Neutral Citation Number: [2024] EWCA Civ 1122

Case Nos: CA-2023-002039
CA-2023-002041
CA-2023-002065
CA-2023-002066

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Dame Clare Moulder (sitting as a Judge of the High Court)
[2023] EWHC 1896 (Comm) and [2023] EWHC 2329 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2024

Before:

LORD JUSTICE NEWEY
LORD JUSTICE LEWIS
and
LORD JUSTICE NUGEE

- -

Between:

FLAVIO DE CARVALHO PINTO VIEGAS and others	**Claimants**
- and -	
(1) THE ESTATE OF JOSÉ LUIS CUTRALE (represented by ROSANA FALCIONI CUTRALE)	**Defendants**
(2) JOSÉ LUIS CUTRALE JNR	

And between:

JOSÉ ANTONIO RUIZ SANCHES and others	**Claimants**
- and -	
(1) THE ESTATE OF JOSÉ LUIS CUTRALE (represented by ROSANA FALCIONI CUTRALE)	**Defendants**
(2) JOSÉ LUIS CUTRALE JNR	

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Alain Choo Choy KC, Juliet Wells and Anisa Kassamali (instructed by **Pogust Goodhead**)
for the **Claimants**
Brian Kennelly KC, Thomas Fletcher and Paul Luckhurst (instructed by **Linklaters LLP**)
for the **Defendants**

Hearing dates: 3, 4 and 8 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 October 2024 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. In these proceedings, the claimants allege that the defendants participated in a cartel which, in breach of Brazilian law, aimed at achieving a monopoly over the markets in Brazil for the acquisition of oranges and the production of frozen orange juice concentrate. According to the claimants, the cartel had come into existence by 1999 and lasted until at least 24 January 2006. The claimants have indicated that they reserve the right to allege that it continued beyond that date.

2. The claimants are described in the particulars of claim as "1,548 independent Brazilian orange farmers" who have suffered loss as a result of the anti-competitive practices in which the defendants are said to have engaged. In some cases, the claims are brought as heirs or representatives of the estates of such farmers.

3. When the claims were issued, the defendants were named as Mr José Luis Cutrale ("Mr Cutrale Snr"), his son Mr José Luis Cutrale Jnr ("Mr Cutrale Jnr") and a company with which they were involved, Sucocítrico Cutrale Ltda ("Sucocítrico"). However, in a judgment dated 5 November 2021 ([2021] EWHC 2956 (Comm)) Henshaw J concluded that there was no jurisdiction over Sucocítrico, leaving Mr Cutrale Snr and Mr Cutrale Jnr as the only defendants. In the following year, Mr Cutrale Snr died and his widow, Mrs Rosana Falcioni Cutrale, was appointed to represent his estate in the litigation.

4. Although they have been the subject of a single set of pleadings, there are two sets of proceedings. The first claim ("the Viegas Claim"), brought by Mr Viegas and others, was issued on 27 September 2019, the second ("the Sanches Claim"), brought by Mr Sanches and others, on 22 November 2019. In advance of either claim form being served, that in respect of the Viegas Claim ("the Viegas Claim Form") was amended twice, on 22 November 2019 and 23 January 2020. The net effect of the amendments was to add 1,361 claimants to the Viegas Claim.

5. The proceedings were served on Mr Cutrale Snr and Sucocítrico on 27 January 2020 and on Mr Cutrale Jnr on 26 February 2020. On 5 June 2020, all three defendants filed an application challenging the jurisdiction of the Courts of England and Wales. As already indicated, that application was successful in the case of Sucocítrico, but it failed as regards Mr Cutrale Snr and Mr Cutrale Jnr.

6. Thereafter, Mr Cutrale Snr and Mr Cutrale Jnr applied for some of the claims which had purportedly been brought against them to be struck out. Mr Cutrale Snr's first application was issued on 19 November 2021. Mr Cutrale Jnr applied on 11 March 2022 after the Court of Appeal had on 25 February 2022 refused him permission to appeal against Henshaw J's decision. A further application was issued on 21 March 2022 on behalf of both Mr Cutrale Snr and Mr Cutrale Jnr.

7. On 18 November 2022, a further claim ("the Nicolau Claim") was issued against the defendants on a protective basis. The claimants were said to include the individuals who had been added to the Viegas Claim or the heirs of such persons.

8. The strike out applications came before Dame Clare Moulder ("the Judge"), sitting as a Judge of the High Court, in June 2023. The Judge delivered a reserved judgment

("the Judgment") on 24 July 2023 and dealt with consequential matters in a further, ex tempore judgment ("the Consequentials Judgment") on 15 September 2023.

9. Both sides have appealed. It is convenient to address the various grounds of appeal in the following order:

   i) The defendants' appeal: grounds 1 and 2 (disallowance of amendments);

   ii) The claimants' appeal: ground 1 (amending to specify representatives);

   iii) The claimants' appeal: grounds 2 and 3 (standing of heirs);

   iv) The claimants' appeal: grounds 4 and 5 (giving time to obtain grants);

   v) The defendants' appeal: ground 3 (carve-outs).

