Neutral Citation Number: [2022] EWCA Civ 1682

Case No: CA-2022-000803

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT MANCHESTER
His Honour Judge Pearce
[2022] EWHC 792 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before:

LADY JUSTICE KING
LORD JUSTICE NEWEY
and
LORD JUSTICE COULSON

- -

Between:

GLENDA JOY JENNISON (as personal representative of the estate of GRAHAM JENNISON deceased)	**Claimant/ Respondent**
- and -	
(1) RICHARD HENRY JENNISON	**Appellants/ Defendants**
(2) GWYNETH MARY JENNISON	

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- -

Philip Stear (instructed by direct access) for the **Appellants**
Rowena Meager (instructed by **Irwin Mitchell LLP**) for the **Respondent**

Hearing date: 1 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. The claimant, Mrs Glenda Jennison, was married to Mr Graham Jennison ("the deceased"), who died in New South Wales, where he was domiciled, on 11 July 2007. The deceased left a will dated 16 August 2006 by which he appointed the claimant as his sole executrix. On 15 May 2008, probate of that will was granted to the claimant by the Supreme Court of New South Wales.

2. The claimant issued the present proceedings on 18 February 2019. She was stated in the heading to the claim form to be suing "as personal representative to the estate of Graham Jennison deceased". The deceased and the first defendant, Mr Richard Jennison, were brothers, and the second defendant, Mrs Gwyneth Jennison, is the first defendant's wife. By her claim, the claimant sought relief in respect of breaches of trust which the defendants were said to have committed in connection with land near Church Street, Wales, Sheffield.

3. Paragraph 3 of the particulars of claim referred to the New South Wales grant of probate ("the Grant"). In paragraph 4 of their defence, which was dated 2 August 2019, the defendants said that it was "not admitted that the said Probate confers any jurisdiction to the Claimant in respect of any part of the said Graham Jennison's estate which may exist within England and Wales".

4. On 25 November 2019, the Grant was resealed by the High Court under the Colonial Probates Act 1892 ("the 1892 Act"). At much the same time, these proceedings were transferred from the High Court to the County Court.

5. On 21 September 2020, the claimant amended her particulars of claim in a variety of respects. As part of the changes, paragraph 3 was expanded to refer to the resealing of the Grant.

6. The defendants in turn amended their defence on 23 September 2020. In its revised form, the defendants put forward a positive case in relation to the Grant. This was said:

> "1A. At the time that the Claimant issued the Claim Form (18 February 2019) purporting to bring the claim as personal representative to the estate of Graham Jennison deceased the Claimant as a foreign Executor had no legal standing or capacity to do so and the Claim is liable to be struck out as being void and a nullity. The Defendants set out their case on the Claimant's lack of standing/capacity in more detail below ….
>
> 4. It is not admitted that the said Probate confers any jurisdiction to the Claimant in respect of any part of the said Graham Jennison's estate which may exist within England and Wales. The said Probate having been resealed in England and Wales on 25 November 2019 it is admitted that the resealed Probate confers with effect from 25 November 2019 (but not before

> that day) jurisdiction to the Claimant as a foreign Executor in respect of any part of the said Graham Jennison's estate which may exist within England and Wales. It is averred that in the absence of any resealed Probate the Claimant being a foreign executor had no capacity and/or legal standing at the date of issue of the Claim Form and that the Claim should accordingly be struck out or dismissed the claim being void and a nullity."

7. The claim came on for trial before District Judge Carter, sitting in the County Court at Manchester, on 8 October 2020. At the outset of the hearing, the District Judge heard an application by the defendants for the proceedings to be struck out, or for summary judgment in their favour, on the basis that the claimant had had no standing to bring the claim when it was issued. In a judgment given that day, the District Judge dismissed the application, and the trial then proceeded. At the conclusion of the trial, the District Judge gave judgment in favour of the claimant on her claim.

8. The defendants appealed the District Judge's ruling on their strike out/summary judgment application. The appeal came before His Honour Judge Pearce on 7 March 2022, but, in a judgment dated 4 April 2022, he dismissed it. The defendants now challenge Judge Pearce's decision in this Court.

9. For completeness, I should mention that the defendants also appealed District Judge Carter's decision on the substance of the claim. We are not, however, concerned with that appeal.

10. District Judge Carter determined the strike out/summary judgment application in the claimant's favour on the basis that "an executor derives its title from the will and not from any letters of administration or grant from the courts" and, hence, that "the claimant as the executrix of the will was entitled … to bring this claim irrespective of whether she was a foreign personal representative or not", albeit that it is "a requirement of these proceedings that, at the time of proving the claimant's case, the claimant is able to show that there has been a grant". District Judge Carter was therefore "satisfied that the claimant has the right to bring this claim". Supposing, however, that he was wrong on that point, District Judge Carter considered that "the court should … exercise its powers under CPR 3 to allow the mistake to be amended and the claim to be dealt with".

11. For Judge Pearce, the 1892 Act was of key importance. In Judge Pearce's view, the resealing of the Grant under that Act served to put the claimant in the same position as she would have been in had the deceased's will been English. Accordingly, "the proceedings were not as a matter of law improperly brought, since it sufficed for the proper constitution of the proceedings that the Claimant was an executor who had her probate re-sealed in the English Courts prior to trial". Judge Pearce further said that, were he wrong on that issue, "the proceedings are not, as a matter of law, an incurable nullity, but rather the court may permit them to continue, waiving any defect pursuant to the power in CPR 3.10".

12. The issues to which the present appeal gives rise can be addressed under the following headings:

i) Standing; and

ii) CPR 3.10.

Standing

The parties' cases in outline

13. Mr Philip Stear, who appeared for the defendants, argued that, while someone appointed as executor under the will of a testator domiciled in England and Wales obtains title to the estate on death, that is not the case with a testator domiciled abroad. The administration of assets of such a person in England and Wales is governed by the law of England and Wales rather than the law of the domicile and, under the former, a foreign executor will not be considered to have title to the testator's estate unless and until a grant of probate is obtained in this jurisdiction or (where this is possible) a foreign grant of probate is resealed here under the 1892 Act. Further, resealing does not operate retrospectively. In the circumstances, so Mr Stear submitted, the claimant had no standing to issue the present proceedings when she did and they remain a nullity notwithstanding the subsequent resealing of the Grant.

