider rule 21.4.

Held: dismissing the appeal; affirming the decision and orders of the learned judge; and ordering that the respondents shall have their costs of the appeal to be assessed by a judge or master of the High Court, if not agreed within 21 days of the date of delivery of the judgment, that:

1. Part 19 and Part 21 of the CPR serve distinct functions. Part 19 is concerned with whether it is desirable to add a party so that all matters in dispute, or an issue connected with those matters, may be resolved. Part 21 is concerned with the machinery by which a person or estate may be represented where ordinary representation is absent or impracticable. However, conceptual distinctness does not require practical isolation. Where the proposed party to be joined is the estate of a deceased person, the court is entitled to consider whether there is a legally effective means by which that estate can be brought before the court, participate in the proceedings, and be bound by the result. An estate is not a natural or legal person. It can participate in proceedings only through a personal representative or a representative appointed by the court. The learned judge therefore did not conflate Part 19 and Part 21 by considering the absence of representation when determining whether joinder was viable, workable and desirable.

   Rules 19.2(3), 21.4 and 21.7 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** applied; **Millburn-Snell v Evans** [2012] 1 WLR 41 applied; **Heirs of Camselle St. Catherine (Represented by Agatha Jules) v Darius St Catherine et al** SLUHCV2003/0444 (delivered 24th March 2017, unreported) considered; **Millicent Bass v Julian Daniel** MNIHCV2016/0024 (delivered 5th May 2017, unreported) considered.

2. There is no rigid sequencing requirement under the CPR which obliged the learned judge to determine joinder under rule 19.2(3) in complete isolation from the question of representation under Part 21. Where the very identity of the proposed party raises an immediate question as to legal capacity or representation, the court may consider that question as part of its overall assessment of whether joinder is appropriate. In practical terms, what must be joined is not the estate as an abstraction, but a legal person acting as representative of the estate for the purposes of the proceedings. In the absence of a grant of representation or a court-appointed representative,

there was no legal person through whom the Estate could be heard, take procedural steps, or be bound by the result. The appellant did not seek the appointment of a representative and placed no evidence before the court identifying a personal representative, a proposed representative, or any factual basis upon which a representative order could realistically be made. The learned judge's conclusion that joinder simpliciter would be a nullity disclosed no error of principle.

Rules 19.2(3), 21.4 and 21.7 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** applied.

3. Rule 19.2(3) undoubtedly supplies the criteria for the addition of a party. However, the rule does not require a judge in every case to produce formulaic findings under each limb where there is a prior and dispositive obstacle to joinder. The amended counterclaim, which sought rectification of the land register in favour of the Estate, plainly had a connection to the Estate and could have proprietary consequences for it. That connection, however, did not conclude the inquiry. Desirability under rule 19.2(3) is a practical and evaluative judgment. It is not exercised in the abstract. In the absence of evidence demonstrating why joinder of the Estate was necessary, workable and desirable, the learned judge was entitled to conclude that the application did not present a proper basis for joining the Estate. The omission of a discrete recital of each limb of rule 19.2(3) did not amount to a material error warranting appellate intervention.

   Rule 19.2(3) of the **Civil Procedure Rules (Revised Edition) 2023** applied; **Gurtner v Circuit and Another** [1968] 2 QB 587 considered; **National Union of Rail, Maritime and Transport Workers v Tyne and Wear Passenger Transport Executive (trading as Nexus)** [2024] UKSC 37 considered; **Fok Hei Yu v Basab Inc** BVIHCMAP2014/0010 (delivered 28th May 2014, unreported) considered.

4. The pleaded allegation of fraud against the appellant did not require a different conclusion. The allegation formed part of the respondents' case against the appellant, but it did not follow that the truth or falsity of that allegation could only be adjudicated if the Estate were joined. The immediate controversy remained whether the appellant's title and claim to possession could withstand the respondents' defences and the relief sought in the amended counterclaim. On the material before the learned judge, there was no clear evidential basis for finding that the Estate's participation was indispensable to the resolution of those issues.

   In re Pablo Star Ltd [2018] 1 WLR 738 applied.

5. Rule 21.7 is not a freestanding bar to the joinder of an estate. It is an enabling provision. Rule 21.4 is similarly facilitative and permits the appointment of a representative in proceedings about the estate of a deceased person, where it is expedient to do so. The critical question was not whether either provision could, in theory, provide a route to representation, but whether there was material on which the learned judge could realistically have exercised the powers under either rule. The joinder application was framed solely as an application to add the Estate as a

defendant to the amended counterclaim. It was not accompanied by any prayer for the appointment of a representative under rule 21.4 or rule 21.7, or by any material explaining the existence or absence of a grant, identifying a suitable representative, or demonstrating why it was expedient to appoint a representative for the Estate. The court's powers under Part 21 are discretionary and must be exercised on a factual foundation.

Rules 21.4 and 21.7 of the **Civil Procedure Rules (Revised Edition) 2023** applied.