10. The defendants' grounds 1 and 2 concern whether the Judge should have disallowed amendments to the Viegas Claim Form on the basis that they prejudiced limitation defences. The claimants' appeal and the defendants' ground 3 all relate to claims made in respect of causes of action which persons who had died by the time the proceedings were issued are said to have had.

The defendants' appeal: grounds 1 and 2 (disallowance of amendments)

Introduction

11. Part 17 of the Civil Procedure Rules is concerned with amendments to statements to case. Where a statement of case has been served, it cannot be amended without either the written consent of all the other parties or the permission of the Court: see CPR 17.1(2) and (3). The position is, however, different if the statement of case has not yet been served. CPR 17.1(1) states:

> "A party may amend their statement of case, including by removing, adding or substituting a party, at any time before it has been served on any other party."

12. The amendments to the Viegas Claim Form were made in reliance on CPR 17.1(1) (quoted in paragraph 65 below). The defendants contend, however, that they should be disallowed pursuant to CPR 17.2. That reads:

> "(1) If a party has amended their statement of case where permission of the court was not required, the court may disallow the amendment.
>
> (2) A party may apply to the court for an order under paragraph (1) within 14 days of service of a copy of the amended statement of case on them."

The White Book explains at 17.2.1 that an application under CPR 17.2 "is appropriate if the amendment challenged is one which, if permission to amend it had been necessary, that permission would not have been granted".

13. The defendants' case is that the amendments at issue should be disallowed on limitation grounds. As they note, there is no dispute that it is arguable that the claimants' claims were barred by limitation by the time the amendments were made. According to the defendants, that of itself makes it appropriate to disallow the amendments. In the alternative, the defendants argue for disallowance on the basis that "relation back" could operate to their prejudice were the amendments allowed to stand.

14. The Judge, however, declined to disallow the amendments. She considered that it would have been appropriate to do so only if a reasonably arguable limitation defence had been prejudiced by the operation of relation back and that that was not the case. The Judge concluded in paragraph 82 of the Judgment:

> "In my view the authorities are clear that the Court is concerned with whether the Defendants have an arguable case on limitation and whether that case is prejudiced by the operation of the principle of relation back. The agreed position in this case was that the Defendants' case on limitation i.e. that it expired by 2009 was arguable. If the amendments are allowed, that case is not prejudiced by the operation of the principle of relation back. The Claimants' counter position is irrelevant to the question of whether the Defendants' case on limitation is prejudiced."

Earlier in the Judgment, in paragraph 43, the Judge had explained:

> "In the present case the pleaded case of the Defendants is that in relation to limitation, the limitation period expired in 2009 and thus on its case the operation of relation back will make no difference to its case. On its case the original claim is out of time and the amended case will be equally out of time regardless of the date it is (deemed to be) issued and thus there is no prejudice to the Defendants' limitation case by the new claim."

In paragraph 86, the Judge said:

> "In my view, in circumstances where the Defendants' pleaded case is that the limitation period expired in 2009, the Claimants have shown that the Defendants do not have a limitation defence which would be prejudiced by the operation of the principle of relation back."

15. The Judge further took the view that the defendants' applications were made too late. The Judge considered that the defendants required relief from sanction to apply under CPR 17.2 outside the 14-day period for which CPR 17.2(2) provides and that such relief should not be granted. She concluded in paragraph 139 of the Judgment:

> "The Defendants have in my view chosen not to bring the application within the time period allowed and waited for well over a year before telling the Claimants that they might

> challenge the amendments on the basis of limitation thereby potentially putting some Claimants outside the limitation period on the Claimants' case. The Defendants' substantive application to disallow the additional Claimants is not to protect its limitation defence but if successful would deprive the bulk of the Claimants of their claim. In my view that is not a just result. In my view the just position in this case is that the Defendants should be entitled to bring their limitation defence to trial but that equally the Claimants should be allowed to have their claims litigated. For these reasons (if I am wrong on the substantive issue of limitation such that it is necessary to decide this issue) the application for relief from sanctions is refused."

Issues

16. The defendants' grounds 1 and 2 give rise to the following issues:

    i) Is the addition of a new claimant barred whenever there is an arguable limitation defence to the claim or only where relation back might operate to a defendant's prejudice?

    ii) If prejudice is required, is there a sufficient prospect of it here?

    iii) Is the 14-day period for which CPR 17.2(2) provides applicable even where an application challenging jurisdiction has yet to be resolved?

    iv) Does an implied sanction attach to CPR 17.2(2)?

    v) If not, should this Court itself grant the defendants an extension allowing them to apply under CPR 17.2(2)?

Issue (i): Is prejudice required?

17. "Relation back" arises as a result of section 35 of the Limitation Act 1980 ("the 1980 Act"). Section 35(1) provides for any new claim made in the course of an action, including a claim involving the addition or substitution of a new party, to:

> "be deemed to be a separate action and to have been commenced—
>
> (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
>
> (b) in the case of any other new claim, on the same date as the original action".