14. In contrast, Ms Rowena Meager, who appeared for the claimant, maintained that an executor can bring proceedings in advance of any grant of probate or resealing regardless of where the testator was domiciled. The claimant thus had standing when this claim was issued. Supposing, though, that that were not the case, the claimant acquired title retrospectively when the Grant was resealed.

The position in England and Wales

15. As a matter of domestic law, an executor is considered to gain title as soon as the testator dies, but an administrator acquires title only when letters of administration are granted. In the meantime, legal title to the estate of a person who dies intestate vests in the Public Trustee under section 9 of the Administration of Estates Act 1925.

16. There was reference to the different positions of executors and administrators in *Woolley v Clark* (1822) B & Ald 744. Abbott CJ said at 745-746:

> "There is a manifest distinction between the case of an administrator and an executor. An administrator derives his title wholly from the Ecclesiastical Court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death."

17. Citing, among other authorities, *Woolley v Clark*, Lord Parker of Waddington, giving the judgment of the Privy Council, made remarks to similar effect in *Chetty v Chetty* [1916] AC 604, a case to which I shall have to return later in this judgment. He said at 608-609:

> "It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate.

> The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant."

18. As can be seen from this passage, the fact that, unlike an executor, an administrator lacks any title until granted letters of administration affects his ability to bring legal proceedings on behalf of the estate. An executor, having title from death, need not wait for probate before issuing a claim, albeit that he will have to obtain probate by the time the case comes on for trial in order to prove his title. In contrast, a person has no right to institute proceedings as an administrator in advance of the issue of letters of administration, and proceedings brought earlier are a nullity. Thus, in *Ingall v Moran* [1944] 1 KB 160, where the plaintiff sued as administrator of his son's estate but took out letters of administration only after the date of the writ, the claim was dismissed. Luxmoore LJ said at 169 that he had "no doubt that the plaintiff's action was incompetent at the date when the writ was issued, and that the doctrine of the relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been obtained cannot be invoked so as to render an action competent which was incompetent when the writ was issued": "It is true," Luxmoore LJ noted at 168, "that, when a grant of administration is made, the intestate's estate, including all choses in action, vests in the person to whom the grant is made, and the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ". In *Millburn-Snell v Evans* [2011] EWCA Civ 577, [2012] 1 WLR 41, Rimer LJ, with whom Lord Neuberger MR and Hooper LJ agreed, said at paragraph 16 that he regarded it as "clear law at least since *Ingall's* case, that an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity". Very recently, the Privy Council, too, has deemed a claim brought on behalf of an estate prior to the grant of letters of administration to be a nullity: see *Jogie v Sealy* [2022] UKPC 32, at paragraphs 41, 68, 124 and 162.

Foreign wills and personal representatives

19. In the case of a person domiciled abroad, the law of the domicile will apply in relation to various matters affecting the distribution of his estate. For example, testamentary capacity can be determined by reference to the law of a testator's domicile at the time of making the will (see *Dicey, Morris & Collins on the Conflict of Laws*, 16th ed., at Rule 166), a will is treated as properly executed if its execution conformed to the internal law in force in the territory of the testator's domicile (see section 1 of the Wills Act 1963) and "succession to the movables of an intestate is governed by the law of his or her domicile at the time of his or her death, including its choice of law rules" (see *Dicey, Morris & Collins on the Conflict of Laws*, at Rule 164).

20. In contrast, a grant of representation under the law of a foreign country has no operation of itself in England (see *Dicey, Morris & Collins on the Conflict of Laws*, at Rule 159) and "[t]he administration of a deceased person's assets is governed wholly by the law of the country from which the personal representative derives his or her authority to collect them" (see *Dicey, Morris & Collins on the Conflict of Laws*, at Rule 158). Thus, in *Preston v Melville* (1841) 8 Cl & F 1, Lord Cottenham LC said at 12-12 that "[t]he domicile regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased". *Story, "Commentaries on the The Conflict of Laws"*, 8th ed. (1883), stated at paragraphs 512-513:

> "In regard to the title of executors and administrators, derived from a grant of administration in the country of the domicil of the deceased, it is to be considered that that title cannot de jure extend, as a matter of right, beyond the territory of the government which grants it, and the movable property therein …. It has hence become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator, in his official capacity, in the courts of any other country except that from which he derives his authority to act in virtue of the probate and letters testamentary there granted to him. But if he desires to maintain any suit in any foreign country, he must obtain new letters of administration, and give new security according to the general rules of law prescribed in that country, before the suit is brought."

In *Re Lorillard* [1922] 2 Ch 638, Warrington LJ noted at 645-646 that "[t]he principle is that the administration of the estate of a deceased person is governed entirely by the lex loci, and it is only when the administration is over that the law of his domicil comes in".

21. The need for a foreign personal representative to obtain a grant of probate or letters of administration in this jurisdiction was mitigated somewhat by the introduction of resealing as an alternative. This was initially available only within the United Kingdom, pursuant to the Probates and Letters of Administration (Ireland) Act 1857 and the Confirmation of Executors (Scotland) Act 1858. Section 95 of the former Act provided:

> "From and after the Period at which this Act shall come into operation, when any Probate or Letters of Administration to be granted by the Court of Probate in Ireland shall be produced to and a Copy thereof deposited with the Registrars of the Court of Probate in England, such Probate or Letters of Administration shall be sealed with the Seal of the last-mentioned Court, and being duly stamped shall be of the like Force and Effect and have the same Operation in England as if it had been originally granted by the Court of Probate in England."

The latter Act stated in section 12:

> "From and after the Date aforesaid, when any Confirmation of the Executor of a Person who shall in manner aforesaid be found to have died domiciled in Scotland, which, includes, besides the Personal Estate situated in Scotland, also Personal Estate situated in England, shall be produced in the Principal Court of Probate in England, and a Copy thereof deposited with the Registrar,' together with a certified Copy of the Interlocutor of the Commissary finding that such deceased Person died domiciled in Scotland, such Confirmation shall be sealed with the Seal of the said Court, and returned to the Person producing the same, and shall thereafter have the like Force and Effect in England as if a Probate or Letters of Administration, as the Case may be, had been granted by the said Court of Probate."

