

Case No: F30MA160

Neutral Citation Number: [2022] EWHC 792 (Ch)

**IN THE COUNTY COURT AT MANCHESTER**

**BUSINESS AND PROPERTY WORK**

**ON APPEAL FROM DISTRICT JUDGE CARTER**

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester  
M60 9DJ

Date: 04/04/2022

**Before :**

**His Honour Judge Pearce**

**Between :**

**(1) RICHARD HENRY JENNISON**  
**(2) MRS GWYNETH MARY JENNISON**

**Appellants/**  
**Defendants**

**- and -**

**MRS GLENDA JOY JENNISON (as personal**  
**representative of the estate of GRAHAM JENNISON**  
**deceased)**

**Respondent/**  
**Claimant**

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**Mr Giles Gunstone** (instructed by **Larkman Lodh**) for the **Defendants/Appellants**

**Ms Rowena Meager** (instructed by **Irwin Mitchell LLP**) for the **Claimants/Respondents**

Hearing date: 7 March 2022  
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**JUDGMENT**

**His Honour Judge Pearce:**

This judgment was handed down in private at 10 a.m. on 4 April 2022. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

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## **INTRODUCTION**

1. This is my judgment on an appeal from a decision of District Judge Carter handed down on 8 October 2020. It follows the hearing of oral submissions on 7 March 2022. Throughout this judgment, I shall retain the description of the parties at first instance as “Defendants” and “Claimant” rather than “Appellants” and Respondent.”
2. By a Part 7 claim issued on 18 February 2019, the Claimant, the widow of Graham Jennison (“the deceased”) and the personal representative of his estate, brought a claim against the First Defendant (the brother of the deceased) and the Second Defendant (the

- First Defendant's wife) for declaratory relief and enquiries, together with a claim for an order for sale and for compensation, on account of the Defendants' alleged breach of trust in dealing with land near Church Street, Wales, Sheffield ("the land").
3. The Defendants defended the claim, in part, on the ground that the Claimant allegedly did not have standing to bring the claim.
  4. Ultimately, the claim was listed for trial before Judge Carter on 8 October 2020. The trial commenced with the hearing of a summary judgment/strike out application ("the Application") brought by the Defendants on the grounds of the Claimant's alleged lack of standing to bring the claim, which was said to render the proceedings a nullity. The Application was dismissed and the trial proceeded. Judge Carter granted relief to the Claimant on her claim.
  5. By an Appellants' notice dated 12 November 2020, the Defendants sought permission to appeal the decisions of Judge Carter, both in refusing the Application and in granting relief to the Claimant on the substantive claim. That application was dealt with on paper by His Honour Judge Stephen Davies on 26 October 2021, when he refused permission on all grounds save ground one, relating to standing and relief under CPR Part 3, these being the grounds upon which the Application was determined against the Defendants. Judge Davies also directed that the issue of statutory relief under Section 61 of the Trustee Act 1925 be remitted to Judge Carter, he having inadvertently failed to deal with the point, but it being possible for him to do so on paper, and without a further hearing.
  6. Judge Davies expressed sympathy for Judge Carter, noting that he had to deal with a large number of issues. I too have sympathy for Judge Carter. It would appear from the sizeable bundles of documents which still lie on the court file that he was presented with a very large amount of material at the trial. I note that the Defendants' skeleton argument for trial ran to 69 paragraphs with many sub paragraphs employing a bewildering combination of letters and Roman numerals to distinguish the sub paragraphs.
  7. The appeal has been conducted in a similar way, the Defendants' skeleton argument beginning with seven grounds of appeal and then running to 103 paragraphs of text over 23 pages. That skeleton argument was supplemented by a further Defendants' skeleton argument dated 26 March 2021, comprising 31 paragraphs of text over five pages. Then when permission was granted, the Defendants filed a yet further skeleton argument dated 8 December 2021 comprising 71 paragraphs over 19 pages, limited to the one narrow ground on which permission had been granted. The last of these skeleton arguments was supported by a bundle of authorities comprising 56 items (the index revert refers to 53 items, but three of the items are not given separate tab numbers). Thus, by the time of the

hearing of the appeal, the Defendants had produced a huge amount of written material upon which it was said reliance was being placed.

8. For all of this, the argument that is now advanced in this appeal, namely that the law of New South Wales in respect of the role and status of an executor differs from that of England and Wales, is one that was not raised at all by the Defendants before Judge Carter and was only raised in a peripheral manner in the last skeleton argument in support of the appeal.
9. The Defendants acted as Litigants in Person, at trial, although I understand that they were supported by a McKenzie Friend. At paragraph 25.1.2 of the first skeleton argument in support of the appeal, the Defendants complain as to the conduct of the trial that, “*When the First Defendant was unable to assist the Judge on his stipulation that he be taken to precise areas of the Authorities being relied upon, the Judge should reasonably have allowed the First Defendant (but did not) a few minutes in which to refer to his McKenzie Friend with a view to them being in a position to highlight the passages concerned. The failure to do so was unfair.*” There is some suggestion that the McKenzie Friend is responsible for the various skeleton arguments, the unwieldy bundle of authorities and the unfocused way in which the Appeal was conducted until the hearing before me on 7 March 2022. If this is correct, I strongly doubt that allowing the First Defendant time to speak to his McKenzie Friend would have made matters any easier for the Judge at trial. In any event, permission was refused on the grounds of alleged unfairness and an application in that regard was not renewed in front of me.
10. The Defendants were represented on the oral hearing of the appeal before me by Mr Giles Gunstone of counsel. It would appear that Mr Gunstone was instructed late and no skeleton argument was provided in substitution for those referred to above. I do not criticise Mr Gunstone for this. Short of simply disavowing all of the previous documents and presenting a short skeleton argument to make his points, there was little that he could do to better the situation that had been created by the previous preparation of this appeal. However, rather than waste time and money on that, he prepared and delivered focused oral submissions dealing with a small number of cases. As he said, the point upon which permission had been granted was a narrow one, albeit of importance to this case and no doubt others. I am grateful both to him and to Ms Meager of counsel, who appeared both at first instance and on the appeal for the Claimant, for their efficiency in dealing with the narrow ground on which the appeal was pursued.

## **BACKGROUND**

11. The Deceased and the First Defendant purchased the land in 1990 as tenants in common. The land is adjacent to the M1 motorway in Sheffield and comprised three main parcels. The Deceased, at that time living in New South Wales, died on 11 July 2007.
12. The death of the Deceased appears not to have come to the attention of the Defendants until 2009. In any event, thereafter, in three transfers occurring in 2011, 2014 and 2019, the Land was transferred in a manner which the Claimant says is inconsistent with the terms of the trust upon which it was held.
13. Following the Deceased's death, a grant of probate in respect of his estate was issued out of the Supreme Court of New South Wales in favour of the Claimant. That grant of probate was resealed in England and Wales on 25 November 2019. However, as noted above, this claim had already been issued in February 2019.
14. By their original defence, the Defendants made no admission that the probate granted to the Claimant in New South Wales granted "*any jurisdiction (sic) to the Claimant in respect of any part of [the Deceased's] estate which may exist within England and Wales.*"
15. By order dated 1 October 2020, the Claimant was granted permission to amend the Particulars of Claim. Permission was granted for service of an Amended Defence. Whilst I anticipate that the court had in mind, in granting permission to amend the Defence that the re-pleading would be responsive to the re-pleading of the Claimant's case, in fact the Amended Defence expanded on the issue of jurisdiction in the following terms:

*"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.”*

## **THE ISSUES**

16. Three issues came before Judge Carter for determination as preliminary issues on 8 October 2020:

16.1. Where the executor of a will was granted probate in a foreign jurisdiction before the issue proceedings, but that probate was not resealed in England and Wales until after the issue of proceedings, are those proceedings improperly brought (the first issue on appeal)?

16.2. Is the issue of the proceedings before the resealing in the domestic court of a foreign grant of Probate an error of procedure of a kind which can be remedied by the Court pursuant to its powers under CPR 3.10 or alternatively are the proceedings an incurable nullity (the second issue on appeal)?

16.3. If any procedural error can be so cured, should the court exercise its power under CPR3.10 to cure the error of procedure (the third issue on appeal)?

## **THE DECISION SUBJECT TO APPEAL**

17. On the first issue, Judge Carter held as follows:

*“20... The following points seem to me to be determinative. Firstly, this is a claim by an executrix and not by a personal representative under letters of administration. As has been pointed out, and is made clear within the joint authorities bundle, and is well known law, an executor derives its title from the will and not from any letters of administration or grant from the courts. Therefore, there is nothing to prevent an executor, bringing a claim prior to the grant of probate.*

*21. At the time this claim was issued, therefore, the claimant as the executrix of the will was entitled, it seems to me, to bring this claim, irrespective of whether she was a foreign personal representative or not. Had there been letters of Administration in Australia, the defendants would have had a good point. There were no such letters of administration and it is not a good point. The claimant was entitled, it seems to me, to issue this claim in accordance with her interest under the will.*

...

*23. It simply is a requirement of these proceedings, that, at the time, approving the claimant’s case, the claimant is able to show that there has been a grant. The grant that the claimant has dates all the way back to May 2008. There is no doubt that she was the*

*executrix and she had a grant of probate. That grant was sealed within the UK on 25 November 2019 and, therefore, at the time that the claimant is required to prove the title to bring this claim as executrix, she is perfectly capable of doing so.*

*24. It is not suggested that the probate granted in New South Wales is invalid or that the resealing is invalid and, therefore, I am satisfied that the claimant has the right to bring this claim.”*

18. On the second issue, Judge Carter said:

*“24. Even if I am wrong on [the first issue], it seems to me that in a situation where, as this point is not taken by the defendants until shortly before trial, the court should, in any event, exercise its powers under CPR 3 to allow the mistake to be amended and the claim to be dealt with. Further, any problems with the issue of the claim, it seems to me, were cured by the resealing in November 2019.*

*25. The defendants have submitted themselves to the jurisdiction of the claimant to bring this claim. They have not taken issue with the proceedings at any stage through this hearing and, therefore, if I am wrong that the claimant is entitled to bring this claim was entitled at the time of issue, I am satisfied that it would be right in accordance with the overriding objective and to ensure that justice is done, that any issues with it would be remedied.”*

19. In granting permission on the issue of the Claimant standing, His Honour Judge Davies said this:

*“4.3 The Judge found ... that the Claimant’s position at the time she commenced proceedings as executrix under the will was fundamentally different from the position of someone who had not been appointed a personal representative of an intestate estate at the time of commencing proceedings so that, in accordance with the texts and authorities cited by him, the proceedings were not a nullity when issued and she had proved the title by obtaining a resealing by the relevant time, namely trial.*

*4.4 I acknowledge the force of that conclusion and reasoning. However, it would appear from the judgment and the respective submissions that there is no authority directly on point, so that the question as to whether or not an action commenced by a foreign executrix, who has obtained probate in the foreign country, but not obtained a resealing in England before issuing proceedings, has never been authoritatively determined. In the circumstances, it seems to me that the point is reasonably arguable and should be permitted to be argued on appeal.*

20. On the issue of relief under CPR Part 3, His Honour Judge Davies said:

*“4.6 The Judge went on to conclude... that even if he was wrong in relation to standing, he was entitled to and would, following the decision of Peter Smith, J. in Meerza v Al Baho [2015] EWHC 3154 (Ch) at [46], allow the claim to be amended, and thus cure the procedural error. However, in my judgment, the question as to whether or not it would have been appropriate for such an application to have been allowed in such circumstances, in particular when according to the defendants they raised this point from the outset in their defence and no application was made to address the point until, apparently made orally in the face of the court, is reasonably arguable.”*

## **THE CASE FOR THE DEFENDANTS/APPELLANTS**

21. Mr Gunstone commenced his submissions for the Defendants asserting that there was significant common ground between the parties:
  - 21.1. An executor in England and Wales gets title and authority to sue from the will under which they are appointed. It arises from the authority in the will itself.
  - 21.2. The executor may issue a claim as executor, without a grant of probate;
  - 21.3. The executor must ensure before trial that there is a grant of probate so that the court can be satisfied that they have capacity when the matter is determined.
  - 21.4. The position of an administrator is different. An administrator entitled to letters of administration should ensure they have the authority of the letters before they issue the claim.,
  - 21.5. If a person issues a claim in the role of administrator prematurely, the claim is liable to be struck out as a nullity. That is an important point of agreement.
  - 21.6. A grant of probate or letters of administration granted in certain jurisdictions can be sealed by the court in the UK, whereupon it has the same force and effect as the English grant – see the Colonial Probates Act 1892.
  - 21.7. It is accepted that New South Wales is one of the jurisdictions to which the Colonial Probates Act 1892 applies.
22. However, the Defendants contend that the position is different where the following executor is appointed by a will in a system of law that differs from that of England and Wales in respect of Probate. In that case, Mr Gunstone says that it is not obvious that the foreign executor should have the same authority as in English executor and the position of the foreign executor is more likely to be akin to that of the Administrator.
23. The first three principles set out at paragraph 21 above are drawn from the decision of the Privy Council in Chetty v Chetty [1916] Q AC 603. The executor in that case obtained



probate in India. Later, letters of administration were granted in the Straits Settlement (Singapore) and a claim was issued on behalf of the estate in Singapore. A defence of limitation was pleaded, relying on the date of death as being the time from which the claim could have been brought. The Privy Council held: *"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, vesting him upon the testator's death, and the consequences 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 the 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 the grant."* Whilst admittedly that was a case involving probate initially in India, which was thereafter affirmed by letters of Administration in Singapore, Mr Gunstone drew attention to the fact that there was no evidence before the Privy Council to suggest that the law in those two countries differed.

24. In Ingall v Moran [1944] 1KB161, the Court of Appeal dealt with a situation where a claim was brought by the father as administrator of his son's estate for damages to the estate arising from his son's death, but the writ was issued before letters of administration were taken out. Longmore LJ referred to Chetty v Chetty saying:

*"It is, I think well established that an executor can institute an action before probate of his testator's will is granted, and that, so long as probate is granted before the hearing of the action, the action is well constituted, although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary only because it is the only method recognized by the rules of court by which the executor can prove the fact that he is the executor."*

25. The contrary proposition in respect of those cases where there is no executor, referred to at subparagraphs 4 and 5 of paragraph 21 above can be seen from the decision of Scott LJ in Ingall v Moran:

*"The cause of action arose, and was vested in the deceased lad, at the moment when he was injured, and the measure of his damages included fair compensation for such loss of expectation of life as was caused to him by the defendant's tort. That chose in action was his. To it the common law maxim "Actio personalis moritur cum persona" would have applied on his death but for the Act of 1934 which caused it to survive. If he had left a*

*will, it would at the moment of his death automatically have vested in his executor. As he died intestate, it vested in the President of the Probate, Divorce and Admiralty Division, and remained in him until letters of administration were issued. Then - and not before - it would automatically pass from the President to the administrator. As the writ was issued on September 17, 1942, and there was no grant till November, it follows, necessarily, that at the time of writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ, falsely (although no doubt quite innocently) alleging that he issued it as administrator."*

Scott LJ found the result of this to be that *"the ... writ was it, in truth, incurably a nullity. It was born dead, and could not be revived."*

26. The Defendants rely also on Burns v Campbell [1952] 1 KB 15, where the Claimant, having been granted letters of administration of her husband's estate in Northern Ireland, instituted proceedings as administratrix in England against the defendant for damages in respect of her husband's death. Some two months later, the Irish grant of administration was re-sealed in the English courts. Lord Denning said:

*"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: see Hilton v. Sutton Steam Laundry. She did later obtain a grant of administration to the English assets, namely, on the re-sealing on March 20, 1951, but that does not cure the matter. It does not revive the nullity. This means that she has lost her claim under the Fatal Accidents Act altogether, because more than twelve months have expired from her husband's death."*

27. The distinction drawn by Mr Gunstone in respect of the foreign executor, where there is evidence before the court that the legal systems of the country where Probate is granted differs from that of England and Wales, as referred to at paragraph 22 above, arises from the following sources:

- 27.1. The Law of Executors and Administrators, Vaughan Williams, sixth American edition:

*"... If a foreign executor should find it necessary to institute a suit here, to recover a debt due to his testator, he must prove the will here also, or a personal representative must be constituted by the court of probate here to administer ad litem."*

27.2. Enobin v Wylie 1 SW & TR 118. A British subject died in Russia having acquired a large amount of property there. He left a will in Russia with appointed Russian executors. The will was authenticated in the Russian courts. The Court held:

*“... it is necessary for the executors to obtain probate before they can get a locus standi in the Court of Chancery. That Court has a sum of money to deal with, which is in the hands of the Accountant-General. The executors, as Russian executors, are not recognized in that Court; they cannot act upon the Russian probate in reference to this property, but they must have an English probate...”*

27.3. Peer International v Termidor [2006] EWHC 2883 (Ch), an intellectual property claim where issues of copyright following death arose. The court had to grapple with the question as to who were the composers’ “legal personal representatives” within the meaning of the Copyright Act 1911. The estates of the deceased composers were subject to Cuban Law. Lindsay J said:

*“59. Who are such “legal personal representatives”? The English copyright is movable property situate in England. In the ordinary course an English court does not, with respect to such property, look into whether some one or more persons, either by way of the order of some foreign court or otherwise, have become describable as “legal personal representatives” but rather expects an English grant to be made that includes the property in question. Thus one finds in Dicey & Morris, Conflict of Laws, 13<sup>th</sup> Edition 2000, under the general editorship of Mr Lawrence Collins, as he then was, the following at Rule 127 and thereafter:-*

*“Rule 127 – A grant of representation or other authority to represent a deceased person under the law of a foreign country has no operation in England.*

.....

#### *Comment*

*26-037 The general rule is that a foreign representative of the deceased who wishes to represent him in England must obtain a grant of representation here and cannot sue in his character as a 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 has obtained an English grant of probate or letters of administration.”*

*The 13<sup>th</sup> Edition was the one current when this part of the argument was dealt with; in the now current 14<sup>th</sup> the rule (now Rule 135) and the comment remains the same – see para 26-037. It is not said that any of the relevant composers died testate. No English grant of probate to the estate of any has been made nor have any relevant letters of administration been granted. Until such a grant to a deceased’s estate is made it vests, nowadays, in the Public Trustee – Administration of Estates Act 1925 section 9 as amended. If, by way of that vesting, the 1911 Act reversions are vested in the Public Trustee, how could Peer, especially in the absence of that legal owner from these proceedings, press for the relief which it initially sought, namely that it is entitled to a declaration that it is the owner (and, presumably, as the pleading gives no reason to separate legal and beneficial ownership, the legal owner) or exclusive (legal) licensee of the identified compositions?”*

- 27.4. Finally, Mr Gunstone cites Kibby v Skillings [2016] EWHC 3165 (QB), a decision of Mr Nicholas Le Poidevin QC sitting as a Deputy High Court Judge. The question of the Claimant’s standing to sue on behalf of the estate of a person who died intestate arose. In one case, a power of attorney had been provided by the deceased and the court was not troubled with the point. In the other, Miss Wollison, Mr Le Poidevin QC noted that the Claimant had a Canadian grant of probate, but said:

*“13.2 ...as I understand it, it is a principle of English law that a foreign personal representative is in general not recognised as having standing to sue here until he extracts an English grant.*

*14. These points seemingly have not been taken hitherto. I would be extremely reluctant to allow them to be taken now, given that as matters stand the real claimants are Mr Skillings' wife and sister-in-law, and it is inconceivable, I think, that they do not know what has been going on or are not happy with his continuing to act. It seems to me that those technical points have effectively been overtaken by an order of Master Winegarten given on 15 July 2013, which was partly concerned with giving directions as to the taking of the account, but also directed that the modest sum of some £22,000-odd, which appears to have been all that remained in Mrs Fairweather's estate, should be paid by the Defendants'*

*solicitors to the Claimant's solicitors, to go to the Claimant on account of the entitlement of Miss Mitchell and the estate of Mrs Woolison as next of kin. “*

Thus, says Mr Gunstone, the court acknowledged that the foreign Personal Representative needed the authority of the English Court as a matter of principle, but the court proceeded on a pragmatic basis in allowing the claim to proceed, not least because the Defendant appeared to have accepted the jurisdiction of the court when it made the order of 15 July 2013.

28. Mr Gunstone acknowledges that of these cases only Enobin v Wylie is an executor case rather than a case involving personal representatives and that therefore the authorities do not provide strong support for the principle that he relies on. But the message from the cases is that, where there is any doubt as to the effect of the foreign probate, the litigant must obtain probate in the English courts before the issue of proceedings.
29. It is trite English law that the deceased's real and personal property vests in an executor appointed by will at the time of death (see Wooley v Clark (1823) 5 B & Ald 744 and indeed Chetty v Chetty). However, the Defendants contrast the scheme of probate in the Probate and Administration Act 1898, the relevant legislation for New South Wales. Section 44 provides:

*“Real and personal estate to vest in executor or administrator*

*(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 provides:

*“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 aforesaid the personal estate and effects vested in the Ordinary in England.”*

30. On death, the property vests in the New South Wales Trustee, the property only vesting in the executor on probate, albeit that such vesting takes effect from the date of death. The Defendants contend that this is a difference of probate regime that brings the Claimant here within the principle referred to at paragraph 22 above.
31. On the second issue, the Defendants refer me to the terms of CPR 3.10: “*Where there has been an error of procedure such as a failure to comply with a rule of a 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.”*
32. The Defendants rely on the decision of the Court of Appeal in Milburn-Snell v Evans [2011] EWCA Civ 577. The claimants were the children of a man who died intestate. Before letters of administration were granted, proceedings were commenced on behalf of the estate against the defendant. The defendant made no admission as to the Claimant’s title to sue until shortly before trial, when the defendant sought sight either of a grant of probate or letters of administration. Neither was produced, but rather the Claimants applied for an order permitting the claim to proceed under CPR 19.8.
33. The trial judge found that, subject to any assistance that the parties might derive from the CPR, the claim stood to be struck out as a nullity. This was accepted as common ground in the Court of Appeal, where it was recorded in paragraph 14 of the judgment of Rimer LJ:
- “It is agreed that Judge Langan was correct that, subject only to any help that the claimants may derive from Part 19.8(1), their claim was a nullity that must be struck out and could not be retrospectively validated by a grant of letters of administration. That is because whereas an executor derives his title to sue from the will and not from the grant of probate -- and so can validly sue before obtaining a grant (although he will have to obtain it later in order to prove his title) -- an administrator derives his title to sue solely from the grant of administration (see Chetty v. Chetty [1916] 1 AC 603, at 608, 609, per Lord Parker of Waddington).”*
- The Court of Appeal went on to hold that, in Rimer LJ’s words, “*it is no part of the function of CPR19.8(1) to cure nullities and give life to proceedings such as the present which were born dead and incapable of being revived.*”

34. The Defendants note the reliance by the Claimant on the decision of Peter Smith J in Meerza v Al Baho [2015] EWHC 3154 (Ch) in support of the contention that CPR 3.10 can be applied to cure any procedural defect in a situation such as this.
35. The claimant in that case commenced claims in her own right, according to Kuwaiti law as a beneficiary of a deceased person and also on behalf of the deceased's estate. To have title to sue, the claimant needed to obtain grant of letters of administration, but this did not occur until after proceedings had been commenced. The defendant subsequently applied to strike out the proceedings, citing Milburn-Snell as authority for the proposition that the proceedings were a nullity. Peter Smith J refused the application, holding that the defect in the claimant's initial authority to sue could be cured by an exercise of the court's powers under rule 17.1, permitting amendment to the statements of case to plead the grant of letters a minute of administration.
36. In this case, no amendment is required, because of the grant of probate was pleaded in the original Particulars of Claim and the resealing of the grant is particularised in the Amended Particulars of Claim. Nevertheless, if the court in Meerza was able to cure any defect by granting permission to amend, it must follow that the court here has the power to do so under CPR 3.10.
37. At paragraph 46 of his judgement, Peter Smith J said:

*“It seems to me that based on those authorities (which were not cited in the cases relied upon by Mr Davies) 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 above 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. The following reasons justify in my view that decision. First the Defendants in the earlier actions as I have set out above did not until 25th April 2012 make any challenge to the jurisdiction of Sheikha Hind to bring any proceedings; they admitted she had. Second significant costs in the actions sought to be struck out will be carried forward in to the fourth action. Third there is no prejudice as the fourth action will still proceed. If I make an order that all of the costs are costs in the case in the Third Action that will be easier. First it will avoid giving the taxing judge the difficult task of identifying which part of the costs are capable of being saved in the Third Action which were not. Second the putting of the costs in the case of course means that Mr Al Baho will if his defence is successful obtain the costs in any event.”*

38. The Defendant argues that the decision in Meerza is wrong. In Kimathi v Foreign & Commonwealth Office (No.2) [2016] EWHC 3005 (QB), the decision in Meerza was distinguished by Stewart J on the ground that the claim in that case had been made in the name of the deceased, not in the name of a living claimant such as a personal representative, as in Meerza. Stewart J also expressed doubt as to whether CPR Part 3 gives the court a general discretion to cure defects in claims, however fundamental. The learned judge stated that, if Meerza had not been distinguishable, he would have felt constrained to depart from the reasoning and judgment of Peter Smith J.
39. Mr Gunstone contends that Stewart J was right to indicate that Meerza was wrongly decided. CPR 3.10 does not apply here is that the principle that these proceedings are a nullity is a matter of substantive, rather than for procedural law.
40. On the third point, the exercise of the discretion (if it exists), the Defendants draw attention to the fact that Judge Carter relied in his indication that he would have exercised the CPR3.10 power in the Claimant's favour, on the Defendants having only raised the issue of the Claimant's title to sue late in the day. Mr Gunston draws attention to the fact that, as in Milburn Snell, the Defendants had not admitted the Claimant's title to sue. He therefore says that Judge Carter was wrong to say that this was an issue only raised late in the proceedings and that demonstrates an error in the exercise of the power under CPR 3.10, if it exists.

#### **THE CASE FOR THE CLAIMANT/RESPONDENT**

41. The Claimant agrees that the matters referred to by Mr Gunstone and summarised at paragraph 20 above are common ground. However, she disputes that the principle asserted at paragraph 21 is a proper statement of the law, at least in the context of this case, given the terms of Section 2 of the Colonial Probates Act 1892.
42. The Claimant begins by drawing attention to the fact that all of the cases referred to by the Defendants, save Enobin v Wylie, involve the position of administrators. Their position is indeed determined by the principle referred to in Chetty v Chetty and other cases that (perhaps subject to the court's powers under CPR 31.10 to cure an irregularity), an administrator cannot institute proceedings before letters of administration have been granted.
43. However, a different rule applies in an executor case and that is the situation here. The Claimant says that none of the cases justify the distinction drawn by the Defendants between those executor cases where the law of probate is the same as England and Wales and those where it is different. So long as the foreign executor is able to prove their right to administer the estate under the will, the principle that the authority arises from the will



applies with as much force to the case of an executor under a foreign will as it does to one under an English or Welsh will. The re-grant is a necessary to proving that authority, but once regrant occurs (as here under the Colonial Probates Act 1892), the executor can take advantage of the principle in Chetty v Chetty and need not prove that probate itself took place before the issue of proceedings, still less that the regrant did.

44. The Claimant does not accept that Enobin v Wylie suggests some different rule for foreign executors where the law of the country in which probate is obtained is different from that of England and Wales. The point in Enobin v Wylie is not that the foreign executors required appointment as administrators, but rather that they required regrant to prove their probate in the English court.
45. Further, Ms Meager submits that the result contended for by the Defendants would be inconsistent with the terms of Section 2 of the Colonial Probates Act 1892. Section 2 provides:

*“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 (subject to ...) , 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.”*

It could not be said that re-grant of probate by resealing had “*like force and effect*” to an original grant in the court of England Wales if the principle in Chetty v Chetty did not apply, since that principle would have applied if the original grant had been in England or Wales.

46. On the second issue, the Claimant relies, as indicated above, on the decision of Peter Smith in Meerza v Al Baho. If the proceedings were not a nullity in that case, but rather were an irregularity that could be cured by amendment, the same must be true here with the further refinement that, since the Particulars of Claim as amended already plead the Grant of Probate and the re-sealing of the grant, no further amendment is required. Quite simply, the wide powers of CPR3.10 must permit the court to cure a defect which is not such as to render the proceedings a nullity from the outset.
47. On the third issue, the Claimant contends that Judge Carter’s exercise of the power under CPR 3.10 was unexceptional and involved no arguable misdirection. Simply it was an evaluative judgment that lay in the range of reasonable outcomes on the material before him.

## DISCUSSION

48. In large part, this appeal turns on points of law. Both the question as to whether it was permissible to issue this claim before the re-sealing of the grant of probate and the question of whether, if it was not permissible so to do, the proceedings are an incurable nullity are matters of law, which have right or wrong answers. But the third issue is the question of an exercise of a power by the District Judge, which was an evaluative exercise on the material before him. The appeal court will not interfere in such a judgment unless the lower court has misdirected itself.
49. Starting with the first issue, the title of the Claimant to sue, the Claimant's argument is well made. The re-sealing of a foreign grant of probate is clearly necessary to give effect to the foreign will (see the express terms of Section 2 of the Colonial Probates Act 1892 and authority on wills from other countries such as that in Enobin v Wylie).
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.
51. It is of some note to see what is said in Theobald on Wills on the issue of the deceased who is domiciled abroad at the time of death. At paragraph 37-007, the authors state of such a situation: "*Probate may be granted to a person named executor in a will in the English or Welsh language, or constituted executor according to the tenor of the will (Non-Contentious Probate Rules 1987 r.30(3)(a) (under the draft Probate Rules, r.44(3)(a) is to the same effect): see Von Linden, In the Goods of [1896] P. 148.*"
52. Rule 30 provides:

“30.—(1) Subject to paragraph (3) below, where the deceased died domiciled outside England and Wales, a registrar may order that a grant do issue to any of the following persons—

(a) to the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled; or

(b) where there is no person so entrusted, to the person beneficially entitled to the estate by the law of the place where the deceased died domiciled or, if there is more than one person so entitled, to such of them as the registrar may direct; or

(c) if in the opinion of the registrar the circumstances so require, to such person as the registrar may direct.

(2) A grant made under paragraph (1)(a) or (b) above may be issued jointly with such person as the registrar may direct if the grant is required to be made to not less than two administrators.

(3) Without any order made under paragraph (1) above—

(a) probate of any will which is admissible to proof may be granted—

(i) if the will is in the English or Welsh language, to the executor named therein; or

(ii) if the will describes the duties of a named person in terms sufficient to constitute him executor according to the tenor of the will, to that person; and

(b) where the whole or substantially the whole of the estate in England and Wales consists of immovable property, a grant in respect of the whole estate may be made in accordance with the law which would have been applicable if the deceased had died domiciled in England and Wales.”

53. In Von Linden, Sir Francis Jeune, President of the Probate, Divorce and Admiralty Division, had said: “where in a foreign will a person is in terms named executor, probate will be granted in this country to that person, but that where the powers granted to a person in the will fall short of the powers of executors according to English law, there will be a grant to him of administration with powers as near as may be to those granted by the will. “

54. Any concern of the kind expressed in Enobin v Wylie as to the effect of a foreign will and the potential difference between law of succession in the foreign country and that in England and Wales is adequately met by the power of the court when asked to grant probate, whether under Rule 30 of the Non-Contentious Probate Rules or pursuant to the

principle in Von Linden, to consider whether the person named as executor in the will in fact has the same or substantially the same powers as an executor in English law. If that person does, probate may be granted and the principle of Chetty allowing the executor to commence proceedings without having obtained the grant of probate or the re-sealing of the grant apply.

55. Equally, on an application for resealing of the grant of probate under Section 2 of the Colonial Probates Act 1892, the court's power is expressed in discretionary terms and if doubt were raised as to whether the role of the executor under the foreign will differed in a material respect from that of the executor in English and Welsh law, the court of probate could refuse the application. That did not happen in this case, nor in my judgment would it have been legitimate to refuse the resealing, given that the effect of resealing was to give effect to a will that appointed the Claimant as executor. The effect of resealing simply gave effect to the testator's expressed request that the Claimant be his executor.
56. 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 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.
57. The second and third issues are, in light of my judgment on the first, of hypothetical interest only.
58. On the second issue, the question as to whether the court has a power to waive any defect of procedure that might have been involved with the issue of this claim before the grant of probate was resealed, I am faced with conflicting decision of Peter Smith J in Meerza and Stewart J in Kimathi v FCO. Since I am sitting in the County Court, a decision of the High Court on the like point that is before me is binding. I am thus seemingly faced with the dilemma as to which authority I should follow.
59. My attention is drawn to the judgment of Mr Le Poidevin QC in Kibby & Buddell v Skillings. It might be said that, if I am wrong on the first issue, the court in that case had no greater power to cure any procedural defect than the court in that case. But in Kibby & Buddell, Mr Le Poidevin QC permitted the claim to proceed. I have noted above the deceased died intestate so that the personal representatives were not executors falling within the principle in Chetty v Chetty. If this is so, the issue of proceedings would, applying the analysis in Kimathi, seemingly be an incurable nullity, yet the Judge in

Kibby & Buddell was not troubled by this issue in permitting the claim to continue. It might be argued that this is an example of the court exercising the power under CPR3.10, to cure a procedural defect, even though that provision is not expressly referred to and that the decision therefore supports the reasoning of Peter Smith J in Meerza.

60. I am however not entirely clear on the jurisdictional basis of the decision in that case. As with the challenge to the standing of the Claimant in Meerza (and arguably the standing of the Claimant here), the point was only taken late in the day. In any event, with respect, the reasoning on this issue within the judgment in Kibby & Buddell is not sufficiently clear for me to draw any legal principle from the judgment.
61. In my judgment, the answer to the tension between the decision in Meerza and in Kimathi lies, for the purpose of this appeal, in the fact that the decision of Stewart J in Kimathi is technically obiter, since he had already distinguished Meerza on other grounds, namely that the claim in Kimathi had been brought by a named person who was in fact dead, rather than by a person who had not obtained letters of administration before the claim was commenced. In that circumstance, only Meerza is binding authority on me on the issue before the court. I must therefore follow the decision Meerza and find that the court has the power under CPR 3.10 to cure this defect, the proceedings not being an incurable nullity. I leave it to a higher court, in this case or on some other occasion, to decide whether in fact Meerza was rightly decided.
62. If I were wrong on the first issue, but correct on the second, the question would arise as to the exercise of the power under CPR3.10. In my judgment, the decision of Judge Carter lies well within the proper exercise of his powers on this issue. He considered the relevant issues and reached a reasonable conclusion. There is no even arguable misdirection on the issue.
63. In particular, in so far as the Defendants contend that he failed to give proper regard to the fact that this issue was raised at an early stage in the proceedings through the non-admission of standing in the defence, Judge Carter rightly noted that the issue had only been raised in clear form at a late stage in the proceedings through the service of the Amended Defence in around September 2020. Whilst it is true that failure of the Defendant in Milburn-Snell to raise the issue of standing in any other than a general way was not fatal to her case that the claim should be struck out, this was in the context of a case in which CPR3.10 was not considered, the court concluding that it had no discretion to allow the proceedings to continue.
64. As Stewart J pointed out in Kimathi, it would be somewhat surprising if the Court of Appeal in Milburn-Snell had failed to consider the power under CPR3.10 to regularise

the proceedings. Nevertheless for reasons set out above, I am bound in the light of Meerza to find that such a power exists. If it does exist, the failure of the Defendant to raise the point earlier is clearly a relevant factor in the exercise of the power. To find otherwise would be to disregard the overriding objective with its focus on dealing with cases expeditiously and at proportionate expense. It is not consistent with the overriding objective for a litigant to fail to take a point at an early stage which the litigant later alleges to be fatal to the claim. Certainly Judge Carter's finding that the circumstance justified the exercise of any power that might exist under CPR 3.10 to regularise the proceedings is unimpeachable

## CONCLUSION

65. For these reasons, I conclude:

- 65.1. On the first issue, 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;
- 65.2. If I am wrong on the first 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;
- 65.3. Any criticism of the exercise by Judge Carter of the power under CPR 3.10 to cure any procedural defect is unsustainable.

66. It follows that this appeal must be dismissed.

## CONSEQUENTIAL MATTERS

67. Following my sending out a draft of this judgment, the parties have sought to agree an order. Whilst the unsuccessful Defendants agree that they cannot resist a costs order in principle, the parties have been unable to agree one matter, that is to say an order for payment on account of the costs of the appeal. Both parties have made submissions by email.
68. The Claimant argues that where (as here) the court is ordering a detailed assessment of costs, the court should normally order the payment of a sum on account (see CPR 44.2(8)). In this case, there is no reason to depart from the usual rule, in particular where there is a stay in operation in respect of the Order of Judge Carter, pending not only the resolution of this appeal but also a renewed application for permission in respect of other grounds. The Claimant contends that there is no good reason for her to have to wait further for her costs. The Claimants seek £28,993.20 (inclusive of VAT) in their costs statement and

contend that £20,000 is a reasonable sum on account of such costs pursuant to CPR 44.2(8).

69. The Defendants contend (without there being any evidence before the court) that they are impecunious. They say that, as elderly litigants, subject to the stress and worry of litigation, they should not be subject to an order now or at least any order should be stayed. In any event, the sum claimed is said to be excessive and if any order is made, I am asked to make it in the lesser sum of £7,500.
70. In my judgment, an order for costs on account is in principle justified here. The unsuccessful Defendants' alleged impecuniosity is not a good reason not to make an order. Further, whilst the impecuniosity of the Defendants may be a ground for varying the time for and manner of payment, that is a matter which is better dealt with on application to a District Judge under CPR 40.9A, when the court will have the opportunity to consider the Defendants' means.
71. As to the amount of the order for payment on account of costs, I bear in mind the guidance of Christopher Clarke LJ in Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566:
- “23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.*
- “24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.”*
72. In my judgment, the Claimant's costs appear on their face to be significantly on the high side. Further, an overpayment at this stage might prove difficult for the Defendants to recover. A reasonable sum is £16,000. This is approximately 55% of the amount claimed by the Claimant and is not a figure that is likely to be more than the ultimate award.
73. Subject to this, I make an order in the terms agreed by the parties.