18. However, section 35(3) of the 1980 Act restricts the circumstances in which a new claim can be introduced after a limitation period has expired. It states:

> "Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a

> new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim."

19. CPR 17.4 provides:

> "(1) This rule applies where—
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> (a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under—
>
> (i) the Limitation Act 1980; or
>
> (ii) the Foreign Limitation Periods Act 1984 or;
>
> (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.
>
> (3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.
>
> (4) The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired."

20. The earliest of the cases to which we were taken in relation to the implications of section 35 of the 1980 Act and what is now CPR 17.4 was *Grimsby Cold Stores Ltd v Jenkins and Potter* (1985) 1 Const.L.J. 362 ("*Grimsby Cold Stores*"), in which the Court of Appeal held that an application to add additional plaintiffs should be refused. Purchas LJ explained as follows:

> "[Counsel for the defendants] submitted, and in my view rightly, that in its approach to Order 15 Rule 6 [i.e. the predecessor of CPR 19.5] the court should be careful to avoid the evil which section 35(3) was passed to prevent, namely prejudice to defendants losing protection from the Limitation

> Act by the reference back to the date of the original writ of any new claim which might otherwise be added. Leave to add a new party should not be given unless it can be shown that the defendant did not have a reasonably arguable case on limitation which would be prejudiced by the additional new claim.
>
> I agree with Watkins LJ that … the appellants have at least a strong arguable case that the damage was suffered more than six years before the date of the application to amend and that, therefore, this application should not have been granted. Any prejudice to the applicant plaintiffs can to a large extent be mitigated, if it exists, by having recourse to the ordinary process of issuing a fresh writ. If the defence of limitation is not available to the defendants then no harm is done. If there is a defence of limitation which has arisen since the date of the original writ but before the application for leave to amend the defendants will have been prejudiced to the extent of something like two years, a period during which the defence under the statute of limitations would not be available to them as the date of the new claim relates back to the date of the original writ. In such a case the material date will be the date on which the new writ is issued. The only prejudice to the plaintiffs would arise out of the extra period available under the Limitation Act arising out of the delay between the date of the application for leave to amend and the date upon which the new writ is issued. This delay arises directly from the application for leave to amend the proceedings. This prejudice, in my view, properly falls upon the plaintiffs."

21. Purchas LJ thus saw the "evil" at which section 35(3) of the 1980 Act was directed as "prejudice to defendants losing protection from the Limitation Act by the reference back to the date of the original writ of any new claim which might otherwise be added" and focused on the possibility of a "defence of limitation which has arisen since the date of the original writ but before the application for leave to amend".

22. *Grimsby Cold Stores* was one of the authorities cited in *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 WLR 1409 ("*Welsh Development Agency*"). One of the issues there was whether the plaintiffs should have been given leave to add a claim for negligent misstatement. Glidewell LJ, giving the judgment of the Court of Appeal, observed at 1420 that Judge Hicks QC, whose decision was under appeal, had approached matters on the basis that, "[i]f the amendment adds a 'new claim' and the relevant limitation period expired between the date of the writ and the date of the amendment, section 35(1) will, after amendment, deprive the defendant of a limitation defence he would otherwise have had" and "the onus is on the plaintiff to show that he is within the statutory limits and to satisfy the conditions prescribed by the statute and the rules". At 1423, Glidewell LJ explained that the plaintiff argued that Judge Hicks QC had been wrong to proceed on the basis that, "if it is reasonably arguable that the relevant limitation period has expired before an amendment is made, so that section 35(1) of the Act of 1980 may deprive the defendant of a limitation defence he would otherwise have, the onus is on the plaintiff to show that the amendment comes

within the provisions of section 35(5) and Ord. 20, r.5(5) [i.e. the predecessor of CPR 17.4(2)]".

23. At 1424, Glidewell LJ said this about *Leicester Wholesale Fruit Market Ltd v Grundy* [1990] 1 WLR 107 ("*Leicester Wholesale Fruit Market*"):

> "In that case the plaintiffs issued a writ against six defendants. Two and a half months later, before the writ had been served on any defendant, they amended it without leave by adding a further four defendants. One of those defendants sought an order under R.S.C., Ord. 15, r. 6(2) that he should cease to be a party to the action. The basis of his application was that at the time when the writ was amended the limitation period of six years had already expired. The registrar refused the application but the judge allowed it on appeal. The plaintiffs appealed to this court.
>
> In his judgment, after quoting the relevant parts of section 35, Glidewell L.J. said, at p. 111:
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> > 'It follows, therefore, that if at the time when a further defendant is added to an action by amendment he has a limitation defence which he could raise if the plaintiff then issued a new writ against him, but if that defence would not have been available to the defendant at the time when the writ was originally issued, he should not be joined as a defendant because he would thus be deprived of a defence which would then have been available to him.'
>
> He then went on to say, however, that there was no evidence in that case that if the claim was statute-barred when the writ was amended to add the additional defendants, it was not so barred when the writ was originally issued. In other words the issue between the parties was whether the cause of action had arisen over six years before the date when the writ was originally issued, or on a much more recent date as the statement of claim alleged, that is to say some three years before the issue of the writ. Glidewell L.J. continued:
>
> > 'Of course, if the second is correct there is no question of limitation. If the first is correct there would have been a limitation defence if Hallams had been a party from the start.'
>
> He did not say this in terms, but it is thus apparent that in that case section 35(1) gave no advantage to the plaintiffs.
>
> He concluded, at p. 113:
>
> > 'In my judgment, the proper approach in circumstances such as these is for the court to ask itself: if at the time when the

