

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: P-342 of 2017

Claim No. CV2016-04288

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW PURSUANT TO PART 56.3, 56.4 AND 56.7 OF THE CIVIL PROCEEDINGS RULES, 1998 AS AMENDED AND PURSUANT TO SECTION 5 OF THE JUDICIAL REVIEW ACT, NO. 60 OF 2000

AND

IN THE MATTER OF THE DECISIONS AND/FINDINGS AND/OR RECOMMENDATIONS OF THE COMMISSION OF ENQUIRY APPOINTED TO ENQUIRE INTO THE ENTIRE PROCESS WHICH LED TO THE CONSTRUCTION OF THE LAS ALTURAS TOWERS AT LADY YOUNG GARDENS, MORVANT COMPRISING OF JUSTICE MUSTAPHA IBRAHIM, DR. MYRON WING-SANG CHIN AND MR. ANTHONY FARRELL PURSUANT TO THE WARRANT OF HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO ON THE 2<sup>ND</sup> DAY OF DECEMBER 2014 AS AMENED BY THE ALTERED WARRANT OF APPOINTMENT DATED THE 27<sup>TH</sup> DAY OF MARCH 2015, THE ALTERED WARRANT OF APPOINTMENT DATED THE 11<sup>TH</sup> DAY OF FEBRUARY 2016, THE ALTERED WARRANT OF APPOINTMENT DATED THE 25<sup>TH</sup> DAY OF MAY 2016 AND THE ALTERED WARRANT OF APPOINTMENT DATED THE 22<sup>ND</sup> DAY OF AUGUST 2016 CONTAINED IN THE REPORT OF THE COMMISSION OF ENQUIRY DATED THE 30<sup>TH</sup> DAY OF AUGUST 2016 WHICH WAS PRESENTED TO HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO ON THE 7<sup>TH</sup> DAY OF SEPTEMBER 2016 AND LAID IN PARLIAMENT ON THE 9<sup>TH</sup> DAY OF SEPTEMBER 2016

AND

IN THE MATTER OF THE COMMISSIONS OF ENQUIRY ACT, CHAPTER 19:01

BETWEEN

DR. MYRON WING-SANG CHIN

First Appellant

MR. ANTHONY FARRELL

Second Appellant

(IN THEIR CAPACITIES AS THE COMMISSIONERS OF THE COMMISSION OF ENQUIRY INTO THE ENTIRE PROCESS WHICH LED TO THE CONSTRUCTION OF THE LAS ALTURAS TOWERS AT LADY YOUNG GARDENS, MORVANT)

AND

NOEL GARCIA

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

First Respondent

Second Respondent

PANEL: A. Mendonça J.A.  
J. Jones J.A.

Date of Delivery: January 16, 2019

**APPEARANCES:**

Mr. G. Ramdeen appeared on behalf of the Appellants

Mr. C. Kangaloo appeared on behalf of the First Respondent

Mr. R. Dass led by Mr. F. Hosein S.C. and instructed by Ms. A. Ramsook for the Second Respondent

I have read the judgment of Mendonça J.A. I agree with it and have nothing to add.

/s/ J. Jones J.A.

**JUDGMENT**

Delivered by Mendonça J.A.

1. This is an appeal by Dr. Myron Wing-Sang Chin and Mr. Anthony Farrell (who I shall refer to as “the Appellants”) from the decision of the case management Judge appointing them to represent the estate of the late Justice Ibrahim (“the Deceased”) for the purpose of these judicial review proceedings and that the intitlement of these proceedings be amended going forward to reflect the appointment of the Appellants as the representatives of the Deceased.
2. The material facts and circumstances which give rise to this appeal are not in dispute. Before I refer to them, however, I will set out the rules of the **Civil Proceedings Rules, 1998** (“the CPR”) which I believe are relevant to this appeal and which are referred to in the course of this judgment.
3. Rules of the CPR:

#### **CHANGE OF PARTIES—GENERAL**

- 19.2(1)** This rule applies where a party is to be added or substituted.
- (2) A party may add a new party to proceedings without permission at any time before a case management conference.
  - (3) The court may add a new party to proceedings if—
    - (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
    - (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.
  - (4) The court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.