6. The learned judge's failure to refer expressly to rule 21.4 did not vitiate the ruling. While rule 21.4 may have been theoretically available because the proceedings touched on the estate of a deceased person, the availability of a jurisdictional route is not the same as the existence of material warranting its exercise. The decisive deficiency was the same under rule 21.4 and rule 21.7; there was no evidential or procedural basis upon which the court could join or appoint a representative for the Estate. The learned judge therefore committed no reversible error by referring to rule 21.7 or by not expressly citing rule 21.4.

   Rules 21.4 and 21.7 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** applied.

JUDGMENT

[1] **ST. ROSE-ALBERTINI JA [AG.]:** By notice of appeal filed on 11th June 2025,[1] the appellant, Mabel Venzen, who is the claimant in the court below, appeals against the order of a learned judge of the High Court of Montserrat dated 31st March 2025, in Claim No. MNIHCV2021/0028.[2]

[2] By that order, the learned judge dismissed the appellant's application to join the unadministered estate of her late father, Matthew Kelly ("the estate of Matthew Kelly" or "the Estate"), as a defendant to an amended counterclaim filed by the respondents, who are the defendants/counterclaimants in the court below.

[1] Bundle of Documents, Notice of Appeal (pp 2-4 filed on 11th June 2025)
[2] Bundle of Documents, Judgment in MNIHCV2021/0028 (pp 6–11, delivered 31st March 2025).

Background

[3] The proceedings below concern the appellant's claim for possession of the property registered as Block 13/12 Parcel 25, in the St Peter's Registration Section, in Montserrat ("the Registered Land").[3] The claim was filed on 3rd November 2021.[4] The Registered Land is presently occupied by the respondents.

[4] The respondents contested the claim and filed a defence and counterclaim on 2nd September 2022. An amended counterclaim was filed on 20th January 2023. In it, the respondents assert an entitlement to occupy the Registered Land based on proprietary estoppel, overriding interests, unjust enrichment, and constructive trust, contending that these pleaded bases, if established, would defeat the appellant's claim to possession. They further alleged fraud committed by the appellant and sought an order that the register for the Registered Land, on which the appellant is recorded as proprietor, be rectified by recording ownership in the name of the estate of Matthew Kelly. The amended counterclaim was regularised by an application filed on 27th February 2023 seeking leave to amend or an order deeming it properly filed. No opposition was filed by the appellant, and the application was granted by order dated 30th March 2023.[5]

[5] The appellant filed a series of interlocutory applications seeking to challenge the respondents' pleadings. The first was an application to set aside the defence and counterclaim filed on 1st November 2022. It was refused. A subsequent application to strike out the respondents' statement of case, or parts thereof, filed on 30th November 2022, was dismissed by order dated 24th July 2023. This was followed by a third application, filed on 31st July 2023, seeking to strike out the portions of the respondents' statement of case containing the allegations of fraud. That application was dismissed by order dated 29th November 2023, and the appellant was ordered to pay the respondents' costs.

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[3] Bundle of Documents, Land Register (pp 49-Exhibit MV3).
[4] Bundle of Documents, Fixed Date Claim Form & Affidavit in Support (pp 20–58, filed on 3rd November 2021).
[5] Supplemental Hearing Bundle, Order dated 30th March 2023 (pp 259 – 261)

[6] The application giving rise to the present appeal was filed on 8th November 2024.[6] In it, the appellant sought to join the Estate as a defendant to the respondents' amended counterclaim ("the joinder application"). The respondents filed a notice of opposition on 13th November 2024.[7]The application first came before the court on 14th November 2024, when various procedural orders were made. These included an order that the appellant pay the respondents' costs in the sum of $1,500.00 in respect of the third unsuccessful strike-out application within 28 days, as those costs had not been paid by the date the joinder application was filed.

The Appeal

[7] In his ruling dated 31st March 2025, the learned judge made the following order:

> "(1) The application to add Estate of Matthew Kelly as Defendant to the counterclaim is dismissed.
>
> (2) The Claimant will pay to the defendant costs of the application.
>
> (3) Those costs may be agreed by the parties or assessed by the court upon final determination of this matter."

[8] The appeal is against the order in its entirety. In the notice of appeal, the appellant advanced the following grounds of appeal:

> "(1) The learned judge erred in dismissing the application for the addition of a new party as defendant to the counterclaim by conflating and not disaggregating the issue of the addition of the party to the proceedings (a question to be considered under CPR 19) and the issue of who would represent the new party (a question to be considered under CPR 21).
>
> (2) The learned judge erred in dismissing the application for the addition of a new party as a Defendant to the Counterclaim having made no finding (when such a finding was required) as to whether or not:
>
> > (a) it was desirable to add the new party so that the court could resolve all the matters in dispute in the proceedings; or
> >
> > (b) there was an issue involving the new party which is connected to the matters in the dispute in the proceedings

[6] Bundle of Documents, Notice of Application (pp 89-90, filed on 8th November 2024).
[7] Bundle of Documents, Notice of Opposition (pp 92-93, filed on 13th November 2024).

and it is desirable to add the new party so that the court can resolve that issue.