22. Resealing was made available much more widely by the 1892 Act, pursuant to which the deceased's will was resealed in the present case. Section 1 of the Act provides for the Act to apply where an Order in Council has so stated. It is in these terms:

> "Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probates and letters of administration granted by the courts of the United Kingdom, direct by Order in Council that this Act shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly."

In practice, the Act has been applied to almost the whole of the Commonwealth, including New South Wales.

23. Section 2(1) of the 1892 Act reads as follows:

> "Where a court of probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person then … the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a court of probate in the United Kingdom, be sealed with the seal of that court, and, thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that court."

Section 2(2) provides that, before resealing a probate or letters of administration, the Court must "be satisfied … that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom".

24. A person appointed as an administrator elsewhere than in the United Kingdom is not entitled to bring proceedings in that capacity in England and Wales until the letters of administration have been resealed under the 1892 Act (where that is possible) or further letters of administration have been granted in this jurisdiction. In *Burns v*

Campbell [1952] 1 KB 15, to which I shall return below in relation to the effects of resealing, the plaintiff brought proceedings "as administratrix" of her husband, who had died domiciled in Northern Ireland. When the writ was issued, she had already taken out letters of administration in Northern Ireland, but she did not have them resealed in England until a couple of months later. The Court of Appeal held the proceedings to be a nullity. Denning LJ said at 17:

> "The result is that on January 19, 1951, when the writ was issued, the widow had not a grant of administration to the English assets. So far as the English courts were concerned, she was not the administratrix. The action was therefore not properly constituted. It purported to be an action by her as administratrix, but she was not an administratrix. The action was therefore a nullity …."

The other member of the Court, Hodson LJ, said at 18 that, "[a]part from the re-sealing of the draft, the writ in this action would admittedly be a nullity, that is to say, it would be a dead thing into which no life could be infused".

25. *Finnegan v Cementation Co Ltd* [1953] 1 QB 688 is to similar effect. There, the plaintiff sued "as administratrix" of her husband having taken out letters of administration in Ireland, where her husband had been domiciled. The claim was dismissed. Singleton LJ said at 693 that "[t]he person who is granted letters of administration in Ireland is not a person empowered by law to administer the estate of the deceased in England". Jenkins LJ regarded it as settled law at 700 that "an action commenced by a plaintiff in a representative capacity which the plaintiff does not in fact possess is a nullity" and concluded at 701 that the question "whether by virtue of the grant of administration taken out by the plaintiff in Southern Ireland she can properly be held to bear the representative capacity of administratrix of the estate of her husband for the purposes of an action in the English courts" was to be answered in the negative.

Does resealing have retrospective effect?

26. As I read Judge Pearce's judgment, he dismissed the defendants' appeal from District Judge Carter's decision on the basis that any defect in the proceedings which the claimant had brought was cured by the resealing of the Grant. Having observed in paragraph 49 of his judgment that "[t]he re-sealing of a foreign grant of probate is clearly necessary to give effect to the foreign will", he said in paragraph 50:

> "In the case of the will subject to Section 2 of the Colonial Probates Act 1892, once that re-sealing has effect, the will is said by the statute to have the same effect as if grant had been made in the English court. That effect is that the will provides the authority for the appointment of the executor, not probate, which is merely the act of proving the will. The appointment would not have '*like effect'* if in fact the position of the executor under the foreign will were different from that under the English will. There is therefore no basis for distinguishing the position of the executor under the foreign will (at least the will that can be re-sealed pursuant to Section 2 of the Colonial

> Probates Act 1892) and that under the English/Welsh will. In either case the principle of Chetty applies and the fact that probate took place after issue of proceedings for recovery of monies on behalf of the estate does not invalidate the proceedings so long as the Claimant is able to prove her title to sue by probate (in the foreign case, resealing) having taken place by the date of trial, such proof being a pre-requisite of proving the claim but not a pre-condition of the validity of the claim in the first place."

At paragraph 56, Judge Pearce concluded:

> "Accordingly, the resealing of the will caused the appointment of the executor to have effect as in the United Kingdom as if the will had been proved in the domestic courts. In those circumstances, the principle of *Chetty v Chetty* applies and the failure to obtain the re-seal[ed] probate prior to the issue of proceedings is no bar to the claim, so long as the re-sealing was effected by the time of the trial. Since it was so effected, the Defendants were not entitled to strike out the claim (or obtain summary judgment on it) and the appeal must be dismissed."

27. Mr Stear challenged the Judge's interpretation of section 2 of the 1892 Act. He argued that resealing operates only prospectively and, hence, that it could not retrospectively validate the proceedings which the claimant had brought.

28. Mr Stear founded his submission principally on *Burns v Campbell*, to which I have already referred. In that case, the Northern Irish letters of administration had been resealed pursuant to section 169 of the Supreme Court of Judicature (Consolidation) Act 1925, which provided:

> "If probate or letters of administration granted by the High Court of Justice in Northern Ireland is or are produced to the High Court and a copy thereof is deposited with the principal probate registry, the grant shall, subject to the provisions of this section, be sealed with the seal of the principal probate registry, and shall have the like effect in England as if it had been originally made by the High Court."

The Court of Appeal rejected the suggestion that resealing under this section had retrospective effect. Denning LJ said at 16-17:

> "It was urged for the plaintiff widow that the word 'originally' gave the re-sealing a retrospective effect. I do not think that is correct. The word 'originally' is only used to denote the way in which the re-sealing operates, not the date from which it operates. It means that the re-sealing has the same effect as an original grant. But it has that effect only from the date of re-sealing. That is shown by the words 'shall have' which are in the future tense. Section 169 means simply that the re-sealing

> shall thereafter have the like effect as if it had been originally made by the High Court.
>
> This view is confirmed by the fact that, as between England and Scotland, the re-sealing only operates in futuro and not retrospectively: see section 168 of the Judicature Act, 1925, which is only a re-enactment of sections 12 and 13 of the Act of 1858, where the word 'thereafter' shows quite clearly that re-sealing has no retrospective operation. It would be very strange if the effect of re-sealing were different as between England and Northern Ireland from what it is between England and Scotland. I do not think that is the case. All these re-sealings operate as a grant only from the date of re-sealing and are not retrospective."

For his part, Hodson LJ said at 18:

> "[Counsel for the plaintiff] says that, having regard to the language of section 169 of the Supreme Court of Judicature (Consolidation) Act, 1925, the grant of administration in England dates back not to the death but to the date of the original grant in Ireland, which was re-sealed in England. That argument is a striking one to advance, because section 169 itself provides that if probate or letters of administration granted by the High Court of Justice in Northern Ireland are deposited with the principal probate registry, the grant shall be sealed with the seal of the principal probate registry 'and shall have the like effect in England as if it had been originally made by the High Court.' The word 'shall' indicates at once that that grant is to have effect from and after the date of the grant, and not before."

29. As was pointed out by Ms Meager, Denning LJ said that his interpretation of the Supreme Court of Judicature (Consolidation) Act 1925 was confirmed by the fact that the equivalent provision, dealing with the position as between England and Scotland, re-enacted sections 12 and 13 of the Confirmation of Executors (Scotland) Act 1858, which had featured the word "thereafter". That word, Ms Meager observed, is not to be found in section 2 of the 1892 Act, which instead uses "thereupon".

30. Even so, I do not consider resealing under the 1892 Act to have retrospective effect. My reasons are these:

    i) In *Burns v Campbell*, Denning LJ saw "the fact that, as between England and Scotland, the re-sealing only operates in future and not retrospectively" as merely confirmatory of a view he had already expressed, and Hodson LJ made no reference to the 1858 legislation's use of the word "thereafter";

    ii) It is hard to see why Parliament should have intended resealing under the 1892 Act to operate retrospectively when resealings as between England and either Scotland or Northern Ireland do not. It is much more probable that the slight differences in wording between the various provisions (section 95 of the

Probates and Letters of Administration (Ireland) Act 1857, section 12 of the Confirmation of Executors (Scotland) Act 1858, section 2 of the 1892 Act and sections 168 and 169 of the Supreme Court of Judicature (Consolidation) Act 1925) merely reflect slightly varying drafting styles. It makes sense that, as Denning LJ said, "[a]ll these re-sealings operate as a grant only from the date of re-sealing and are not retrospective";

iii) Section 2 of the 1892 Act nowhere states that resealing is to have retrospective effect. Read naturally, the word "thereupon" signifies just "upon that being done". It does not imply retrospectivity;

iv) Section 1 of the 1892 Act also uses the word "thereupon". It provides that, where an Order in Council directs that the Act should apply to a territory, "thereupon, while the Order is in force, this Act shall apply accordingly". There can be no question of "thereupon" producing retrospectivity in that context.

The significance of Chetty v Chetty

31. It is the claimant's case, however, that the appeal should be dismissed even if (as I consider to be the case) resealing does not have retrospective effect. Ms Meager argued that the claimant derived her title to the claim against the defendants from the deceased's will, not from the resealing of the Grant. The claimant, Ms Meager said, needed either to have the Grant resealed or to obtain a grant of probate in this jurisdiction in advance of trial only so that she could *prove* her title. Having been named as the deceased's executor in his will, Ms Meager maintained, the claimant acquired title on death.

32. Ms Meager relied in support of her submissions on *Chetty v Chetty*. In that case, a Mr Chetty, who was domiciled in British India, died there in 1904 leaving a will appointing another Mr Chetty as executor. The executor did not succeed in obtaining probate until 1912, when the High Court of Judicature at Madras ordered its grant, but in the meantime proceedings had been issued in 1911 in the Straits Settlements by an administrator pendente lite. One of the issues was whether that claim was statute-barred on the basis that there had been "a legal representative of the deceased capable of instituting or making such suit or application" for more than three years before the date of issue. The Privy Council answered the question in the affirmative. Having made the remarks quoted in paragraph 17 above, Lord Parker of Waddington continued at 609:

> "It would seem, therefore, that an executor is not only the legal representative of his testator, but capable of instituting a suit within the meaning of s. 17, sub-s. 1, of the Ordinance in question. There is nothing in the Ordinance to confine 'legal representative' to a person to whom the Court has actually made a grant."

The Privy Council thus appears to have applied the principle that "an executor derives his title and authority from the will of his testator and not from any grant of probate" in the context of a testator who had been domiciled in a territory different from that of the pending proceedings.

33. Ms Meager argued that the present case is analogous. Like the executor in *Chetty*, she said, the claimant derives her title from the deceased's will and so she already had standing when the claim was issued in February 2019.

34. Mr Stear's response was that, in so far as *Chetty* purports to decide that a person appointed as executor by a testator domiciled in one jurisdiction may institute proceedings in another jurisdiction before any grant or resealing in the latter, it is contrary to principle and should not be followed. He pointed out that this Court is not bound by decisions of the Privy Council and suggested that, there being no reference in the report to *Attorney-General v New York Breweries Co Ltd* [1898] 1 QB 205 (Court of Appeal) and [1899] AC 62 (House of Lords) ("*New York Breweries*"), *Chetty* had been decided per incuriam.

35. In *New York Breweries*, individuals named as executors in the will of a testator domiciled in New York had been granted letters testamentary there. They neither obtained a grant of probate in this jurisdiction nor intended to do so, but nevertheless persuaded an English company in which the testator had had shares to transfer them into their names. In what was a test case, the question was whether probate duty was payable, and the House of Lords, affirming the decision of the Court of Appeal, held that it was on the basis that the company had made itself an executor de son tort. Relevant legislation referred to a person "who shall take possession of and in any manner administer any part of the personal estate and effects of any person deceased" and a person who "ought to obtain letters of administration".

36. Analysis of *New York Breweries* is made more difficult by the fact that the Courts' concern was in the end with whether, having regard to the legislative context, probate duty was payable, not with what, if any, status the American executors should be recognised as having. Mr Stear argued that the case nonetheless provides authority for the proposition that a foreign executor has no title or authority in relation to English assets unless and until probate is obtained in this jurisdiction. In that connection, he took us to, for example, a passage at 71-72 in which the Earl of Halsbury LC said:

> "Then, my Lords, the learned judge goes on: 'They [i.e the company] have simply done that which the common law of England gives them the right to do, namely, to pay an executor.' They have done nothing of the sort. The learned judge must forgive me for saying, when he says they have paid the executor, they have done no such thing. They have paid a person whom the learned judge calls an executor, but who is not an executor within the meaning of this Act; and when the learned judge says that they 'have simply done that which the common law of England gives them the right to do, namely, to pay an executor without asking him for proof of his title by the production of the probate,' I am afraid he forgets for a moment that what was done here was done with the full knowledge that the person whom they paid, not only was not an executor, but had given distinct notice that he never intended to become an executor within the meaning of the English law. Therefore I have considerable difficulty in following the learned judge's argument."

37. In a similar vein, A.L. Smith LJ had said in the Court of Appeal, at 217:

> "My brother Wills says that what the company have done is simply to pay to the executors, who were persons entitled to receive it, money which belonged to them as executors, which had belonged to the testator, and which upon his decease and upon his will coming into operation became the property of the executors. But in the present case the American will as regards these English assets had no validity whatever in this country, nor had the American executors any right under it to receive the testator's assets here. Until they had taken out representation to their testator in this country, they were pure strangers to the English assets. This American will, to the knowledge of all parties, was never to come into operation as a will in this country; the American executors were never to become executors in this country, it being the express intention of all parties that they should not. This is not the case, as put in argument, of a debtor of a testator paying a debt, due from him to that testator, to the executor named in his English will before that executor has proved the will, but it is a case in which the payment is made to a person who has no legal right to receive it, with knowledge that that person would never become legally entitled to receive it."

A.L. Smith LJ had, however, observed in the previous paragraph, at 216:

> "I must point out that, when either an executor has to justify what he has done as executor, or another has to justify what he has done at the request of an executor, each must prove that the executor was in fact the executor of the deceased, and this can only be done by production of the probate, for, as Jervis C.J. pithily put it in *Johnson v. Warwick*, when the will is proved, the Court has the legal optics through which to look at it; and that this was so was not in reality disputed at the bar."

Concern with *proof* can also be seen in the judgments of Rigby and Collins LJJ. Rigby LJ said at 221:

> "Any person intermeddling with the assets under the direction of an executor de son tort, whether he be a foreign representative or not, is himself chargeable as an executor de son tort. It makes no difference that the foreign representative is named as executor in the will by virtue of which he is made representative abroad. That will cannot be looked at or given in evidence until representation is taken out here, and the maxim 'De non apparentibus et non existentibus eadem est ratio' will apply."

For his part, Collins LJ said at 224:

> "I agree that there is a broad distinction between acts done by or under the direction of a mere intruder not named in the will and acts done by or under the authority of a named executor. The latter taking title under the will is not in fact a tortfeasor, neither is any one acting under him, and for certain purposes this distinction may be material. But if the acts of the persons who have dealt with the assets are challenged, as they now are by the Crown, and their rights have to be ascertained in a court of law before probate is taken out—and a fortiori if it was never intended to be taken out—there is no material difference between the position of the mere intruder and his agents and the executor and his agents. They are each estopped by their acts, whether tortious or innocent, from denying that they are executors, and as they cannot prove probate they make themselves liable to probate duty in respect of the assets which they have administered."

38. In the circumstances, I do not think *New York Breweries* can be taken as authority for the proposition for which Mr Stear wished to use it. It seems to me to do no more than confirm that a foreign executor will need to obtain a grant of probate or resealing in this jurisdiction if he needs to prove title. All the Court of Appeal judges alluded to the importance of probate as a matter of proof.

39. Aside from *New York Breweries*, Mr Stear argued that, as a matter of principle, the position of a person named as an executor in the will of a testator domiciled abroad should not be equated with that of someone so named in the will of a testator domiciled in this jurisdiction. The latter, Mr Stear said, would rank first in the order of priority for which rule 20 of the Non-Contentious Probate Rules 1987 provides. In contrast, the grant to the former of either probate or resealing would always be discretionary: see rules 30 and 39 of the Non-Contentious Probate Rules 1987, each of which includes the word "may". Mr Stear further made the point that, under rule 39(2) of the Non-Contentious Probate Rules 1987, an Inland Revenue affidavit or account must be lodged on any application for resealing.

40. As, however, is explained in Tristram and Coote's Probate Practice, 32nd. ed., at paragraph 12.78, "Where the will of a testator, whatever his domicile, is admissible to proof in England and Wales and is in the English or Welsh language, any executor named therein is accepted as having full rights of executorship". In any event, I cannot myself see any sufficient reason for declining to follow *Chetty v Chetty*. While, as Lord Neuberger said in *Willers v Joyce (No 2)* [2016] UKSC 44, [2018] AC 843 at paragraph 16, "there is no question of [a court in England and Wales] being bound to [follow a decision of the Privy Council] as a matter of precedent", "[t]here is no doubt that, unless there is a decision of a superior court to the contrary effect, a court in England and Wales can normally be expected to [do so]". In the present case, the distinctions which Mr Stear drew between a foreign executor and a domestic one strike me as relatively insubstantial, and *Chetty v Chetty* has stood for more than 100 years. We ought, I think, to take the normal course and follow it.

41. There remains to be considered, however, the question whether the *Chetty v Chetty* approach is to be applied in relation to *all* foreign executors or only where the law of the testator's domicile, like that of England and Wales, treats an executor as acquiring

title from the date of the testator's death. It is quite possible that in *Chetty v Chetty* the Privy Council knew or assumed that the law of British India was the same as that of England and Wales, as might have been expected when India was part of the British Empire. Might the position be different where the law of the domicile is known to differ in this respect from that of England and Wales?

The position in New South Wales

42. The point matters in the present case because New South Wales law is not identical to English and Welsh.

43. The relevant statutory provisions are to be found in the Wills, Probate and Administration Act 1898 (NSW) ("the NSW Act"). Section 44 of the NSW Act, headed "Real and personal property to vest in executor or administrator", provides:

> "(1) Upon the grant of probate of the will or administration of the estate of any person dying after the passing of this Act, all real and personal estate which any such person dies seised or possessed of or entitled to in New South Wales, shall as from the death of such person pass to and become vested in the executor to whom probate has been granted or administrator for all the person's estate and interest therein in the manner following, that is to say—
>
> (a) On testacy in the executor or administrator with the will annexed.
>
> (b) On intestacy in the administrator.
>
> (c) On partial intestacy in the executor or administrator with the will annexed."

Section 61 of the NSW Act states:

> "From and after the decease of any person dying testate or intestate, and until probate, or administration, or an order to collect is granted in respect of the deceased person's estate, the real and personal estate of such deceased person shall be deemed to be vested in the NSW Trustee in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England."

By section 3 of the NSW Act, the "NSW Trustee" is "the NSW Trustee and Guardian constituted under the NSW Trustee and Guardian Act 2009".

44. The implications of these provisions were considered by the Federal Court of Australia in *Byers v Overton Investments Pty Ltd* (2001) 109 FCR 554, [2001] FCA 760 ("*Byers*") and by the Court of Appeal of New South Wales in *Deigan v Fussell* (2019) 19 BPR 39,853, [2019] NSWCA 299 ("*Deigan*"). In *Byers*, Ms Byers had been granted probate of a Mr Scott's will, but only after she had already brought

proceedings as Mr Scott's executor. In paragraph 6 of its judgment, the Court identified as follows the issue which arose:

> "It is beyond contention that on the grant of probate to Ms Byers, by the operation of s 44(1), the whole of Mr Scott's estate vested in her 'as from' the death of Mr Scott. After probate was granted, Ms Byers was undoubtedly competent to commence a proceeding to the benefit of the estate. The question here, however, is whether this proceeding was properly commenced given that probate had not been granted at the time the original application or the amended application was filed."

The Court concluded in paragraph 23 that "Ms Byers had no title to the relevant chose in action until grant of probate" and that it followed that "at the time this proceeding was commenced and at the time the application was amended she had no standing to commence proceedings such as this and the proceedings were therefore a nullity". The Court had said in paragraph 21:

> "At common law a grant of probate was purely evidentiary albeit the only acceptable evidence of an executor's appointment. As explained above, title to the property of a testate estate vested in the executor at the death of the testator. Section 61 alters that position in relation to the vesting of property only. It does not alter the fact that the title to the position of executor stems from the will. As such it makes a distinction between the powers of the executor before and after probate that does not exist at the common law. As Mr McInerney, counsel for the respondent pointed out in his written submissions:
>
> *'After death and before a grant of probate, an executor has a title derived from the will which grants the executor a status in respect to the estate. The executor's authority in respect to the estate is limited, however, to situations where the vesting of the property in the executor is not a necessary pre-condition to the exercise of that authority."*"

Turning to whether the statutory relation back for which section 44 of the NSW Act provided could cure the defect, the Court said in paragraph 28 that section 44(1) "retrospectively vests the property of the deceased in the executor", but "it does not, either in its own words or by implication, retrospectively give the executor standing in relation to proceedings commenced when the executor-elect had no title to the property". In this connection, the Court noted that in an earlier case, *Marshall v DG Sundin & Co Ltd* (1989) 16 NSWLR 463, Yeldham J had "accepted that in New South Wales, prior to probate, an executor is in the same position as an administrator at common law".

45. The Court thus decided as follows:

> "When Ms Byers commenced this proceeding (and when the application was amended) she had not been granted probate. The effect of s 61 of the WPA Act is that she did not at that time have title to the relevant property, namely the chose in action that the estate now seeks to pursue against the respondents. Being without title to the chose in action, she was not competent to commence proceedings to pursue that right. For reasons given above, the statutory relation back under s 44(1) does not cure that defect. The weight of authority and reason leads to the conclusion that this proceeding was incompetently commenced and therefore it was and remains a nullity."

46. In *Deigan*, one member of the Court, White JA, in an erudite judgment, took the view that the powers of a person named as an executor who had not yet been granted probate were more extensive than had been held in previous authority. However, the other members of the Court, Bathurst CJ and Macfarlan JA, did not express a concluded view. Bathurst CJ said in paragraph 5:

> "In those circumstances, it is not necessary for me to express an opinion on the question of whether Ms Deigan, although named as executrix in the will, could not before the grant of probate exercise the right of rescission on behalf of and for the benefit of the estate, or on the question of whether if she did her action was retrospectively validated. The issues involved in the latter question are of considerable complexity and as White JA with respect correctly points out the conclusion which he has reached is contrary to at least that of Emmett J in *Byers v Overton Investments Pty Ltd* … and the same conclusion reached by the Full Court of the Federal Court in that case …. Although there is great force in the reasoning of White JA, it does not seem to me appropriate to decide that the decision of the Full Court of the Federal Court was plainly wrong in circumstances where it is unnecessary to do so."

47. The point on which the judges diverged is not, perhaps, important for present purposes. What is noteworthy is that, on any view, the law of New South Wales, unlike that of England and Wales, does not consider an executor who has not obtained probate to have legal title to the testator's estate. As a matter of New South Wales law, that is vested in the "NSW Trustee". It is therefore necessary to address the question whether the *Chetty v Chetty* approach is applicable even where the law of the domicile does not consider an executor to gain title on death.

Is the Chetty v Chetty *approach of general application?*

48. It is plain that, if the *Chetty v Chetty* approach is applied in relation to the will of a testator who was domiciled in New South Wales, a Court in this jurisdiction will potentially treat an executor as having title to the estate when a New South Wales Court would not. As Ms Meager accepted, on her case the claimant could have issued her claim before obtaining a grant of probate in New South Wales and, hence, at a time when, under New South Wales law, the deceased's estate was vested, not in her,

but in the NSW Trustee in accordance with section 61 of the NSW Act. The claimant would have needed to be in a position to prove her title by the time the case came on for trial, by means of either an English grant of probate or a New South Wales grant and resealing, but, in the eyes of an English Court, she would have had standing from the time of the deceased's death.

49. There is, however, no doubt that English and Welsh law can diverge from that of New South Wales on whether a person appointed as an executor by a New South Wales testator has acquired title to assets in the estate. As *Dicey, Morris & Collins on the Conflict of Laws* states at Rule 156, "any property of the deceased which at the time of his or her death is locally situate in England" "vests automatically in his or her personal representative by virtue of an English grant". Supposing, therefore, that the claimant had obtained a grant of probate in this jurisdiction and not in New South Wales, she would undoubtedly have been considered to have title to property of the deceased in this country despite the estate being vested in the NSW Trustee as a matter of New South Wales law.