> writ was amended the plaintiff had instead issued a fresh writ against the same defendant, could that defendant have successfully applied to strike out the action on the ground that the limitation period had expired and the action was thus an abuse of the process of the court? If the answer to that question is "No," then I can see no reason why exactly the same result should not be achieved by amending the writ to add the defendant as a defendant instead of issuing a new piece of paper. Therefore, in my view, the test should be the same.'"

24. At 1425, Glidewell LJ noted that *Leicester Wholesale Fruit Market* was a case where section 35(1) of the 1980 Act gave no advantage to the plaintiff whereas the plaintiff would have gained such an advantage in *Grimsby Cold Stores*. He then said:

> "We now wish to make it clear that, though the test applied in *Leicester Wholesale Fruit Market Ltd. v. Grundy* [1988] 1 W.L.R. 107 was the correct test in the circumstances of that case, in which section 35(1) gave the plaintiff no advantage, it was unnecessary for the decision in that case to disagree with what Purchas L.J. said in *Grimsby Cold Stores Ltd. v. Jenkins & Potter* (1985) 1 Const.L.J. 362, 370. Our view is that Judge Hicks was correct in concluding that where section 35(1) does, or may well, give the plaintiff an advantage a different test, namely that enunciated by Purchas L.J. in the *Grimsby Cold Stores* case, should be applied. In such a case, leave to amend by adding a new claim should not be given unless the plaintiff can show that the defendant does not have a reasonably arguable case on limitation which will be prejudiced by the new claim, or can bring himself within R.S.C., Ord. 20, r. 5."

25. It is plain, I think, that the Court of Appeal considered that, where it is reasonably arguable that a new claim would be statute-barred but the position is not clear, the Court should not decline to permit the addition of the claim unless there is a basis for thinking that relation back would serve to deny the defendant a limitation defence which would have been available to him had the new claim been brought by way of a writ issued at the date of the amendment. In other words, there must be a prospect of relation back putting the defendant in a worse position than he would have been in if there had been a new writ.

26. In *Chandra v Brooke North* [2013] EWCA Civ 1559, (2013) 151 ConLR 113 ("*Chandra*"), Jackson LJ, with whom Laws and McFarlane LJJ agreed, recorded in paragraph 64 that in *Welsh Development Agency* the Court of Appeal had held that "if the plaintiff could show that the defendant did not have a reasonably arguable limitation defence which would be prejudiced by the operation of section 35(1) of the 1980 Act, then the court may give leave to amend" and said in paragraph 65 that the "guidance given by the Court of Appeal in [*Welsh Development Agency*] remains effective". Jackson LJ went on:

> "66. If a claimant seeks to raise a new claim by amendment and the defendant objects that it is barred by limitation,

> the court must decide how to proceed. There are two options. First the court could deal with the matter as a conventional amendment application. Alternatively, the court could direct that the question of limitation be determined as a preliminary issue.
>
> 67. If, as is usually the case, the court adopts the first option, it will not descend into factual issues which are seriously in dispute. The court will limit itself to considering whether the defendant has a 'reasonably arguable case on limitation': see [*Welsh Development Agency*] at 1425 H. If so, the court will refuse the claimant's application. If not, the court will have a discretion to allow the amendment if it sees fit in all the circumstances.
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> 68. If the court refuses permission to amend, the claimant's remedy will be to issue separate proceedings in respect of the new claim. The defendant can plead its limitation defence. The limitation issue will then be determined at trial and the defendant will not be prejudiced by the operation of relation back under section 35 (1) of the 1980 Act.
>
> 69. This leads on to a separate and important point. If a claimant applies for permission to amend and the amendment arguably adds a new claim which is statute barred, then the claimant should take steps to protect itself. The obvious step is to issue separate proceedings in respect of the new claim. This will have the advantage of stopping the limitation clock on the date of the new claim form. If permission to amend is granted, then the second action can be allowed to lapse. If permission to amend is refused, the claimant can pursue his new claim in the second action. The two actions will probably be consolidated and the question of limitation can be determined at trial."