(3) The learned judge erred in dismissing the application for the addition of a new party as a defendant to the counterclaim on the ground that it was impermissible under rule 21.7 when rule 21.4 makes provision for the appointment of a person to be a representative of the estate of someone who is deceased."

[9] Thus, in essence, the appeal concerns whether the Estate of Matthew Kelly should have been added as a party to the amended counterclaim, in the absence of any personal representative, application for representation, or evidential foundation enabling the court to make an effective representative order. It turns on the application of rules 19.2(3), 21.4 and 21.7 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** ("the CPR"). These rules are reproduced below for ease of reference:

Rule 19.2

(3) The court may without an application add a new party to proceedings if –

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

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

Rule 21.4

(1) This rule applies only to proceedings about –

(a) the construction of a written instrument;

(b) **the estate of someone who is deceased**; or

(c) property subject to a trust.

(2) The court may appoint one or more persons to represent any person or class of persons (including an unborn person or persons) who is or may be interested in or affected by the proceedings (whether presently or for any future, contingent or unascertained interest) where –

(a) the person, or the class or some member of it, cannot be ascertained or cannot readily be ascertained;

(b) the person, or the class or some member of it, though ascertained cannot be found; or

(c) **it is expedient to do so for any other reason**."

Rule 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.

………………..

(4) Where a claim is brought by or against a person appointed under this rule, the court may give directions as to the manner in which the proceedings are to be conducted, including any steps necessary to protect the interests of the estate.

Ground 1: Whether the Learned Judge conflated Parts 19 and 21 of the CPR in Refusing the Joinder Application

Appellant's Submissions

[10] Counsel for the appellant submitted that the learned judge erred by conflating the issue of the addition of a party under Part 19 of the CPR with the separate issue of representation of a deceased person's estate under Part 21 of the CPR. Counsel

submitted that the joinder application was made pursuant to Part 19 and sought joinder of the Estate as a defendant to the respondents' amended counterclaim, and made no application or request for the appointment of a representative for the Estate.

[11] Counsel submitted that it was necessary to add the Estate as a third party to enable the court to resolve all matters in dispute in the proceedings. Reliance was placed on section 20 of the **Supreme Court Act**[8] and the decision in **Gurtner v Circuit and Another**,[9] where Denning MR said:

> "It seems to me that when two parties are in dispute in an action at law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to "be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome."

[12] Counsel submitted that section 20 of the **Supreme Court Act** corresponds with the rule stated in **Gurtner** and, similarly, rule 19.2(3). Accordingly, as the orders sought in the respondents' amended counterclaim would affect the rights of a third party, namely the Estate, it would be a proper exercise of the court's discretion to add the Estate so that all matters in controversy may be effectually and finally resolved.

[13] Counsel also relied on the case of **In re Pablo Star Ltd**[10] regarding the question of whether it was desirable to add a new party to a claim, citing the threshold considerations which emerge from that case as follows: (i) the policy objective of enabling parties to be heard if their rights might be affected by a decision made in the claim; and (ii) the overriding objective of the rules. Counsel argued that as the rights of the Estate might be affected by a decision in the claim, it was proper that it be joined. Further, if the court should find that no fraud was committed, the

[8] Cap 2.01 of the Revised Edition of the Laws of Montserrat.
[9] [1968] 2 QB 587 at 595.
[10] [2018] 1 WLR 738.

unadministered Estate may face difficulty in bringing a claim in time, particularly as there exists a third party not recognized on the register to be reinstated.

[14] Counsel also relied on **National Union of Rail Maritime and Transport Workers v Tyne and Wear Passenger Transport Executive (trading as Nexus)**,[11] where the court stated:

> "As a matter of **basic principle**, the proper parties to an action are those whose legal rights will be determined by the court [emphasis added]."

[15] Counsel submitted that Part 19 governs the circumstances in which a party may be added to proceedings, and the question for determination under this Part is whether the proposed party is a proper or necessary party, having regard to the desirability criteria set out in rule 19.2(3). In contrast, rule 21.4 and rule 21.7 address questions of representation once it is established that an estate is involved in proceedings.

[16] Accordingly, Counsel submitted that the proper analytical sequence was for the judge to first determine whether the Estate ought to be added as a party under Part 19. Only if that question was answered affirmatively would the issue arise concerning how the Estate should be represented for the purposes of the proceedings. By dismissing the application on the basis that there was no material from which to identify a suitable representative of the Estate, the learned judge treated the absence of such information as determinative of the joinder application. Counsel submits that in doing so, the learned judge failed to disaggregate the joinder inquiry from the considerations arising under Part 21 concerning representative parties.

[17] Counsel further argued that this approach amounts to a misdirection in principle, as the existence or identification of a representative is not a precondition to determining whether an estate is a proper party to proceedings. Moreover, conflating these

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[11] [2024] UKSC 37 at paragraph 67.

distinct procedural questions undermined the exercise of the judge's discretion under Part 19.