50. As mentioned in paragraph 20 above, "[t]he administration of a deceased person's assets is governed wholly by the law of the country from which the personal representative derives his or her authority to collect them". It seems to me that the question whether the claimant is to be considered to have acquired title to the deceased's cause of action against the defendants as the executrix appointed under his will is properly characterised as one relating to the administration of a deceased person's assets. It appears to me, too, that, notwithstanding that the claimant obtained a grant of probate in New South Wales, it is from this jurisdiction that she derives her authority to collect assets here: after all, a foreign grant of representation is not without more recognised as having any force in England and Wales. That being so, the law of England and Wales is, I think, to be applied to the issue of whether the claimant acquired title to the deceased's estate on his death and New South Wales law on the point is immaterial. On that footing, the *Chetty v Chetty* approach is in point and the claimant is to be regarded as having acquired title to the cause of action against the defendants on the deceased's death and so as having had standing to issue the present claim when she did.

Conclusion

51. In my view, District Judge Carter was right to dismiss the defendants' strike out/summary judgment application. The claimant had standing when the claim was issued.

CPR 3.10

52. Supposing that, contrary to the conclusions I have reached thus far, the claimant had no standing to issue the claim when she did, could the Court nevertheless allow the proceedings to continue under CPR 3.10? That reads:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction—
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error."

53. We were referred to a number of authorities on this issue. The earliest of them was *Millburn-Snell v Evans*. In that case, the claimants had purportedly brought proceedings on behalf of an intestate's estate without first obtaining letters of administration. The Court of Appeal held them to be an incurable nullity. No one seems to have suggested that the claim could be rescued pursuant to CPR 3.10, but CPR 19.8(1) was said to be in point. That provides:

> "Where a person who had an interest in a claim has died and that person has no personal representative the court may order—
>
> (a) the claim to proceed in the absence of a person representing the estate of the deceased; or
>
> (b) a person to be appointed to represent the estate of the deceased."

54. The Court of Appeal rejected the contention that CPR 19.8(1) could apply. Rimer LJ, with whom Lord Neuberger MR and Hooper LJ agreed, said in paragraph 30:

> "The claimants' invocation of rule 19.8(1) was responsive to the defendant's strike out application. Logically, however, if they are right about rule 19.8(1), they could (indeed should) promptly after issuing their claim form have applied to the court for an order that the nullity they had thereby conceived should have life breathed into it by way of an order that they be appointed to represent the estate of the deceased intestate and the claim permitted to proceed to trial. The reason that any such application should and would have failed is because rule 19.8(1) does not, in my view, have any role to play in the way of correcting deficiencies in the manner in which proceedings have been instituted. It certainly says nothing express to that effect and I see no reason to read it as implicitly creating any such jurisdiction. It is, I consider, concerned exclusively with giving directions for the forward prosecution towards trial of *validly* instituted proceedings when a relevant death requires their giving. In the typical case, that death will occur during their currency and will usually be of a party. More unusually, it may have preceded them. But on any basis it appears to me clear that it is no part of the function of rule 19.8(1) to cure nullities and give life to proceedings such as the present which were born dead and incapable of being revived."

55. In *Meerza v Al Baho* [2015] EWHC 3154 (Ch), in contrast, Peter Smith J held that proceedings could be saved under CPR Part 3. The claimant had issued a claim on behalf of an intestate without obtaining letters of administration. Having cited *Maridive & Oil Services (SAE) v CNA Insurance Co (Europe) Ltd* [2002] EWCA 369, [2002] 1 All ER (Comm) 653 ("*Maridive*") and a decision of his own, *Midtown Ltd v*

City of London Real Property Co Ltd [2005] EWHC 33 (Ch), Peter Smith J said in paragraph 46:

> "It seems to me that based on those authorities … I have a discretion under CPR 3 to apply the overriding objective to enable cases to be dealt with justly. In particular based on Chadwick LJ's observations [in *Maridive*] it seems to me clear that that power can be used to ensure that any technical objections whether procedurally or a matter of law can be overcome provided it is just so to do. In the present case it is clearly just to accede to an application to amend to perfect the claim by reason of the grant of the letters of administration if that were necessary."

56. In *Maridive*, on which Peter Smith J placed reliance, a claimant had sought to raise a new claim in its reply. Mance LJ held this to be irregular in paragraph 34 but added, "Irregular though it was, I see no basis for treating it as a nullity". In paragraph 37, he said:

> "Once one concludes, as I do, that the reply on 14th March 2000 introduced a claim, which was, though irregular, nonetheless not a nullity, and that the irregularity can be cured by allowing the claim to be proceeded with by subsequent amendment of the particulars of claim, I have no doubt that the third condition [in the relevant bond] was satisfied as from 14th March 2000."

In paragraph 54, in the passage to which Peter Smith J made reference in paragraph 46 of his judgment in *Meerza v Al Baho,* Chadwick LJ said:

> "There is no absolute rule of law or practice which precludes an amendment to rely on a cause of action which has arisen after the commencement of the proceedings in circumstances where (but for the amendment) the claim would fail. The court has a discretion whether or not to allow the amendment in such a case; a discretion which is to be exercised as justice requires. In the present case I have no doubt that, had the claimants sought to amend their particulars of claim (so as to rely on the demand of 13 March 2000) within the period from 12 April to 30 August 2000, they should have been permitted to do so. There was no reason why they should have been required to commence new proceedings."

57. *Millburn-Snell v Evans*, *Meerza v Al Baho*, *Maridive* and *Midtown Ltd v City of London Real Property Co Ltd* were all considered by Stewart J in *Kimathi v Foreign and Commonwealth Office (No 2)* [2016] EWHC 3005 (QB), [2017] 1 WLR 1081 ("*Kimathi*"). There, as the headnote explains, "the defendant sought to have the claim of one of a number of test claimants struck out on the ground that it was a nullity, it having been brought in the name of a deceased claimant personally rather than in the name of his personal representative", and Stewart J acceded to the application. He distinguished *Meerza v Al Baho* on the basis that it "did not deal with the position

where the claim was brought in the name of the deceased claimant" (paragraph 17) but also said this:

> "18. The claimants seek to use the *Meerza* case as a reason for stating that even if an action is a nullity it can be overcome provided it is just to do so. Firstly, I distinguish the *Meerza* case for the reasons set out above. Secondly, I have these serious concerns about the statement of principle that CPR Pt 3 is a cure-all for every defect however fundamental, whether or not it is one of law, and whether or not the authorities have previously determined that there is a nullity:
>
> > (i) The rule against allowing amendments to a claim to plead a subsequently arising claim is one of practice not law and can be departed from when the justice of the case requires: see *Toepfer v Cremer* [1975] 2 Lloyd's Rep 118, 125, per Lord Denning MR. The change in approval in such cases derived from developments in the law relating to 'relocation back' and amendment to RSC Ord 18, r 9 which specifically permitted amendment to plead any matter, even if it arose after issue of writ: see *Vax Applicances Ltd v Hoover plc* [1990] RPC 656.
> >
> > (ii) In *Hendry v Chartsearch Ltd* [1998] CLC 1382 Evans LJ (with whom the other Lords Justices agreed) said that the rules had changed and, 'In accordance with modern practice generally, the court has a general discretion which should not be restricted by hard-and-fast rules of practice, if not of law, such as that which is suggested here.'
> >
> > (iii) In the *Maridive* case … , para 23 Mance LJ made it clear that he did not 'regard the present case as one where, as at the date when Moore-Bick J made his order allowing an amendment, the original claim could be said to be "incurably bad"'. See also paras 34 and 37 where Mance LJ emphasised that what was amenable to being cured in that case was an irregularity and not a nullity. Chadwick LJ, at para 54, said: 'There is no absolute rule of law or practice which precludes an amendment to rely on a cause of action which has arisen after the commencement of proceedings …' In the *Meerza* case … at [46] Peter Smith J concluded that this statement by Chadwick LJ made it clear that any technical objection whether procedural or legal could be overcome provided it was just to do so. In my judgment it is not clear at all from those observations of Chadwick LJ; indeed the contrary is the case. The citation appears to me to be predicated upon the fact that if there were an absolute

> rule of law or practice precluding an amendment to rely on a cause of action arising out of the commencement of the proceedings, then the court would not have a discretion. If I am wrong about that, the observations of Chadwick LJ are obiter, as the *Maridive* case was one not of nullity but irregularity.
>
> (iv) Although a judge must be cautious in making assumptions when a point has not been expressly argued before the Court of Appeal, I find it difficult to believe that the court (Lord Neuberger of Abbotsbury MR, Hooper and Rimer LJJ) in the *Millburn-Snell* case … would not have considered their wide discretion under CPR Pt 3 to apply the overriding objective to enable cases to be dealt with justly, and so, in effect, decided the case per incuriam.
>
> 19. In my judgment, there is no such discretion where the claim is a nullity, as the *Millburn-Snell* case and the more historic decisions make clear it is. If the *Meerza* case is not distinguishable I find myself constrained to depart from the reasoning and judgment of Peter Smith J. In their skeleton argument, the claimants said that the court can assist to ratify a claim that would otherwise be a nullity and relied upon the case of *Adams v Ford* [2012] 1 WLR 3211. There a solicitor took a pragmatic approach to include people in the claim form from whom he did not have authority. An application to strike out was refused. However, this decision of the Court of Appeal reinforces my judgment [that] there is no such power. Contrary to what the claimants asserted, the Court of Appeal first approached the question of whether what the solicitor had done there was a nullity and expressly decided that it was not: see paras 27–32. It is implicit in the judgment of Toulson LJ that had the proceedings been a nullity then they would not have been salvageable, save as to those claimants who had authorised the issue of proceedings: see para 36."

58. In *Jogie v Sealy*, Lord Burrows (with whom Lady Rose agreed) said this at paragraph 55 about *Kimathi*:

> "In [*Kimathi*], Stewart J rejected the view, that had been accepted by Peter Smith J in *Meerza v Al Baho* … , that the courts had a discretion under CPR Part 3 (dealing with the courts' case management powers) to apply the overriding objective to overcome the nullity of a claim, by allowing an amendment as to the capacity of a claimant (who had only subsequently been granted letters of administration) where it was just to do so (eg where it would cause no prejudice that could not be dealt with by a costs order). As Stewart J said at para 19:

> 'In my judgment, there is no such discretion where the claim is a nullity, as the *Millburn-Snell* case and the more historic decisions make clear it is. If the *Meerza* case is not distinguishable I find myself constrained to depart from the reasoning and judgment of Peter Smith J.'
>
> Stewart J regarded it as an untenable argument that *Millburn-Snell* was decided per incuriam because the Court of Appeal had not considered the application of the overriding objective and CPR Part 3. I agree with Stewart J's analysis."

59. I, too, consider that Stewart J was right that the "wide discretion" conferred by CPR Part 3 cannot be used to validate a nullity. CPR 3.10 applies in relation to "an error of procedure such as a failure to comply with a rule or practice direction". Dyson LJ explained in *Steele v Mooney* [2005] EWCA 96, [2005] 1 WLR 2819 that CPR 3.10 "gives a non-exhaustive definition of a procedural error as including a failure to comply with a rule or practice direction" and that "procedural errors are not confined to failures to comply with a rule or practice direction": see paragraphs 18 and 20. Even so, CPR 3.10 is not applicable where the proceedings that have purportedly been brought are to be regarded as a nullity. CPR 3.10 allows existing proceedings to be regularised, not the creation of valid proceedings. It is not, to use words of Stewart J, "a cure-all for every defect however fundamental, whether or not it is one of law, and whether or not the authorities have previously determined that there is a nullity". As Stewart J noted, nothing in *Maridive* suggests otherwise: in that case, Mance LJ stressed that the claim with which the Court was concerned was, "though irregular, not a nullity".

60. Turning to the present case, the bringing of a claim on behalf of an estate by a person who, at the time, lacks standing to represent it is not a mere "error of procedure", but renders the proceedings a nullity: see paragraphs 18, 24 and 25 above. They are, in the circumstances, "a dead thing into which no life could be infused" (to quote Hodson LJ in *Burns v Campbell*) and "born dead and incapable of being revived" (to quote Rimer LJ in *Millburn-Snell v Evans*). Had, therefore, I considered the claimant to have had no standing when she issued the claim in February 2019, I would have held that CPR 3.10 had no application and that the proceedings had to be struck out.

Conclusion

61. I would dismiss the appeal.

Lord Justice Coulson:

62. I agree.

Lady Justice King:

63. I also agree.