27. *Welsh Development Agency* and *Chandra* were both the subject of comment in *Ballinger v Mercer Ltd* [2014] EWCA Civ 996, [2014] 1 WLR 3597 ("*Ballinger*"). In paragraph 25, Tomlinson LJ, with whom Lord Dyson MR and Briggs LJ agreed, noted that the doctrine of relation back has the consequence that "where an amendment is permitted to introduce a new claim which was in time at the date of commencement of the action but arguably out of time on the date on which permission to amend is granted, the defendant is thereafter precluded from reliance at trial on the arguable limitation defence". Addressing in paragraph 27 the burden of persuasion, Tomlinson LJ said:

> "Working from first principles … it is plain that, provided the defendant can show a prima facie defence of limitation, the burden must be on the claimant to show that the defence is not

> in fact reasonably arguable. The claimant is after all in effect inviting the court to make a summary determination that the defence of limitation is unavailable. If the availability of the defence of limitation depends on the resolution of factual issues which are seriously in dispute, it cannot be determined summarily but must go to trial. Hence it can only be appropriate at the interlocutory stage to deprive a defendant of a prima facie defence of limitation if the claimant can demonstrate that the defence is not reasonably arguable."

28. The final decision of the Court of Appeal to which we were taken in this connection was *Cameron Taylor Consulting Ltd v BDW Trading Ltd* [2022] EWCA Civ 31, [2022] PNLR 11 ("*Cameron Taylor*"). In that case, the claimant had issued proceedings on 6 March 2020 in which negligence was alleged and had amended the claim form on 17/18 March to add claims against a company referred to as "CTC" in respect of a development in Feltham. The amendments were disallowed. Coulson LJ, with whom Males and Whipple LJJ agreed, said in paragraph 7 that, "working back 15 years", that being the period identified as the "longstop" for limitation purposes in section 14B of the 1980 Act, "the relevant cut-off date for the purposes of the limitation arguments is 18 March 2005". Having concluded in paragraph 49 that it was "reasonably arguable that the last dates of the relevant acts or omissions – the issuing of allegedly defective drawings to the contractor for construction – occurred before 18 March 2005", Coulson LJ said in paragraph 55 that it was "reasonably arguable that the claims against CTC in relation to Feltham were new claims made after the limitation period identified in s.14B had expired" and, hence, that "[a]pplying the test in [*Welsh Development Agency*] and *Chandra*" "permission to make the amendments of 17/18 March 2020 should have been refused".

29. Mr Brian Kennelly KC, who appeared for the defendants with Mr Thomas Fletcher and Mr Paul Luckhurst, pointed out that in *Cameron Taylor* Coulson LJ did not refer to an arguable limitation defence having arisen in the period between the issue of the claim form on 6 March and its amendment on 17/18 March, but rather spoke of the amendments falling to be disallowed on the simple basis that it was reasonably arguable that the limitation period had expired. He further relied on the fact that Coulson LJ had said in unqualified terms earlier in his judgment, in paragraph 38, that "[i]f a defendant can show that it is reasonably arguable that the new claim introduced by the amendments is statute barred, then leave to amend should not be given".

30. However, Coulson LJ did not suggest that the principles which can be derived from *Welsh Development Agency* either were incorrect or should be qualified. To the contrary, he quoted in paragraph 34 of his judgment the Court of Appeal's endorsement in *Welsh Development Agency* of the test which Purchas LJ had enunciated in *Grimsby Cold Stores* and said in paragraph 38 that he considered that "the right approach is that explained in [*Welsh Development Agency*] and subsequently reiterated by Jackson LJ in *Chandra*". Further, there is no indication that the claimant had suggested that the amendments of 17/18 March 2020 could be sustained on the footing that relation back would not assist it.

31. In all the circumstances, I agree with the Judge that an amendment should be disallowed or, as the case may be, refused where there is a prospect of relation back prejudicing a defendant. The mere fact that there may be an arguable limitation

defence will not preclude an amendment. The defendant's position for limitation purposes must be made worse as a result of relation back.

32. That, it seems to me, clearly emerges from *Grimsby Cold Stores* and *Welsh Development Agency*. It makes good sense, too. There is no evident reason why a new claim should not be permitted if the claimant would be no better off had the claim been made from the outset. As Purchas LJ observed, the "evil" which section 35(3) was passed to prevent was "prejudice to defendants losing protection from the Limitation Act by the reference back to the date of the original writ of any new claim which might otherwise be added". That "evil" cannot exist where there is no danger of a defendant being any worse off as regards limitation as a result of relation back.

Issue (ii): Is there a sufficient prospect of prejudice?

33. The defendants plead in their defence that Brazilian law applies to determine whether the claims against them are barred by limitation; that under Brazilian law such claims are time-barred three years from the date of the alleged violation or, in exceptional circumstances, from the date on which the injured party became aware of the alleged violation; and that, in the present case, the date of the alleged violation was no later than the date on which the relevant orange purchase contracts were executed and the claimants had the requisite knowledge by no later than February 2006. On that basis, the defendants assert that any cause of action accruing prior to February 2009 is time-barred.