Respondents' Submissions

[18] In response, counsel for the respondents submitted that the learned judge did not commit any error by considering the requirements of Part 21 alongside the joinder application, as the legal effect of the Estate being unrepresented was central to the determination of the joinder application and necessarily engaged Part 21. Counsel submitted that an estate is not a legal person and therefore cannot sue or be sued in its own name. Further, proceedings involving an estate must be conducted through a duly appointed personal representative, whether an executor, an administrator, or a representative appointed by the court.

[19] Counsel relied on the cases of **Millburn-Snell v Evans**[12] and **Heirs of Camselle St. Catherine (Represented by Agatha Jules) v Darius St Catherine et al**,[13] to advance the position that any attempt to add the Estate as a party without an existing grant of representation or a Part 21 representative order would render the joinder a nullity. He bolstered this argument by relying on the ruling in **Millicent Bass v Julian Daniel**,[14] in which the court determined that one cannot join a party to litigation unless that party is a legal person capable of participating in the proceedings.

[20] Counsel submitted that once the appellant sought to join the Estate as a defendant to the amended counterclaim, the learned judge was bound to consider Part 21, as the joinder application necessarily raised the question of who would represent the Estate if it were added. Therefore, there was no improper conflating of the rules, rather, Part 21 arose directly and necessarily from the nature of the application. Counsel maintained that it was both proper and necessary for the learned judge to

[12] [2012] 1 WLR 41.
[13] SLUHCV2003/0444 (delivered 24th March 2017, unreported).
[14] MNIHCV2016/0024 (delivered 5th May 2017, unreported).

address Part 21 first and, having concluded that the Estate was unrepresented and incapable of being joined, there was no need to engage further with Part 19 and the joinder application.

Analysis

[21] This ground concerns the proper relationship between rule 19.2, which governs the addition of parties, and rules 21.4 and 21.7, which govern representation where a person interested in proceedings cannot readily be before the court in the ordinary way, or where the proceedings concern the estate of a deceased person. The issue is whether the learned judge materially conflated those distinct inquiries. For the reasons which follow, I am not persuaded that he did.

[22] The appellant is correct in submitting that Parts 19 and 21 serve different purposes. Part 19 asks whether it is desirable to add a proposed party so that all matters in dispute, or a specific issue connected with the dispute may be resolved. Part 21, by contrast, is concerned with the machinery by which a person or estate, once relevant to proceedings, may be represented where ordinary representation is absent or impracticable. In that sense, the inquiries are conceptually distinct and should ordinarily be kept separate. In other words, Part 19 is engaged in determining whether the Estate should be a defendant to the amended counterclaim, while Part 21 is engaged in ascertaining who may represent the Estate if it is determined that joinder is appropriate.

[23] That said, conceptual distinctness does not mean practical isolation. Where the proposed party to be joined is the estate of a deceased person, as in this case, a court cannot ignore the question of representation when deciding whether joinder is a viable and useful step. An estate is not a natural person. It participates in proceedings only through a personal representative or through a representative appointed by the court where the rules permit. Accordingly, where a litigant seeks to add an estate as a party, the court is entitled to ask whether there is any juridically

effective means by which that estate could be brought before the court and be bound by the proceedings.

[24] In the present case, the relief sought on the amended counterclaim includes rectification of the land register in favour of the Estate, which, if successful, would have proprietary consequences for the Estate. In those circumstances, the Estate is plainly implicated. However, it does not automatically follow that it could simply be added under Part 19 without simultaneous regard to the means by which it would be represented. Here, the court is concerned not with abstractions, but with whether the proposed joinder would produce an effective party before it. Moreover, the fact that a person or entity may be affected by the outcome of proceedings does not dispense with the requirement that they be capable of being brought before the court in a legally effective manner.

[25] I am unable to accept the appellant's submission that the learned judge was required to determine joinder first in complete isolation from representation and only thereafter consider Part 21. Such a rigid sequencing requirement is not compelled by the CPR. Where the very identity of the proposed party raises an immediate question as to legal capacity or representation, a court may consider that question as part of the overall assessment of whether joinder is appropriate, workable and desirable. A judge does not necessarily conflate two rules merely because he recognizes that the viability of one procedural step depends upon the availability of another.

[26] Under the CPR, where a claim already exists and may concern the interest of an unadministered estate, representation under Part 21 must be addressed before, or at least at the same time, as any order purporting to add that estate as a party. This is not a matter of rigid sequencing, but a practical precondition to the making of an effective joinder order. The Estate cannot participate in proceedings merely as an abstraction. In practical terms, what must be joined is not the estate, but a legal person acting as representative of the estate for the purposes of the proceedings.

In the absence of a grant or a court-appointed representative, there is no legal person through whom the estate can be heard, or take procedural steps, or be bound by the result.

[27] Here, the appellant did not seek the appointment of a representative under Part 21, and the evidence identified no personal representative, proposed representative, or factual basis upon which the court could realistically make a representative order. That omission was not technical. Rather, it went to whether joinder could produce an effective party capable of participating, being heard, and being bound. Without that foundation, the court would risk adding a non-juridical party, which would be procedurally defective. Thus, on the central issue of whether the learned trial judge was correct in dismissing the Part 19 application on the basis that the Estate was not a legal person, this is purely a question of law, and his conclusion on that point is unassailable.

[28] The authorities cited by Counsel for the appellant, though helpful in illustrating the governing principles of joinder and procedural fairness, do not displace the central requirement that the court must act on a legally workable basis for representation. The learned judge appreciated that the application, although framed as one for joinder, necessarily engaged the practical question whether there was any lawful mechanism by which the Estate could be before the court. He could not be said to have erred by treating the absence of a representative or evidential foundation for representation as fatal to the joinder application.

[29] A fair reading of the written ruling does not support the contention that the learned judge conflated the two issues. At paragraph 6, he first addressed the matter as one of principle, namely whether the Estate could be sued if it was not a legal person. At paragraph 8, he observed that where proceedings are contemplated against an estate, the appointment of a personal representative is required. His later reference to rule 21.7 served to reinforce that anterior point about the need for representation; it did not replace or confuse the joinder inquiry under Part 19. The conclusion is

captured at paragraph 10 of the ruling, where he stated: **'The application for joinder is therefore refused. To grant it simpliciter would be a nullity as the court cannot join a party to the litigation unless that party is a legal person'**. To the extent that this ground of appeal alleges that the learned judge conflated Part 19 and Part 21, that allegation is not borne out on a reading of his ruling. In those circumstances, there is no error of principle and Ground 1 fails.

Ground 2: Whether the Learned Judge erred by Failing to Apply and Make Findings under Rule 19.2(3)

Appellant's Submissions

[30] Here, the appellant's main argument is that the joinder application expressly relied on the fact that the amended counterclaim alleged that the appellant had committed fraud against the Estate and sought relief in the form of rectification of the land register to record ownership in the name of the Estate. Such relief, it is said, would directly affect proprietary rights of the Estate, and this necessitated joinder as a defendant to the amended counterclaim.

[31] Counsel submitted that, in those circumstances, a central issue for determination was whether the joinder of the Estate was desirable in order to resolve all matters in dispute. A further issue was whether the allegation of fraud against the Estate constituted an issue which could only properly be resolved if the Estate were added to the proceedings. Counsel submitted that the reasons provided in the learned judge's written ruling contain no analysis of either limb of rule 19.2(3), and there was no finding on whether joining the Estate was desirable for the resolution of the dispute, nor any assessment of whether the fraud allegation required the involvement or participation of the Estate. Counsel submitted that the absence of any engagement with the criteria under rule 19.2(3) indicates that mandatory and relevant considerations were not taken into account by the judge. Reliance was placed on **Fok Hei Yu v Basab Inc**,[15] in support of the appellant's position that while

[15]BVIHCMAP2014/0010 (delivered 28th May 2014, unreported).

the discretion to add a party is wide, it must be exercised judicially and by reference to the principles set out in the relevant rules.

[32] Counsel further submitted that the Estate has not agreed to be a claimant in the claim and must therefore be made a defendant to the amended counterclaim, unless the court orders otherwise, pursuant to rule 8.5(2). Further, the appellant does not assert a cause of action against the Estate, nor does she seek to join the Estate as a defendant to her claim. The proposed joinder is confined to the amended counterclaim, as it seeks orders which would determine the legal rights of the Estate. Further, given that the fraud alleged was said to have been committed against the Estate rather than against the respondents themselves, the desirability of joinder was a matter that required express consideration. The failure to do so, it is submitted, vitiated the exercise of discretion and offended the fundamental principle of procedural fairness, which requires that a person whose legal rights may be determined by a court order be given the opportunity to be heard.[16]

Respondents' Submissions

[33] In response, counsel for the respondents submitted that rule 19.2(1) permits a claimant to add a new defendant to legal proceedings, and that the appellant's position is problematic because a counterclaim is a separate claim, and the appellant is defending it rather than advancing it. Since rule 19.2(1) is available only to a claimant, it cannot be relied upon by a defendant to a counterclaim, as the basis for adding another defendant to that counterclaim.

[34] Counsel submitted that the learned judge was not obliged to embark upon an analysis under rule 19.2(3) because the joinder application was defective at a more fundamental level. The failure to secure a grant of administration or to apply for the appointment of a representative party under Part 21 meant that the Estate, as the proposed party to be joined, lacked legal capacity. On that basis, the joinder

[16] National Union of Rail Maritime and Transport Workers v Tyne and Wear Passenger Transport Executive (trading as Nexus) [2024] UKSC 37; CPR 19.3.

application could not succeed, irrespective of the desirability considerations under rule 19.2(3).

[35] Counsel further submitted that, even if rule 19.2(3) were engaged, the appellant placed no evidential material before the court capable of satisfying either limb of the rule. The application was unsupported by affidavit evidence and contained only bare assertions of the alleged impact on the Estate's interests. He contends that, as the appellant elected not to file an affidavit in support, there was no evidential basis upon which the court could properly conclude that it was desirable to add the Estate in order to resolve matters in dispute, or that there existed an issue involving the Estate which could not be resolved without its joinder.

[36] Counsel argued that the appellant's submission that the Estate's stance on the fraud allegation against her could resolve the dispute was not raised before the court below and is therefore impermissible in this appeal. In any event, the Estate was not a necessary party for the determination of the fraud allegation, as the alleged fraud concerned the conduct of the appellant alone and may be adjudicated without the Estate's participation.

[37] In conclusion, counsel submitted that the respondents have no complaint against the Estate and that it may be characterised as a "silent actor" whose joinder was not required for the court to grant declaratory or rectification relief. Thus, the fact that the learned judge did not expressly address rule 19.2(3) does not amount to an error of principle.

Analysis

[38] This ground concerns whether the learned judge failed to consider and apply the criteria set out in rule 19.2(3), which the appellant says permits the court to join the Estate, if it was desirable to do so in order to resolve all the matters in dispute, or an issue involving the Estate which was connected to the dispute. It is framed as a

complaint that the learned judge failed to expressly analyse and make the findings required by rule 19.2(3).

[39] The issue is whether that omission, if established, amounts to a material error in the exercise of discretion. The appellant says that because the amended counterclaim seeks rectification of the land register in favour of the Estate and includes allegations said to affect the Estate's interests in the Registered Land, the judge was bound to decide expressly whether it was desirable to add the Estate so that all matters in dispute could be resolved.

[40] Rule 19.2(3) undoubtedly supplies the considerations for addition of a party. However, the rule does not require a judge in every case to produce separate formulaic findings under each limb, irrespective of prior and dispositive obstacles presented by the application itself. The appellate court must examine whether, reading the ruling fairly and as a whole, the judge failed to address a material consideration which could realistically have altered the outcome, or whether the criteria for joinder were wholly side-stepped.

[41] The rectification relief sought in the amended counterclaim plainly has a connection to the Estate. If rectification is ultimately granted, the land register would reflect ownership in the name of the estate of Matthew Kelly. There is therefore some force in the appellant's submission that the Estate is not peripheral to that issue. Equally, the authorities which emphasise that parties whose legal rights may be directly determined should, where possible, be before the court, as they reflect an important aspect of procedural fairness and sound case management.

[42] However, the existence of that connection to the Estate does not conclude the inquiry. Desirability under both limbs of rule 19.2(3) is a practical and evaluative judgment. It is not exercised in the abstract. The court must ask whether adding the proposed party would assist in resolving the litigation in an effective and legally coherent way. Where the proposed party is an unadministered estate with no

identified personal representative and there is no application or information before the court to enable the appointment of a representative party, the judge is entitled to regard that deficiency as bearing directly on whether joinder is truly desirable and permissible. A joinder order that cannot yield a party capable of participating, being heard, or being bound is obviously not conducive to the efficient resolution of the proceedings.

[43] In that regard, Ground 2 cannot be severed from the realities identified under Ground 1. The appellant's criticism assumes that the desirability inquiry under rule 19.2(3) had to proceed as if the Estate were already capable of participating in proceedings. That assumption is unsound. In the absence of an evidential foundation for representation, the learned judge was entitled to conclude that the application did not present a workable basis for joinder. The omission of a discrete recital of each limb of rule 19.2(3) does not, in those circumstances, establish an appellate error.

[44] I do not accept that the fraud allegation against the appellant required the judge to reach a different conclusion. The pleaded allegation is one aspect of the respondents' case against the appellant, but it does not follow that the truth or falsity of that allegation could only be adjudicated if the Estate were joined. The immediate controversy remains whether the appellant's title and claim to possession can withstand the respondents' defences, and the relief sought in the amended counterclaim.

[45] On the material before the judge, there was no clear evidential basis for finding that the Estate's participation in the amended counterclaim was indispensable to the resolution of those issues, as distinct from being said to be preferable in theory. When the learned judge stated at paragraph 10 of his ruling that, '**As presently constituted there is no claim properly brought forward which would involve the Estate of Matthew Kelly as a Defendant to the counterclaim,**' he was not saying that the Estate could have no interest in the relief sought. Rather, he was

expressing that the application before him had not placed the Estate before the court in a cogent, and procedurally proper way.

[46] A prayer which seeks rectification in favour of the Estate is sufficient to show that the Estate's position may be affected by the form of relief which may be granted. However, what was missing, over and above a bare assertion of a connection with the Estate, was evidence and material demonstrating why joinder was necessary, workable, and desirable beyond the pleaded relief. The appellant filed no affidavit evidence identifying a personal representative, or a proposed representative, or any person(s) interested in the Estate, or the absence or existence of any grant, or any other facts from which the court could assess the practical utility of adding the Estate to the amended counterclaim.

[47] The approach in **In re Pablo Star Ltd** reinforces that conclusion. A court at first instance is not concerned with desirability in the abstract. The controlling questions are whether the proposed party's rights or interests may be affected and whether joinder would further the overriding objective. The case also underscores the need for restraint where third-party joinder would enlarge proceedings beyond what is necessary to determine the issues before the court. That restraint is important here. The amended counterclaim shows that the Estate's position may be affected by the relief sought, but that does not itself establish that joinder was required.

[48] It remained for the appellant seeking joinder to demonstrate that the Estate's interests were sufficiently engaged to require its participation in the proceedings, and that there was a proper evidential and procedural foundation for bringing it before the court. In the absence of this, joinder would risk expanding the proceedings without producing an effective participating party. In those circumstances, the learned judge could not be criticised for refusing to engage in a purely theoretical desirability analysis, untethered from the procedural realities of the case.

[49] I therefore conclude that the appellant has not demonstrated that the learned judge ignored rule 19.2(3) in any material way. At its highest, the complaint is that the ruling did not articulate the desirability analysis in the terms counsel would have preferred, but that is insufficient to justify appellate intervention. While the authorities relied upon by the appellant underscored the importance of joining parties whose rights may be directly affected, they do not require the court to make a joinder order incapable of yielding an effective participating party.

[50] The decisive point is that the learned judge first considered whether the Estate had legal capacity to be added as a party and found that it did not. Once that conclusion was reached, it was not necessary to embark upon a review of the specific requirements of rule 19.2(3), as the appellant had not crossed the threshold for that question to be engaged. In any event, the application did not provide any sufficient basis upon which the learned judge could have exercised any discretion relative to the criteria in rule 19.2(3). That conclusion was open to him on the material before him, and the absence of elaborate express findings under either limb of the rule did not undermine the refusal of joinder. Ground 2 accordingly fails.

Ground 3: Whether the Learned Judge erred in Relying on Rule 21.7 and in Failing to Consider the Application of Rule 21.4

Appellant's Submissions

[51] Counsel for the appellant submitted that rule 21.7 provides a mechanism for the appointment of a representative where a deceased person's estate is already involved in proceedings and has no personal representative. It does not operate as a bar to the joinder of an estate as a party. By contrast, rule 21.4, which expressly applies to proceedings concerning the estate of a deceased person, empowers the court to appoint a representative where it is expedient to do so. This provision, counsel submitted, was not considered in the learned judge's reasoning.

[52] Counsel further submitted that, by treating the absence of evidence identifying a suitable representative as fatal to the joinder application, the learned judge imposed

a requirement not found in the rule, since the rules contemplate that questions of representation may be addressed after it has been determined that an estate is properly before the court. Counsel also submitted that rule 21.7(4), properly understood, places responsibility on the claimant for applying for the appointment of a representative in proceedings involving an unrepresented estate. Counsel argued that in the context of the amended counterclaim, that responsibility did not rest with the appellant but with the respondents as counterclaimants.

[53] In other words, the learned judge erred in law by relying on rule 21.7 to refuse joinder, without first determining whether the Estate was a proper party under Part 19 and then considering the court's powers under rule 21.4.

Respondents' Submissions

[54] Counsel for the respondents submitted that the learned judge correctly relied on rule 21.7 in concluding that the Estate could not be joined in the absence of representation. Counsel submitted that the permissive language of Part 21 does not displace the long-established common law rule that an estate must act through a personal representative, and that Part 21 assumes representation and does not authorize proceedings against an unrepresented estate.

[55] Counsel again relied on **Millicent Bass v Julian Daniel** and **Millburn-Snell v Evans**, submitting that although some of these cases concerned estates as claimants, the principle applies equally where an estate is to be joined as a defendant.

[56] In the alternative, Counsel submitted that where the CPR is silent or unclear, the court is entitled to resort to the English rules pursuant to section 11 of the **Supreme Court Act**. He relied on the case of **Hugh C. Marshall Snr v Antigua Aggregates Ltd**[17] for the proposition that English procedural rules may be adopted where appropriate.

[17] Civil Appeal No. 23 of 1999 (delivered 26th June 2000, unreported).

[57] In this regard, counsel invited the Court to consider the English rule 19.12(2), which expressly contemplates claims being brought against an estate where no grant has been obtained, but requires an application for the appointment of a representative. Counsel submitted that this approach provides clarity and supports the learned judge's reasoning. The rule provides:

> "(2) Where a defendant against whom a claim could have been brought has died and
>
> (a) a grant of probate or administration has been made, the claim must be brought against the persons who are the personal representatives of the deceased;
>
> (b) a grant of probate or administration has not been made –
>
> (i) the claim must be brought against 'the estate of' the deceased; and
>
> (ii) **the claimant must apply to the court for an order appointing a person to represent the estate of the deceased in the claim."** (Emphasis added).

[58] Counsel disagreed that rule 21.7(4) imposed any obligation on the respondents, as counterclaimants, to apply for a representative party order. He submits that this argument was not taken when leave to amend the counterclaim was granted and cannot now be raised for the first time on appeal.

[59] Counsel took issue with what he referred to as ancillary challenges raised by the appellant, including the appellant's reliance on section 20 of the **Supreme Court Act**, which counsel submitted is misplaced. Reliance was placed on **Charmaine Bernard v Ramesh Seebalack**,[18] where the Privy Council held that section 20 cannot be used to override or assist in the interpretation of the CPR, which constitutes a comprehensive procedural code. Further, relying on **The Treasure Island Company Ltd v Audubon Holdings Ltd**,[19] counsel submitted that the

[18] [2010] UKPC 15.
[19] BVI Civil Appeal No. 22 of 2003 (delivered 20th September 2004, unreported).

overriding objective does not confer an independent power on the court to dispense with procedural requirements.

[60] Counsel further submitted that the authorities relied on by the appellant, including **Gurtner v Circuit**,[20] **In re Pablo Star Ltd**,[21] and **National Union of Rail, Maritime and Transport Workers v Nexus**,[22] are distinguishable because the legal rights of the Estate in this case are not directly determined by the allegations made against the appellant. Counsel also submitted that the principles governing appellate restraint in discretionary decisions, as articulated in **Dufour v Helenair Corporation Ltd**[23] and **Nilon Ltd v Royal Westminster Investments S.A.**,[24] are instructive, and that the learned judge's decision cannot be characterised as plainly or blatantly wrong.

Analysis

[61] Ground 3 is directed to the learned judge's treatment of rule 21.7 and, more particularly, to the complaint that he failed to consider rule 21.4 as an available route for representation of the Estate. The issue is whether that omission disclosed a material legal error. The appellant submits that rule 21.7 was treated as a prohibition against joinder, when it is facilitative, and that rule 21.4 conferred a wider power to appoint a representative in proceedings concerning the estate of a deceased person.

[62] It is correct that rule 21.7 is not a freestanding bar to the joinder of an estate. It is an enabling provision. So too is rule 21.4, which enables representation in proceedings about estates, among others, and permits the court to appoint one or more persons to represent an estate which is interested in or affected by the

[20] [1964] G. No. 1503; [1968] 2 Q.B. 587.
[21] [2017] EWCA Civ 1768; [2018] 1 WLR 738.
[22] [2024] UKSC 37.
[23] (1996) 52 WIR 188.
[24] [2015] UKPC 2.

proceedings, where it is expedient to do so. Rule 21.7 applies where it appears that a deceased person was interested in proceedings but has no personal representative and permits the court to appoint someone to represent the deceased person's estate for the purpose of those proceedings.

[63] The critical question is therefore not whether either rule could provide a route to representation, but whether, on the application before the court, there was material on which the judge could realistically have exercised the powers provided under either rule.

[64] The joinder application was framed solely as an application to add the Estate as a defendant to the amended counterclaim. It was not accompanied by any prayer for the appointment of a representative under rule 21.4 or rule 21.7. Nor was there material explaining the existence or absence of a grant, identifying a suitable representative, or demonstrating why it was expedient to appoint a representative for the Estate. The court's powers under Part 21 are broad, but they are discretionary and must also be exercised on a factual foundation.

[65] I am unable to accept the appellant's contention that the judge's failure to expressly resort to rule 21.4 vitiated the ruling. The rule may have been theoretically available, given that the proceedings touched on the estate of a deceased person. However, the availability of a jurisdictional route is not the same as the existence of material warranting its exercise. In particular, rule 21.4 did not assist the appellant unless the court was provided with some basis for identifying why ordinary representation was unavailable or impracticable, why appointment was expedient, and who could properly be appointed in such representative capacity. Those matters were not deployed in any meaningful way before the learned judge.

[66] It is clear that the learned judge dismissed the Part 19 application because the Estate was not a legal person, before he made any reference to representation of the Estate. He then stated at paragraph 10 of the ruling that the CPR contemplates

circumstances where a representative party can be appointed without an application but that '**there is no material before this court that would enable the court to decide who that representative party could be'**. He was merely indicating that even without an application before him there was no evidence on which he could make an order for the Estate to be represented under Part 21 in general.

[67] I do not consider that the learned judge's approach in this regard discloses any reversible error. The omission to refer expressly to rule 21.4 made no material difference because the decisive deficiency was the same under either rule; there was no evidential or procedural basis upon which the court could make an effective order joining the Estate through a representative or appointing a representative for the Estate. In those circumstances, the learned judge committed no error in principle by referring to rule 21.7, or by not expressly citing rule 21.4. Ground 3 also fails.

Disposition

[68] For the reasons set out above, I conclude that the learned judge did not materially conflate the joinder inquiry under Part 19 with the representation inquiry under Part 21. Nor has the appellant shown that the absence of express findings under rule 19.2(3), or the judge's reliance on rule 21.7 without express reference to rule 21.4, amounted to errors warranting appellate interference. The appeal therefore fails.

[69] I therefore dismiss the appeal on all three grounds and make the following orders:

(1) The appeal is dismissed, and the decision and orders of the learned judge are affirmed.

(2) The respondents shall have their costs of the appeal to be assessed by a judge or master of the High Court, if not agreed within 21 days of the date of delivery of this judgment.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Paula Gilford
Justice of Appeal [Ag.]

By the Court

Chief Registrar