- (5) The court may order a new party to be substituted for an existing one if—
  - (a) the existing party’s interest or liability has passed to the new party; and
  - (b) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party.
- (6) The court may add or substitute a party at a case management conference.
- (7) The court may not add a party after a case management conference on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the case management conference.

**PROCEEDINGS AGAINST THE ESTATE OF A DEAD PARTY**

- 21.7 (1)** Where in any proceedings it appears that a dead person was interested in the proceedings then, if the dead person has no personal representatives, the court may make an order appointing someone to represent his estate for the purpose of the proceedings.
- (2) A person may be appointed as a representative if he—
    - (a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; 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.

- (4) Until the court has appointed someone to represent the dead 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.
- (5) A decision in proceedings where the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate.

#### **POWER OF COURT TO GIVE DIRECTIONS TO ENABLE PROCEEDINGS TO BE CARRIED ON AFTER A PARTY'S DEATH**

- 21.8** (1) If a party to proceedings dies, the court may give directions to enable the proceedings to be carried on.
- (2) An order under this rule may be made on or without an application.

#### **JUDICIAL REVIEW—APPLICATION FOR LEAVE**

- 56.3**(1) No application for judicial review may be made unless the court gives leave.
- (2) An application for leave may be made without notice.
- (3) The application must state—
- (a) the name, address and description of the applicant and respondent;
  - (b) the relief including in particular details of any interim relief sought;
  - (c) the grounds on which such relief is sought;

- (d) the applicant's address for service;
  - (e) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued;
  - (f) details of any consideration which the applicant knows the respondent has given to the matter in question in response to a complaint made by or on behalf of the applicant;
  - (g) whether any time limit for making the application has been exceeded and, if so, why; and
  - (h) whether the applicant is personally or directly aggrieved by the decision about which complaint is made; or
  - (i) where the applicant is not personally or directly aggrieved, what public or other interest the applicant has in the matter; and
  - (j) the name and address of the applicant's attorneys (if applicable).
- (4) The application must be verified by evidence on affidavit which must include a short statement of all the facts relied on.
- (5) The applicant must file his application for leave and affidavit not later than the day before the application is to be heard unless the court otherwise orders.

#### **JUDICIAL REVIEW – HEARING OF APPLICATION FOR LEAVE**

- 56.4(1) An application for leave to make a claim for judicial review must be considered by a judge of the High Court.
- (2) The judge may give leave without hearing the applicant.
- (3) However, if—
- (a) the judge is minded to refuse the application;
  - (b) the application includes a claim for immediate interim relief; or

(c) it appears that a hearing is desirable in the interests of justice, he must direct that a hearing in open court be fixed.

(4) The judge may direct that notice of the hearing be given to the respondent or the Attorney General.

#### **HOW TO MAKE AN APPLICATION FOR AN ADMINISTRATIVE ORDER**

56.7 (4) The affidavit must state –

(a) the name, address and description of the claimant and the defendant.

#### **SERVICE OF CLAIM FORM FOR AN ADMINISTRATIVE ORDER**

56.10 (1) The claim form and the affidavit in support must be served on the defendants not less than 14 days before the date fixed for the case management conference.

4. On 2<sup>nd</sup> December, 2014 the President of the Republic of Trinidad and Tobago, pursuant to Section 2 of the Commissions of Enquiry Act Chapter 19:01 appointed the Deceased and the Appellants as commissioners in relation to a commission of enquiry to enquire into the entire process which led to the construction of the Las Alturas Towers at Lady Young Gardens, Morvant. I shall refer to the Deceased and the Appellants collectively as “the commissioners” and the commission of enquiry as “the Commission”). The Deceased was directed to be the Chairman of the Commission. The terms of reference of the Commission were subsequently amended to include an enquiry into the causes, events, matters, circumstances and considerations which led to the decision to demolish buildings H and I of the Las Alturas Towers “including the demolition thereof”.
5. The commissioners executed their commission and issued their report dated 30<sup>th</sup> August, 2016. In the report the commissioners made certain decisions and/or findings and/or recommendations (“the findings”) in relation to the First Respondent, Noel Garcia, of which

he complains as having caused him great distress. I shall hereafter refer to the First Respondent interchangeably as “the First Respondent” or “Mr. Garcia”.

6. On 2<sup>nd</sup> December, 2016 Mr. Garcia obtained leave to make a claim for judicial review in relation to the findings contained in the report of the Commission.
7. On 8<sup>th</sup> December, 2016, pursuant to leave granted to him, Mr. Garcia filed a fixed date claim form for judicial review. Each of the commissioners “In their capacities as the Commissioners of the Commission of Enquiry into the Entire Process which Led to the Construction of the Las Alturas Towers of Lady Young Gardens, Morvant” were named as the defendants to the judicial review claim. Mr. Garcia sought the following relief:

*(1) A declaration that the Commission in deciding and/or finding and/or recommending or in the process of arriving at the said decisions and/or findings and/or recommendations as against Mr. Noel Garcia in the Commission Report dated August 30, 2016 acted illegally and/or in excess of jurisdiction and/or ultra vires and/or irrationally and/or unreasonably and/or irregularly and/or by improperly exercising discretions and/or in abuse of power and/or by taking into account irrelevant considerations and/or on no evidence or no probative evidence in which the said decisions and/or findings and/or recommendations could reasonably be made and/or by exercising power in a manner that is so unreasonable that no reasonable person could have exercised the power and/or without observing the principles of natural justice and/or denying [Mr. Noel Garcia] his legitimate expectations thereby causing a substantial wrong or miscarriage of justice and/or in breach of its duties and/or omitted to perform a duty and are null and void and of no effect;*

*(2) Further and/or alternatively, an order of certiorari to remove into this Honourable Court and quash those decisions and/or findings and/or recommendations;*

*(3) Costs;*



*(4) Such other orders, directions, declarations, writs and/or other relief as the Court considers just and as the circumstances warrant.*

8. On or about 8<sup>th</sup> or 9<sup>th</sup> June, 2017 before the judicial review claim could be heard and determined, the Deceased unfortunately passed away. On 31<sup>st</sup> October, 2017 Mr. Garcia made an application to appoint the Appellants as representatives of the Deceased for the purpose of the judicial review proceedings and also for directions to enable the proceedings to be carried on. The application is as follows:

*“The [First Respondent] hereby applies to the Honourable Court pursuant to Part 21.7 of the Civil Proceedings Rules 1998, as amended (“the CPR”) and/or the inherent jurisdiction of the Honourable Court for an Order that the [the First Appellant and/or the Second appellant] be appointed as the representative and/or representatives of [the Deceased] for the purposes of these proceedings.*

*The [First Respondent] also hereby applies to the Honourable Court pursuant to Part 21.8 of the CPR and/or under the inherent jurisdiction of the Honourable Court for directions to enable these proceedings to be carried on.”*

9. The application was supported by an affidavit of the First Respondent in which he deposed to the following, *inter alia*:

- (i) The Deceased was interested in these proceedings at the time of his death even though he was a defendant not in his personal capacity but as that of a commissioner on the Commission.*
- (ii) No person has applied for a grant of probate or letters of administration in respect of the estate of the Deceased. Accordingly, the Deceased has no personal representative.*
- (iii) By virtue of Rules 21.7 (1) and 21.7 (4) of the CPR the court may appoint a person as a representative of the estate of the Deceased and until the court has appointed someone to represent the estate of the Deceased, the [First*

*Respondent] may take no step in the proceedings apart from applying for an order to have a representative appointed.*

*(iv) Under Rule 21.7 (2) of the CPR a person may be appointed as a representative if he can fairly and competently conduct proceedings on behalf of the estate of the deceased person and has no interest adverse to estate of the deceased person.*

*(v) Leave was granted to make the application for judicial review on the grounds essentially contained in the declaration referred to in the fixed date claim form which is set out earlier in this judgment;*

*(vi) The judicial review proceedings were therefore brought against the conduct of the commissioners and the Commission as a whole. As such the Appellants had exactly the same interest as the estate of the Deceased, as they were all members of the Commission and will be able to fairly and competently conduct proceedings on behalf of the estate of the Deceased.*

10. The application was heard before the case management Judge and was granted.

11. In his judgment, the Judge appears to be of the view that the rules of court pursuant to which the application was made by the First Respondent do not apply to public law matters but that the court has an inherent jurisdiction to substitute a party in judicial review proceedings where appropriate. In the circumstances the Judge said the question “*at the end of the day which the court had to consider in determining the application was whether [the Deceased] had an interest in the matter which could have survived his death*”. He held that the Deceased (as well as the other commissioners, namely the Appellants) had an interest in the matter personal to them which could survive their death. In the circumstances, it was appropriate to appoint someone to represent the estate of the Deceased. He found that the Appellants were the appropriate persons to do so. He said:

*“there could be no one in a better position to deal with [the Deceased’s] residual interest in the Commission than the other Commissioners, in light of the fact that*

*it was a single report, with no dissent. In the circumstances, it would hardly be likely that the [Appellants] would unknowingly have some interest adverse to that of [the Deceased], and they would be privy to anything which may have transpired, which would affect the interest of [the Deceased].”*

12. The Appellants now appeal and they rely on the following grounds of appeal:

- (i) There is no lis between the parties to a claim for judicial review and hence there are no “parties” to a claim for judicial review. The concept of substitution for the estate of the Deceased is therefore inapplicable to these proceedings.*
- (ii) The learned Judge misunderstood and/or misconstrued the true nature of the proceedings by the substitution order made. The proper respondent is in fact the “Commission of Enquiry Appointed to enquire into the entire process which led to the construction of the Las Alturas Towers at Lady Young Gardens, Morvant appointed pursuant to Warrant of His Excellency dated December 02, 2014” and not the individual commissioners who need not have been named as individual parties to the claim.*
- (iii) The procedure was in any event irregular and/or improper in that the application for substitution was not served upon the family of the Deceased but rather the attorney-at-law acting for the Commission.*
- (iv) While the Judge was correct to invite submissions by Counsel for the Appellants/Respondent Commission he was wrong to reject same. There was no evidence before him of the nature of the relationship, if any, that the Appellants had with the Deceased. There was likewise no evidence that the Appellants did not have any adverse interest to the said estate and that they were willing to be so substituted and had no objections to being so substituted.*

(v) *The substitution was wholly unnecessary and entirely misconceived having [regard] to the nature of the proceedings and the fact that there is no liability [that] could attach to the said estate in light of provisions of the Commissions of Enquiry Act.*

13. I propose to treat with the grounds of appeal together.

14. It is correct to say that in judicial review proceedings there is no *lis* between the parties. Judicial review proceedings are directed at the decision and not the parties. As was said in **Gilharry v. Transport Board et al BZ 2012 CA 10**, “*what is vulnerable [in judicial review proceedings] is the decision and not the decision maker*” it is the “*process by which the courts exercise a supervisory jurisdiction over the activities of public authorities in the field of public law*”.

15. It is, however, not correct to say that there are no parties to a claim for judicial review. As counsel for Mr. Garcia has pointed out, there are parties in the sense that there is a party that has an interest in challenging a decision, and there is the person, body or entity whose decision is subject to that challenge.

16. The existence of parties in judicial review proceedings is reflected in the CPR at Part 56 which is applicable to judicial review proceedings. So for example Rule 56.3 which refers to the application for leave to make an application for judicial review requires (at Rule 56.3(3)(a)) that the applicant state in the application the name, address and description of the applicant and the respondent. The applicant must also provide his address for service (Rule 56.3(3)(d) ) and Rule 56.3(5) requires the applicant to file the application not later than the day before the application is to be heard unless the court otherwise orders. The Judge, may grant leave without hearing the applicant (Rule 56.4 (2)) or may direct a hearing (56.4(3)) and may direct that notice be given to the respondent or the Attorney General (Rule 56.4(4)).

17. Where leave is granted, the CPR refers to the person making the claim as the claimant and requires him to file with the claim form an affidavit identifying “the name, address and description of the claimant and the defendant” as well as their addresses for service (Rule 56.7(4) ). Further, Rule 56.10(1) requires the claim form and the affidavit in support to be

served on the defendants not less than 14 days before the date fixed for the case management conference.

18. As there are parties in judicial review proceedings, it should come as no surprise that courts have made orders for their substitution. For example, in **Civil Appeal No. 109 of 1985 Sooknanan v. The Conservator of Forests et al TT 1986 CA 14** the Court of Appeal held that the Attorney General was not a proper party to the judicial review proceedings before it and ordered that he be substituted with the proper respondents, namely the Conservator of Forests and the Minister of Agriculture, Lands, Fisheries and Food Production. Similarly in **R v. Secretary of State for the Environment, ex p. Friends of the Earth and Another [1996] Env.L.R. 198** one of the appellants [a Mr. Lees] died while the appeal was pending and was replaced by a Ms. Orengo. The court noted:

*“Unhappily Mr. Lees dies while this appeal was pending. Mr. Lees was replaced by Ms. Orengo and the necessary procedural steps were deemed to have been taken to enable her to appear as an appellant before this court.”*

19. The concept of substitution of parties is therefore not unknown in the context of judicial review proceedings. I cannot accept the Appellants’ contention to the contrary as contained in ground (i) of the grounds of appeal.
20. It was contended by the Appellants, as is evident from their grounds of appeal, that the proper defendant to the judicial review proceedings is the “Commission of Enquiry into the entire process which led to the construction of the Las Alturas Towers at Lady Young Gardens, Morvant”. I accept that it was possible for the First Respondent to have named the Commission as the defendant to these proceedings as contended by the Appellants. Even though he may have been best advised to do so, it was nevertheless open to the First Respondent to name as the defendants the individual commissioners as was done in this case. That is neither fatal nor erroneous. This can be gleaned from **Sooknanan (supra)**.
21. In that case Persaud J.A, who gave the leading judgment of the Court of Appeal, referred to the following from the case of **Attorney General of Fiji v Director of Public Prosecutions [1983] 2 AC 672**. (at p 684):

*“While their Lordships are accordingly of opinion that it was permissible for the Director of Public Prosecutions in the present case to make the application in the name of his office, they do not consider that it would necessarily be incompetent for a person in the position of the Director of Public Prosecutions to apply either in his personal name, or in some such style as “A.B. being the Director of Public Prosecutions. If he were to apply in either of these ways, there might be some inconvenience if he died, or demitted office, while the proceedings were in progress, because proceedings under section 97 (1) have to be founded on the allegation that “his interests are being or are likely to be affected.” Where the allegation relates to the interests of an office, it could hardly be maintained after the applicant had ceased to hold the office. In such cases, it will therefore probably be more convenient, as a general rule, to apply in the name of the office than in the personal name of the office holder.”*

He then noted:

*“And the situation envisaged in the latter portion of the extract quoted above would seem, in my view, to be contemplated by sec. 56 of the Interpretation Act (Chap.3:01), (referred to by counsel for the respondent). That section provides:*

*“A civil or criminal proceeding taken under any written law by or (in the case of civil proceeding) against any person in virtue of his office (whether in the person’s own name or in the name of his office) shall not be discontinued or abated by his death, resignation, absence or removal of office, but may be carried on by or, as the case may be, against the person for the time being holding that office”.*

*In my opinion, “civil proceeding” in sec. 56 should not be given a restricted meaning as sec. 2 of the State Liability and Proceedings Act has sought to do. An examination of secs. 55 to 61 of Chap.3:01 under the heading ‘Procedural Matters’ indicates in my view that all proceedings of whatever nature are contemplated.”*

Persaud JA was therefore of the view that Section 56 of the Interpretation Act Chapter 3:01 would apply to the case where the holder of the office is named as the claimant or defendant and dies. In such a case the claim may be carried on by or against the person holding the office for the time being. There is nothing there to suggest that naming the holder of the office is not permissible. Further, the scenario where the office holder is named as a party and dies also provides an example where a substitution may be permitted so the claim may be carried on by or against the person holding the office for the time being.

22. It is therefore not surprising that in this jurisdiction, in judicial review proceedings involving a commission of enquiry, one will find instances where the commission has been named as the defendant and instances where the commissioners have been named as defendants (see for example Claim No. CV2009-01632 Urban Development Corporation of Trinidad and Tobago Limited, Calder Hart v. John Uff, Desmond Thornhill, Kenneth Sirju, Israel Khan and the Attorney General of Trinidad and Tobago; Civil Appeal No. 136 of 2007 NH International (Caribbean) Limited v the Commission of Enquiry into the award of all contracts to NH International (Caribbean) Limited and Warner Construction and Sanitation Limited and/or Warner Construction Limited from 2002 to the present; and CV2009-3394 Urban Development Corporation of Trinidad and Tobago v. Kenneth Sirju, Desmond Thornhill and John Huff and the Attorney General of Trinidad and Tobago).
23. As I mentioned earlier, the Judge in deciding to order the substitution of the parties proceeded under the inherent jurisdiction of the court. The application before him was made under both the inherent jurisdiction and Rules 21.7 and 21.8 of the CPR. The Judge therefore did not accept that the rules were applicable. He came to that conclusion, it seems, because of the reasoning in **River Thames Society and Lady Berkeley v First Secretary of State and Ors [2006] EWHC 2829 (Admin)** to which he made reference.
24. In **River Thames Society (supra)**, the Society applied to challenge a grant of planning consent by the First Secretary of State. The Society, however, took a decision to withdraw the proceedings and its vice-chairman applied to be substituted as the claimant. The court

considered Part 19.2(4) of the English Civil Procedure Rules which governs the substitution of a party and is in the following terms:

*“The court may order a new party to be substituted for an existing one if -*

*(a) the existing party’s interest or liability has passed to the new party; and*

*(b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings.”*

25. The Judge in **River Thames Society (supra)**(Underhill J) considered that the language of the rule was difficult to apply to judicial review proceedings as the concept of the original claimant having an “interest” or liability which has passed to a would-be new claimant is inapt. Underhill stated (at para 3):

*“...the concept of the original claimant having an “interest” which has “passed” to the would-be claimant is inapt. While in one sense claimants in public law proceedings – whether in the form of conventional judicial review proceedings or other statutory challenges of the kind with which we are here concerned – are of course required to have an “interest” in the dispute, it is an interest of a very different kind, and the term is used in a very different sense, from a private law interest; and it is hard to see how such an interest can be “passed” to another person. Nor, I might add, does a defendant in public law proceedings normally have a “liability” which can be passed. It is fairly clear to me that what the draftsman had in mind was private law rights and obligations, which are indeed capable of being “passed” by being devolved or assigned.”*

26. He stated that cases of the kind before him could be accommodated within Part 19 by a benign construction of the concept of the passing of an interest but that would be stretching language beyond breaking point. The Judge, however, was of the view that if a claimant could never be substituted in public law cases there can be clear injustice. He noted that there have been many cases where there have been substitutions in similar circumstances as the case before him. He therefore concluded that while Part 19 is inapplicable to the judicial review



proceedings, the court had an inherent jurisdiction to make the substitution, which it would exercise, so far as possible, in accordance with the principles appearing in Part 19 and cases in relation to it, and its predecessor rules.

27. Rule 19.2 (4) of the English Civil Procedure Rules, which was the relevant rule considered in **River Thames Society (supra)**, is not equivalent of or similar to Rules 21.7 and 21.8 of the CPR, which are the rules pursuant to which the First Respondent's application was made. It is, however, the equivalent of Rule 19.2 (5) of the CPR. I agree with the reasoning of Underhill J in relation to that rule. It is difficult to apply the language of Rule 19.2 (5) to judicial review proceedings generally. That rule allows the court to make an order for substitution if the existing party's "interest" or liability has passed to the new party. While the claimant in judicial review proceedings has an interest, as Underhill J noted, it is an interest of a different kind than in private law proceedings and the word is used in a different sense in private law cases. A claimant in judicial review proceedings does not need to possess any interest that can devolve to or be assigned (or in other words, pass) to a new party. The same is true of a defendant as he need not have an interest or liability that can be passed and generally does not. The rule would likely be of no relevance generally to judicial review claims. It does not appear therefore that the framers of the rule intended it to apply to judicial review proceedings.

28. The application of the First Respondent invoked Rule 21.7 and not Rule 19.2 (5). However in coming to his decision the Judge did not rely on that rule but invoked the inherent jurisdiction of the court. It seems fair to say that in doing so he was of the view that the reasoning in **River Thames Society (supra)** was applicable to that rule as well. It seems to me that he was right to be of that view.

29. Rule 21.7 comes under the rubric "Proceedings against the estate of a dead party." It applies where a dead person is "interested" in proceedings and has no personal representative. The rule permits the court to make an order appointing someone to represent the dead person's estate. Where such an order is made, a ruling in the proceedings binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's

estate (see rule 21.7 (5)). Where the court appoints a representative of the estate of the deceased person for the purpose of the proceedings it generally makes an order under Rule 21.8 that the proceedings be carried on as between the claimant and the person appointed to represent the estate of the deceased person.

30. The primary purpose of Rule 21.7 is to enable the court to appoint a representative of the deceased person's estate so as to bind the estate to any ruling the court may make in the proceedings. It enables the court to dispense with the need for a formal grant of probate or letters of administration. In those circumstances, in my view, the words "that a dead person was interested in the proceedings" in Rule 21.7 (1) have the same sense as the passing of an interest or liability as in rule 19.2 (5), otherwise there would be no need to bind the estate to any ruling that may be made in the proceedings.
31. Rule 21.7 therefore has no application to the case where a deceased defendant has no interest or liability capable of passing on his death. It operates in the same context as rule 19.2(5) and facilitates the appointment of a representative of a deceased person. In that light, it is subject to the same criticisms as have been made in the **River Thames Society (supra)** case in relation to 19.2(5). A defendant in judicial review proceedings is not required to have any interest that passes on death and normally does not. Nor does the defendant normally have any liability that can be passed. As in the case of rule 19.2(5), rule 21.7 does not appear to have been drafted with judicial review proceedings in mind.
32. In granting the application the Judge thought that the Deceased had an interest personal to him that survived his death. I, however, do not accept that that is an interest that passed to the estate of the Deceased. In this case it may be said that the Deceased had an interest in the proceedings but it is not an interest that was personal to him. It is an interest as a member of the Commission or in other words as a commissioner. In such circumstances, it would not be possible to say that such an interest passed on his death to his estate. Also, I do not believe there is any question of any liability passing to the estate on the death of the Deceased. There is no claim for damages and, in any event, as a commissioner the Deceased would not have

any personal liability that would pass on his death (see *Section 11 of the Commissions of Enquiry Act Chapter 19:01*).

33. If Rules 19.2(5) and 21.7, which are the rules in the CPR that are relevant to the substitution or adding of a representative of a deceased party, were not drafted with judicial review proceedings in mind and an applicant cannot bring himself within the language of the rules, what then is the position? Like the Judge, I also believe that an application for substitution of a deceased person in those circumstances may be considered under the inherent jurisdiction of the court. I accept what was said in the **River Thames Society (supra)** case that the principles relevant to the exercise of such jurisdiction are to be derived from the CPR, and where they might be of assistance, the previous rules of court and the cases decided thereunder.
34. It seems to be that the aim of and the principle to be derived from the rules in the CPR relating to the substitution of a dead person is that the court should permit a substitution to ensure that the parties who are required for the just and effective resolution of the matters in dispute are before the court. In that context, the overriding objective of the CPR is also relevant.
35. It is appropriate to point out that no one has suggested that Section 56 of the Interpretation Act applies to this case. It seems clear to me that it does not as there is no one holding the office once held by the Deceased. Although Section 3 of the Commissions of Enquiry Act Chapter 19:01 provides for the President to appoint a new commissioner in the place of one who has died, this has not occurred and probably will not happen as the Commission has completed its enquiry and issued its report. That, however, does not stand in the way of the court making an order for substitution where it is appropriate to do so.
36. The question therefore is whether in this case the substitution of the Deceased is required for the just and effective resolution of the matters in dispute. And it is appropriate to emphasise that this case is perhaps the unusual case where in judicial review proceedings the claimant is seeking to substitute a defendant in the event of his death because he was named as a defendant in his personal name.

37. Here it is relevant to note that notwithstanding the death of the Deceased there are two surviving commissioners who are also named as defendants in these proceedings, namely the Appellants, against whom the proceedings continued. A reason given by the First Respondent for the making of the application for the substitution was that he could take no further step in the proceedings other than to apply for an order to have a representative appointed. This is so provided in Rule 21.7(4), but in my view that applies in limited circumstances, such as where the claimant is seeking relief against the deceased and it is necessary to bind the estate of the deceased or where the claim is abated on the death of the defendant but the cause of action survives and the claimant wishes to carry on the proceedings. On the facts of this case the First Respondent could have proceeded against the surviving commissioners without recourse to the court. Put simply, an application was not necessary under rule 21.8 to “enable” the proceedings to be carried on. Whether the substitution was required for the just and effective resolution of the matters in dispute before the court should be considered in that context.

38. I see no basis for saying that the substitution was required in this case. As the Judge recognised, the findings challenged by Mr. Garcia are those of a single commission of enquiry. There was a single report of the Commission and there was no dissent. There is nothing to suggest that the Appellants, as the two surviving commissioners, would not be capable of putting before the court all relevant information and providing the court with all appropriate assistance to resolve the issues. Correspondingly, there is nothing to suggest that the presence of the estate of the Deceased is necessary to resolve the issues in dispute in these proceedings. Certainly nothing of that kind is alluded to in the affidavit of the First Respondent in support of the application. There is no indication that the substitution of the Deceased would add or bring anything to the proceedings that the surviving commissioners cannot provide. The application seems to have been made essentially on the false premise that in view of the death of the Deceased no further step in the proceedings could be taken until there was a substitution.

39. It seems to me to follow from the fact that the substitution of the Deceased would not add or bring anything to the proceedings that the surviving commissioners cannot, that the

substitution would not be required to give effect to the overriding objective. In short the substitution would not be required to enable the court to deal with the case justly.

40. In the circumstances, in my judgment, the Judge ought not to have granted the application of the First Respondent.
41. Before leaving this appeal, I would like to make reference to an issue raised in the grounds of appeal: whether the application should have been served on a member of the family of the Deceased. In this regard it is appropriate to note the application of the First Respondent sought to appoint the Appellants or any one of them to represent the estate of the Deceased and to substitute them, or anyone who is appointed, as the defendant(s). If I am correct in saying the application is not to be considered under Rule 21.7, which gives the court the power to make such an order for the appointment of a person to represent the estate of the deceased, the court would have power to do so under **Section 25** of the **Wills and Probate Act Chapter 9:03**. This section gives the court the power to make a grant of administration where there is no representative of the estate of the deceased. The grant may be limited in any way as a court may deem fit. The grant therefore may be limited for purposes of the proceedings in respect of which the application is made. It has always been the practice in such cases to serve the application on a member of the deceased's family (see for example *In the Estate of A.B. Simpson (deceased) [1936] P.40*). Such a practice is eminently advisable and fair as it is the family of the deceased that can be expected to have an interest in representing the estate of the deceased especially where there is some interest or liability capable of passing to the estate.
42. Such a practice, it would seem to me, is also advisable where the application is properly made under Rule 21.7 as it is the family of the deceased that is likely to have any real interest in the proceedings and would probably be in the best position to provide a person that satisfies the requirement of Rule 21.7 (2).
43. If there was otherwise merit in the application, the Judge ought to have directed that it be served on a member of the Deceased's family before proceeding to hear and determine it.

44. In view of the above, I would allow the appeal, set aside the order of the Judge and dismiss the application of the First Respondent. Also I would hear the parties on the question of costs.

**A. Mendonça J.A.**