34. In their reply, the claimants deny that their claims are time-barred. They plead that, as a matter of Brazilian law, an injured party does not become aware of an alleged violation until he has unequivocal knowledge of it; that the "earliest possible date" on which they obtained such knowledge was 6 March 2018; that the three-year limitation period was in any event restarted by the filing of "protests" between 19 November 2019 and 5 March 2021; and that, to the extent that the alleged cartel operated before or after the period between 7 January 1999 and 24 January 2006, "the limitation period has not yet started to run as the Claimants do not have unequivocal knowledge of the existence of the Cartel in those periods".

35. Plainly, neither side has pleaded that the limitation period expired in the short periods between the issue of the Viegas Claim on 27 September 2019 and either 22 November 2019 (when the claim form was first amended) or 23 January 2020 (when the other amendments were made). According to the defendants, the claims will have become time-barred years earlier. On the basis of the claimants' pleading, their claims could not have become time-barred before at any rate 2021 (i.e. three years after 6 March 2018).

36. However, Mr Alain Choo Choy KC, who appeared for the claimants with Ms Juliet Wells and Ms Anisa Kassamali, did not dispute that it would be open to the trial judge to hold that the limitation period had expired on a date which neither side had identified in its pleadings. More specifically, he accepted that, in principle, the trial judge could find that the claimants had acquired the necessary knowledge on a date different from any that the parties had positively advanced.

37. Mr Kennelly sought to show how that could happen by reference to "cease and desist agreements" with a Brazilian anti-trust agency by which, according to the particulars

of claim, Mr Cutrale Jnr and Sucocítrico, among others, "confessed their participation in the Cartel … as well as undertaking to pay financial penalties and to cease the illicit conduct". The particulars of claim explain that reference to the ratification of the agreements was published in the Official Journal of the Federal Government of Brazil on 29 November 2016 and that a "Judgment Certificate dated 28 November 2016 was published in the Official Journal on 9 December 2016". Supposing, Mr Kennelly pointed out, that time were held to run from the date of one of these events, the limitation period would have expired between the issue of the Viegas Claim Form and the second set of amendments.

38. Against that, Mr Choo Choy observed that there is no indication in either the defence or the expert evidence on Brazilian law that the date of publication of the "cease and desist agreements" matters for limitation purposes. In fact, the expert called by the defendants noted in a report that a Brazilian Court had in other litigation "rejected the submission that the three-year limitation period started to run as at the date of the ['cease and desist' agreements] in 2016".

39. The authorities suggest that permission for amendments should be refused (or, as the case may be, amendments should be disallowed) where a limitation defence is "reasonably arguable". Thus, in *Welsh Development Agency* Glidewell LJ spoke of a claimant being allowed to add a new claim only if he "can show that the defendant does not have a *reasonably arguable* case on limitation which will be prejudiced by the new claim, or can bring himself within R.S.C., Ord. 20, r. 5" (emphasis added). Remarks to similar effect were made in *Chandra* (at paragraph 67) and *Ballinger* (at paragraph 27): see paragraphs 26 and 27 above.

40. It seems to me that it could not be appropriate to reject the introduction of a new claim on limitation grounds unless, on the facts, there was a solid basis for thinking that a limitation defence could be prejudiced by relation back. On the other hand, the threshold cannot, I think, be a high one. A claimant wishing to add a claim need not do so by way of amendment: it can be the subject of a fresh claim form. In contrast, where a new claim is brought in by amendment, the defendant will lose the chance ever to rely on the limitation period having expired in the interval between the date on which the claim was issued and that on which it was amended. That being so, any real prospect of a limitation defence being prejudiced by relation back should suffice.

41. As I understand it, the Judge considered that she should focus exclusively on what was said in the defence. Thus, she said in paragraph 82 of the Judgment that "[t]he Claimants' counter position is irrelevant to the question of whether the Defendants' case on limitation is prejudiced". In my view, however, that is to adopt too narrow an approach. It seems to me that, in determining whether there is a prospect of relation back prejudicing a limitation defence, the Court should have regard not only to the defence, but to the claimants' pleadings and to such other materials as are before the Court and may cast light on the issue.

42. In the present case, I do not think the possibility of the defendants being prejudiced by relation back can be discounted. It is common ground that the date from which the three-year limitation period for which Brazilian law provides can potentially run from the date on which a claimant acquired the relevant knowledge. It cannot, as it seems to me, be said with certainty at this stage that that date will not prove to fall within the periods between the issue of the Viegas Claim Form and the amendments to it. That is

especially so when (a) the claimants refer in both the particulars of claim and the reply to the cartel potentially having continued beyond 24 January 2006 without their being aware of that, (b) no disclosure has yet been given by any of the numerous claimants and (c) Mr Kennelly has demonstrated how there is scope for a significant event to have occurred in the (narrow) windows between issue and the amendments.

43. In the circumstances, it appears to me that, contrary to the Judge's view, the amendments which were made to the Viegas Claim Form on 22 November 2019 and 23 January 2020 will fall to be disallowed if the defendants are permitted to apply for that under CPR 17.2. As things stand, there is a sufficient prospect of relation back prejudicing the defendants for the amendments to be rejected.

Issue (iii): Implied extension to CPR 17.2(2)?

44. CPR 17.2(2) states that a party may apply to the Court for an order disallowing amendments "within 14 days of service of a copy of the amended statement of case on them". Since the Viegas Claim Form had been served on both Mr Cutrale Snr and Mr Cutrale Jnr as amended by late February 2020, the 14-day period will, on the face of it, have expired long before the strike out applications were issued. The defendants argue, however, that it cannot have been intended that a defendant disputing the Court's jurisdiction should have to make any application under CPR 17.2(2) in advance of that dispute being resolved. It is logically coherent, Mr Kennelly submitted, for a defendant to be obliged to apply under CPR 17.2(2) only when the jurisdiction of the Court has been accepted or held to exist, particularly as the authorities show that making (or even threatening to make) a strike out application may amount to a voluntary submission. CPR 17.2(2), Mr Kennelly said, should be read as if the words "or at the same time as filing an acknowledgment of service under CPR 11(7)(b)" were added to it. CPR 11(7)(b) allows a defendant to file a further acknowledgment of service if the Court does not accede to an application disputing jurisdiction.

45. The Judge, however, saw "no reason to imply into the rules an extension of the deadline in CPR 17.2(2)": see paragraph 118 of the Judgment. She further expressed the view that "it was open to the Defendants to have made it clear by expressly stating in the application notice under CPR 17.2 that the application to strike out was without prejudice to their challenge to the jurisdiction".

46. The authorities on which Mr Kennelly relied in support of the contention that a defendant who wishes to challenge the Court's jurisdiction risks being held to have submitted if he makes an application under CPR 17.2(2) included *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3107 (Ch), [2007] 1 All ER (Comm) 1160 ("*Global Multimedia*") and *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2017] EWHC 1416 (Comm) ("*Newland Shipping*"). In *Global Multimedia*, a Mr Abu-Aljadail was held to have submitted to the jurisdiction. Sir Andrew Morritt C said in paragraph 31:

> "To any objective outside observer his conduct [i.e. that of Mr Abu-Aljadail's solicitor], and accordingly that of Mr Abu-Aljadail from the giving and receipt of instructions on 3 April to the letter of 10 May—a period of over five weeks—was only consistent with an acceptance of the jurisdiction of the court to

> determine the claims of AMS on their merits. A defendant who intends to challenge the jurisdiction of the court does not seek an extension of time for his defence, he does not advance a defence on the merits in the form of the settlement agreements, nor does he threaten to strike out the claim if the claimant refuses to discontinue it."

In *Newland Shipping*, a defendant explained his failure to apply for a default judgment to be set aside on the basis that he wished to avoid any risk of submission to the jurisdiction. Ms Sara Cockerill QC, sitting as a Deputy High Court Judge, said in paragraph 18 of her judgment:

> "the authorities … make clear the very great degree of caution which a party who is challenging jurisdiction must exercise. … It certainly seems possible that an argument that challenging the default judgment in partnership with a jurisdictional challenge might be said to amount to a submission to the jurisdiction in circumstances where the authorities tend to suggest that taking any step in relation to the merits of the claim can amount to a submission (see *Global Mutimedia International v ARA Media Services* [2006] EWHC 3612, [2007] 1 All E.R. (Comm) 1160 and *Deutsche Bank AG London Branch v Petromena ASA* [2015] EWCA Civ 226 [2015] 1 WLR 4225). Accordingly it seems to me that the Fifth Defendant was entitled to form the view that it was unsafe to apply to set aside the default judgment now and the course of action taken cannot fairly be described as wrong. On the contrary, challenging jurisdiction was logically the first step, whether or not it might have been combined with a very cautiously worded challenge to the default judgment."

47. Mr Kennelly also took us to *PJSC Bank "Finance and Credit" v Zhevago* [2021] EWHC 2522 (Ch) ("*Zhevago*"). In that case, Sir Julian Flaux C said:

> "66. In my judgment the test derived from *Rein v Stein* applied in *Williams & Glyn's* and *Rubin* [*v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236] that there will be a submission to the jurisdiction if the step is 'only necessary or only useful if the objection has been waived' and the test formulated by Patten J in *SMAY Investments* [*v Sachdev* [2003] EWHC 474 (Ch), [2003] 1 WLR 1973] that the conduct must be a wholly unequivocal submission to the jurisdiction are not different tests but the same test. The latter is just a more succinct and modern statement of the same test. This is made clear by Colman J in *Advent Capital v Ellinas Imports-Exports Ltd* [2005] EWHC 1242 (Comm); [2005] 2 Lloyd's Rep 607, a case to which I drew attention in argument. At [78] Colman J said:

> 'The relevant test is whether the party has by his conduct in the proceedings acted in such a way which is only necessary or only useful if objection to the jurisdiction of the court in question has been waived or has never been entertained at all: see *Williams & Glyn's Bank v. Astro-Dinamico* [1984] 1 WLR 438 at p444 approving *Rein v. Stein* (1892) 66 LT 469 at p471. The essence of the test is that – reflected in the word "only" – there has to be an unequivocal representation by word or conduct that objection is not taken to the relevant jurisdiction.'

> 67. The issue of an application to strike out the claim at the same time as an application to challenge the jurisdiction cannot conceivably be described as 'only necessary or only useful' if the objection to the jurisdiction made in the same application and is clearly not being abandoned. Putting it another way, where both applications are being made, the fifth defendant's conduct is at best equivocal. Whilst he could have made it absolutely clear by expressly stating in the application notice that the application to strike out was without prejudice to his challenge to the jurisdiction, the fact that he did not do so does not make his conduct wholly unequivocal. Andrew Baker J was correct to reject the similar argument which Mr Samek QC ran in *Tsarova* [*v Ananyev* [2019] EWHC 2414 (Comm)]. Furthermore, the suggestion that somehow the fifth defendant had submitted to the jurisdiction by making the alternative application to strike out is, as I pointed out during the course of argument, inimical to proper case management."

48. Mr Choo Choy argued that there are at least two ways in which a defendant wishing both to challenge jurisdiction and, if necessary, to apply under CPR 17.2(2) could avoid any real risk of submission to the jurisdiction. In the first place, he could make an application within the 14 days prescribed by CPR 17.2(2) for an extension of time for the specific purpose of enabling the jurisdiction issue to be determined in advance of any application under CPR 17.2(2). Alternatively, he could file an application under CPR 17.2(2) before the 14 days expired but making it clear in the application notice itself that the application was made conditionally on the Court ruling that it had jurisdiction.

49. I agree that a defendant taking either of the courses which Mr Choo Choy outlined would run no real risk of submitting to the jurisdiction. In neither situation would the defendant's conduct be "only necessary or only useful if objection to the jurisdiction of the court in question has been waived or has never been entertained at all" and there would be no "unequivocal representation by word or conduct that objection is not taken to the relevant jurisdiction".

50. In any event, the language of CPR 17.7(2) is perfectly clear. It provides for an application to be made "within 14 days of service of a copy of the amended statement of case". There is no scope for qualifying it in the way for which the defendants contend.

Issue (iv): Implied sanction?

51. The Judge proceeded on the basis that, if the 14-day period mentioned in CPR 17.2(2) is not subject to an implied extension where the Court's jurisdiction is disputed, the defendants could not apply for the amendments to the Viegas Claim Form to be disallowed unless they obtained relief from sanction and that, in that context, the three-stage test set out in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3296 ("*Denton*") should be applied. The defendants had not disputed that CPR 17.2(2) is subject to an implied sanction.

52. Before us, however, the defendants contended that there is no implied sanction and, hence, that *Denton* was not in point. They relied in support of that contention on the decisions of this Court in *Lufthansa Technik AG v Panasonic Avionics Corpn* [2023] EWCA Civ 1273, [2024] 1 WLR 2012 ("*Lufthansa*") and *Yesss (A) Electrical Ltd v Warren* [2024] EWCA Civ 14 ("*Yesss*").

53. *Lufthansa* concerned an "*Island Records*" order requiring the defendant to provide information about revenue and costs in relation to sales of goods which had been held to infringe a patent. It was held that, since the order did not contain an express sanction for non-compliance, the defendant did not require relief from sanction under CPR 3.9 in respect of breach of the order. After referring to CPR 3.8 and 3.9, Birss LJ, with whom King LJ and I agreed, said:

> "21. These rules do not create sanctions but apply when a sanction exists. Rule 3.8 operates to make clear that when a sanction is provided for there is no need to come back to court for an order imposing it. It takes effect and the onus on taking action is the other way round. The party in default needs to apply for relief from it. Rule 3.9 provides for the principles to be applied in applications for relief from sanctions, now explained fully in *Denton v TH White Ltd (Practice Note)* [2014] 1 WLR 3926 itself. *Denton* is not concerned with identifying whether or not a relevant sanction exists. The sanction may be expressly provided for, in which case no difficulty arises, but there are also cases in which, as Moore-Bick LJ put it in *Salford Estates (No 2) Ltd v Altomart Ltd (Practice Note)* [2015] 1 WLR 1825 at para 13, 'the courts have recognised the existence of implied sanctions capable of engaging the approach contained in rule 3.9 and therefore now the [*Denton*] principles'. This has been applied to the filing of a notice of appeal (in *Sayers v Clarke Walker (Practice Note)* [2002] 1 WLR 3095 per Brooke LJ). The idea in *Sayers* is that although the rule providing for the time limit has no express

> sanction connected to it, it is implicit that without the relief (ie an extension of time) the appeal could not be brought, which amounts to a sanction. In *Salford* itself this same principle was extended to apply to a respondent's notice.
>
> 22. