Neutral Citation Number: [2023] EWHC 3150 (Ch)

Case No: PT-2022-000070

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 December 2023

Before :

MASTER BRIGHTWELL

- -

Between :

THE ALI ABDULLAH ALESAYI WILL ESTABLISHMENT	**Claimant**
- and -	
HASHIM ALI ALESAYI	**Defendant**

- -
- -

Rebecca Drake (instructed by **Bird & Bird LLP**) for the **Claimant**
Simon Atkinson (instructed by **Simmons & Simmons LLP**) for the **Defendant**

Hearing date: 21 September 2023

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Approved Judgment

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Master Brightwell:

1. It is an established principle that, in order to sue in the courts of England and Wales, a person has no standing to institute proceedings as an administrator in advance of the issue of letters of administration, and that proceedings brought earlier are a nullity: see *Jennison v Jennison* [2023] Ch 225 at [18]. The claimant has no grant of representation. The issue therefore arises whether the current proceedings are brought for the administration of a foreign estate and a nullity accordingly or whether they are properly to be seen as proceedings brought for the benefit of the claimant personally.

2. The claimant alleges in the particulars of claim that the claimant is a legal entity registered in the Kingdom of Saudi Arabia, and that it is the "parent holding entity" for assets bequeathed under the Proof of Will of the late Ali Abdullah Ali Alesayi ("Mr Ali"), who died in September 2016. It appears to have been incorporated in Saudi Arabia on 26 August 2019. The defendant is one of Mr Ali's sons and, being resident in England, he was served in the jurisdiction. The claimant pleads that Mr Mohammed Ali Alesayi ("Mr Mohammed"), one of the defendant's brothers, is and has at all material times been the guardian of assets bequeathed under the Proof of Will and thus owes Guardianship Duties (and that the defendant owes Assistant Guardianship Duties) to the claimant and others due to benefit under the Proof of Will.

3. It is also claimed by the claimant that Mr Ali, who was the founder of the Alesayi Trading Corporation, settled the Proof of Will before the Jeddah General Court on 5 September 2011, and that under that Proof of Will one third of the estate assets are to be set aside for investment for needy relatives, the poor and charity. The particulars of claim define this one-third share of the estate as "the Will's Assets".

4. It appears that on 22 April 2021 an order was made in Saudi Arabia, on the request of and in favour of Mr Mohammed, granting him powers in respect of Mr Ali's estate. This order is defined in the particulars of claim as the Probate Order. It is alleged that the Probate Order gave Mr Mohammed power to commence legal proceedings on behalf of the claimant and it is not in dispute that he is the person who has caused the claimant to issue these proceedings.

5. Mr Simon Atkinson, appearing for the defendant, submits that the types of claim contained within the particulars of claim can be categorised in four different ways, as set out below. Ms Rebecca Drake, for the claimant, did not disagree with the analysis.

6. The first of these four types of claim is that Mr Mohammed and the defendant entered into an oral agreement on an unspecified date concerning the way in which the Will's Assets would be held (the "Holding and Transfer

Agreement"). The claimant alleges that it was thus agreed that the Will's Assets would be transferred to a parent holding entity after the incorporation of such an entity and after Mr Mohammed had obtained a probate order giving him the powers necessary to deal with the Will's Assets. It is further pleaded that the parent holding entity (i.e. the claimant) is entitled under Saudi Arabian law to sue for breach of the agreement, and that the defendant is in breach of an obligation to transfer any estate assets in his possession to the claimant.

7. The claimant further alleges that three non-Saudi companies were incorporated, each with the sole purpose of holding assets which had been bequeathed under the Proof of Will and were to be divided, pending the incorporation of the claimant and the obtaining of a probate order giving Mr Mohammed the powers necessary to deal with the Will's Assets. The overseas companies in question are (a) Topaz Hub Holding Company ("Topaz"), incorporated in the Cayman Islands on 2 October 2017, (b) Nebulae Sarl ("Nebulae"), incorporated in Luxembourg on 2 March 2017, and (c) Bennington Sarl ("Bennington"), also incorporated in Luxembourg, on 11 August 2016. It is pleaded that the assets of all three companies are either Will's Assets or entirely funded by Will's Assets.

8. The second type of claim pleaded by the claimant is for alleged breaches by the defendant of his Assistant Guardianship Duties, arising under the terms of the Proof of Will. It is claimed that he has failed to transfer the shares in Topaz to the claimant and failed to effect the conversion of shares in a company called AJ Pharma II held by a company called MAHA Investment (in turn owned by Topaz) from class B shares to class A shares, such that the claimant is not in possession of assets that it should be, and is unable to manage the Will Assets as necessary. Under this heading, the claimant also alleges that the defendant has failed to provide information which he has a duty to provide, and that he has similarly failed to act in order to facilitate a purchase from Bennington of certain real property in Germany.

9. Thirdly, it is alleged that the failure of the defendant to transfer assets to the claimant under the second heading has caused the defendant to be unjustly enriched at the expense of the claimant.

10. Fourthly, and under the heading of "Relief", and in the prayer to the particulars of claim, the claimant seeks declarations that 100% of Topaz and Nebulae and all their assets, and one third of Bennington and all its assets, are assets of the claimant and due to the claimant.

11. At the date of the hearing, neither the claimant nor Mr Mohammed nor any other person had any grant of representation in relation to the English estate of Mr Ali. When the claim came on for a costs case management conference on 9 May 2023, I raised with the parties the question whether the claim was

properly constituted and whether the claimant had standing to pursue the claim. As they were not prepared to address the court about that question on that occasion, I adjourned the hearing with directions for the service of sequential written submissions.

12. In his written submissions on behalf of the defendant, Mr Atkinson argued that the second and third claims were a nullity as they were brought by or on behalf of Mr Ali's estate and without a grant of representation. He accepted, however, that the claimant had standing to bring the first and fourth types of claim, but argued (pursuant to an application issued by the defendant on 30 August 2023) that they should be struck out or reverse summary judgment granted on them for other reasons. At the hearing, however, he contended that all four types of claim were a nullity, for the reasons set out in his written submissions. At the hearing, he did not press the strike out application, such that the oral submissions were almost entirely on the question of standing.

The requirement for a grant of representation

13. It is a general requirement of English law that a grant of representation must be obtained in England in order to enable a person representing a deceased person abroad to bring proceedings in England. Authority granted in a foreign country has no operation in England: Dicey, Morris and Collins, *The Conflict of Laws*, 16th edn at 27-036:

> 'The general rule is that a foreign representative of the deceased who wishes to represent him or her in England must obtain a grant of representation here and cannot sue in his or her character of foreign personal representative. The Rule, is, in short, an application of the general principle that no person will be recognised by the English courts as personal representative of the deceased unless and until he or she has obtained an English grant of probate or letters of administration.'

14. In *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank plc* [2015] EWHC 3052 (Ch), a person claiming to be an heir of the late 7th Nizam of Hyderabad claimed to be entitled without any grant to sue in stakeholder proceedings in England, in relation to a fund held here by the defendant bank. Henderson J said this, at [28]–[30]:

> '28. That argument, it seems to me, is not sustainable on the basis of authority which is both clear and binding on me. Under the English conflict of laws, the stage of administration of an estate is governed by the law of the place where the assets are situated, which, in the current context, means England. Procedural questions arising in the administration are, likewise, dealt with by the law of the place where the administration is taking place. It is only when one gets on to the question

of succession and who is entitled beneficially to share in the estate that one looks to the law of the domicile of the deceased, where one is concerned, as here, with personal property.

29. The disputed fund is situated in this jurisdiction. That remains the case, regardless of how it may vest in accordance with the Muslim personal law of the 7th Nizam. The authorities establish that claims to property in this jurisdiction can only be advanced by and through a properly constituted personal representative. That proposition is most succinctly stated by Warrington LJ in the case of *Re Lorillard* [1922] 2 Ch 638 at 645-6, where he said:

> "The 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 domicile comes in."

30. I was also referred to a first instance authority in the British Virgin Islands to similar effect, and to the decision of the House of Lords in *New York Breweries Co. Ltd v Attorney General* [1899] AC 62.'

15. This line of authorities was recently considered in detail by Dame Clare Moulder DBE in *Viegas v Cutrale* [2023] EWHC 1896 (Comm). There, a large number of individuals connected with orange farmers domiciled in Brazil brought claims in the Commercial Court relating to an alleged cartel between Brazilian undertakings concerning the production of orange juice. Claims were pursued by or on behalf of a number of persons who had died, without those bringing the claims having first obtained a grant of representation in England.

16. The judge first declared that claims brought in the name of a deceased person were a nullity. She then moved to consider the claims brought by personal representatives (before obtaining a grant). The first stage was to consider the proper characterisation of the claims, i.e. as concerned with administration or of succession. Characterisation is a matter for the *lex fori*, i.e. English law: see at [173], citing *Macmillan Inc v Bishopsgate Investment Trust plc (No.3)* [1996] 1 WLR 387 at 407B (Auld LJ). This was relevant because the rule described by Henderson J in *High Commissioner for Pakistan* does not apply where a person has an absolute entitlement to a deceased's property in accordance with the law of the domicile and where it is enforced in England in a personal and not a representative capacity: see *Haji-Ioannou v Frangos* [2010] 1 All ER (Comm) 303 at [74] (Slade J), citing *Vanquelin v Bouard* (1863) 15 CB (NS) 841. Where a person sues pursuant to such a right, their claim is characterised as a matter of succession, which is governed by the law of the domicile.

17. In *Viegas v Cutrale*, Dame Clare held at [198] that, insofar as a claim is brought before the distribution of assets, it relates to the administration of estates and an English grant is required in order for the heirs to bring the claim and collect the assets on behalf of those entitled to the assets of the estate in question. Then, and on the basis of the detailed evidence of Brazilian law before her, she found that the heirs had no absolute entitlement to the property but acted on behalf of all those entitled to the relevant estates, and thus required a grant. It is now very clearly established on authority that a claim commenced by a claimant purportedly as administrator (and not as executor) is an incurable nullity: see *Jogie v Sealy* [2022] UKPC 32 at [41]–[55] (Lord Burrows); [122]–[124] (Lord Leggatt) (expressly assuming that the relevant law in that appeal from Trinidad and Tobago was the same as English law). There appears to be an exception where a limitation period has expired (see at [54]) but there is no suggestion of that being relevant in the present case. Where proceedings are a nullity, they are 'born dead and incapable of being revived': *Millburn-Snell v Evans* [2012] 1 WLR 41 at [30] (Rimer LJ), and the lack of standing is not an error of procedure which can be cured: *Jennison v Jennison* at [60] (Newey LJ).

18. Where proceedings are brought by a named executor, but before a grant of probate has been obtained by that person, they are not a nullity. The proceedings may be pursued until a grant of probate must be produced: Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate*, 22nd edn at 5-10. This is because the executor's authority derives from the will and not merely, as in the case of an administrator (including where the grant is of letters of administration with a will annexed), from the grant: *Chetty v Chetty* [1916] 1 AC 603 at 608–609 (Lord Parker of Waddington).

Causes of action two and three

19. I turn now to consider the question of the claimant's standing in relation to the claim concerning alleged breaches by the defendant of his Assistant Guardianship Duties, and the claim that the defendant has been unjustly enriched. They were discussed together in the parties' oral submissions. It is pleaded at paragraph 60 of the particulars of claim that, because of the breaches summarised above, 'the Defendant is liable to pay to the Claimant both an account of profits in respect of all financial and non-financial gains made by the Defendant in connection with any of his dealings with any Will's Assets and/or in respect of any unjust enrichment and/or receipt of benefit in connection with any of his dealings with Will's Assets, and damages….'. As I have mentioned above, the Will's Assets are the one-third share of the assets to be set aside for investment for needy relatives, the poor and charity in accordance with the Proof of Will.

20. Ms Drake did not contend that these causes of action should be characterised other than as claims relating to the administration of Mr Ali's estate. It is difficult to see how they could be characterised otherwise. The claim for breach of duty is a claim based on the duties alleged to be owed in relation to the implementation of the terms of the Proof of Will. The claim in unjust enrichment is a claim that the defendant has retained assets which are Will's Assets and thus required to be transferred in order to be distributed, but the claim is not brought by a person claiming to be absolutely entitled to those assets. Both claims are thus clearly brought for the benefit of the estate of Mr Ali (in the sense in which that term is understood in English law). The duties pleaded in paragraph 38 of the particulars of claim are alleged to exist in relation to the management of the Will's Assets and to look conspicuously similar to the duties of a personal representative in English law. Such claims are viewed by English law, as the *lex fori*, as claims relating to the administration of an estate.

21. Prima facie, therefore, the claim is a nullity to the extent it pursues these causes of action as there is no grant of representation and the claimant is not an executor. Ms Drake argued however that the claims should not be struck out as a nullity, for two related reasons. First, she did not accept that the relevant grant would be of letters of administration rather than of probate. There is correspondence before the court suggesting that Mr Mohammed has applied for a limited grant, and it is suggested that he in due course will be entitled to a grant of probate, as he is named in the Proof of Will. Secondly, if at least the first and fourth causes of action are properly constituted, the claimant suggests that Mr Mohammed can be substituted or added as a claimant under CPR r 19.2(2) or 19.2(4), in relation to all parts of the claim.

22. At one point it appeared to be contended that the claimant establishment would or might be entitled to apply itself for a grant of probate (although this may have been the way in which the defendant sought to characterise the claimant's argument). As I understand it, the point was not pursued by the claimant at the hearing, but in any event I do not consider it to be arguable. A person appointed by a will not in English or Welsh and in terms that would constitute that person an executor according to its tenor by English law may obtain a grant of probate in England (see Williams, Mortimer and Sunnucks at 6-11, 13-04). I consider it unarguable that the claimant is appointed executor by the tenor of the Proof of Will. The claimant is not only not named in the Proof of Will, but did not even come into existence until after the death of Mr Ali.

23. As Williams, Mortimer and Sunnucks says at 13-05, except where an executor is appointed by the will or by its tenor where it is in another language, the grant is not of probate but of administration with or without the will annexed. I

consider it to be clear that the claimant itself would be entitled to apply only for a grant of letters of administration in England. Such an application would be subject to the rules of priority set out in rule 30 of the Non-Contentious Probate Rules 1987, applicable where a deceased person died domiciled outside England and Wales.

24. As I explain below, I do not consider that the claimant has standing to pursue any of the present claim, and that it is all concerned with the administration of the estate of Mr Ali. Ms Drake accepted that, in such circumstances, there is no jurisdiction to add or substitute another person as claimant. As this claim is accordingly a nullity, there can be no question of Mr Mohammed being substituted as claimant either now or once he has obtained a grant of probate.

Causes of action one and four

25. The claimant contends that its first cause of action, suing on the alleged Holding and Transfer Agreement, is an entirely personal claim, not concerned with the administration of Mr Ali's assets and therefore not brought in the administration of his estate. Ms Drake submits that it falls to be categorised as a contractual claim and that it is extraneous to the Proof of Will and to the administration of assets accordingly.

26. The relevant alleged obligation on which the claimant seeks to sue is pleaded at paragraph 13 of the particulars of claim. It pleads that on a true construction of the Holding and Transfer Agreement, the defendant was obliged to transfer any Estate Assets in his possession which are Will's Assets to the parent holding entity (i.e. to the claimant) as soon as, or as soon as reasonably practicable after, the parent holding entity was incorporated and Mr Mohammed obtained a probate order giving him the powers necessary to deal with the Will's Assets. It is pleaded at paragraph 14 that the Holding and Transfer Agreement was made because of the time it would take for the incorporation of the claimant to be effected and for the obtaining of the probate order. It was thus said to be an agreed step to hold the ring before the administration of the Will's Assets could be carried out. It is of some relevance that the remedies sought for breach of the Holding and Transfer Agreement are pleaded together with and thus identical to the remedies sought for alleged breaches of duty. An account of profits and damages are sought 'in connection with any of [the defendant's] dealings with the Will's Assets'. No separate relief is sought in relation to the Holding and Transfer Agreement.

27. In private international law, the purpose of characterisation is to establish the appropriate law applicable to a particular issue. Thus, in *Jennison v Jennison*, it was held that the question whether the claimant obtained title to a cause of action vested in a deceased person as at his death was to be characterised as a question of administration of estates, and thus to be governed by English law.

As the claimant had been appointed executrix in New South Wales, it did not matter that the law of New South Wales might not have vested in her title to sue; what was relevant was that English law did so. At [50], Newey LJ said this:

> ‘50. As mentioned in para 20 above, “The 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.’

28. The question with which the court is presently concerned is not the proper law of the Holding and Transfer Agreement. It is that of whether the claimant has standing to pursue the claim said to be based upon it. On analysis, I consider the issue to be the same as that which arose in *Viegas v Cutrale*. It is whether the claim is being pursued for the benefit of Mr Ali’s estate, or whether it is being pursued by and for the claimant personally. If the former, then, as in *Jennison*, it will be from this jurisdiction and not Saudi Arabia that the claimant must derive its authority to bring proceedings here. In *Viegas*, the issue was whether the heirs had commenced proceedings in a personal or a representative capacity. That required consideration of whether they had acquired absolute rights under Brazilian law. On the expert evidence as to Brazilian law, they had not, and the proceedings were accordingly for the benefit of the beneficiaries of each relevant estate, and the claims were therefore brought by the heirs as part of the administration of the estate (see at [241]).

29. In the present case, Ms Drake submits that the claimant’s rights under the Holding and Transfer Agreement are entirely personal and entirely separate from Mr Ali’s estate. I consider this to be obviously wrong. The claim under the Holding and Transfer Agreement on its face seeks the transfer of Estate Assets to the claimant so that they can be administered as the Will’s Assets in accordance with the Proof of Will. Mr Atkinson refers to paragraphs 15(c) and 26 of the claimant’s written submissions on standing, where it is said that the

named claimant 'is the estate itself', and that 'all the claims brought by it relate to the administration of the estate'.

30. Ms Drake submitted, at least in her written submissions, that there are no assets in this jurisdiction and that the *High Commissioner for Pakistan* case (where there were such assets) confirms that the stage of administration of an estate is governed by the law of the place where the assets are situated which, in this case, is Saudi Arabia. She submitted further that *High Commissioner for Pakistan* is distinguishable because this claim is brought by the estate itself, and not by an individual *qua* beneficiary. I do not consider these propositions to be correct. The division drawn by Henderson J was between administration and succession. If a claim is brought in relation to administration, it is brought by someone in a representative capacity, who must have a grant. What Henderson J was explaining was that one looked to the law of the place of administration in order to determine whether the claim related to administration or not, and it was only if it related to succession that one looked to the law of the domicile. That is entirely consistent with the approach adopted in *Viegas v Cutrale*. The court there looked to the law of the domicile in order to determine whether the heirs had become absolutely entitled; they had not.

31. It must follow that the claimant's position is that as the claimant establishment is said to be entitled to have the assets of the estate vested in it, because it has become absolutely entitled or because it is a corporate entity and not an individual, it has a personal interest separate from the administration of the estate. But its interest is not absolute. On the claimant's own case (which I am aware is disputed) it is entitled to have the Will's Assets vested in it so that they may be subsequently administered and distributed in accordance with the Proof of Will. The fact that the claim is brought by a legal entity and not an individual does not justify a different approach to the categorisation of the causes of action pursued by the claimant. The fact that the claimant contends that it has a right to possession of the Will's Assets does not mean that it somehow *is* the estate in the way that a personal representative who is an individual person, and claims similar rights, is not the estate. As I have said, the claimant contends that it is entitled to call in the Will's Assets in order to administer them. Far from being extraneous to the terms of the Proof of Will, the claim seeks quite explicitly to give effect to them.

32. Furthermore, even though there may be no asset of the English estate except the right to bring proceedings here does not mean without more that the proceedings are to be categorised as other than concerned with administration or that no grant is required. As Dicey, Morris and Collins explains, at 27-004:

> 'If there is no property of the deceased to be administered in England, the executor's or administrator's oath which accompanies the application for

a grant must state the reason why it is required, e.g. to constitute a personal representative to take or defend legal proceedings, or to obtain foreign representation'.

33. Accordingly, the claim under the alleged Holding and Transfer Agreement is a claim brought in England for the purpose of administering the estate assets and not for the benefit of the claimant personally. In accordance with *Jennison v Jennison*, the issue is therefore to be characterised as one of whether the claimant has authority to bring proceedings here *in the administration of a deceased's person's assets*. For reasons set out above, such authority is acquired by a grant of representation and in the absence of letters of administration or the entitlement to a grant of probate, the proceedings are a nullity.

34. I consider that the same analysis applies in relation to the fourth cause of action, the claims for declarations that the assets of Topaz, Nebulae and Bennington are assets of the claimant and due to the claimant. The claimant clearly seeks the declarations in order to administer the relevant assets as Will's Assets for the benefit of those persons or objects who are entitled to them. In relation to each company it is pleaded, further, that the company itself and its assets are and have at all material times been either assets of the estate or entirely funded by assets of the estate. It is pleaded that the relevant assets are the Will's Assets and *thus* assets of the claimant (emphasis added). The declaration claim is also brought for the benefit of those entitled to the Will's Assets and not for the benefit of the claimant personally. The claimant has no standing to pursue this claim in this jurisdiction either.

Conclusion

35. The entirety of the claim is brought by the claimant on behalf of the estate of the late Mr Ali. Each cause of action seeks a remedy not for the benefit of the claimant personally but for the benefit of those entitled to the estate. The claim is therefore brought in a representative capacity and thus as part of its administration, and English law applies to the question whether the claimant has standing. As the claimant is not named as executor by the tenor of the Proof of Will, it could be entitled only to a grant of letters of administration. As no such grant has been obtained, the proceedings are a nullity.

36. I will accordingly make an order striking the claim out.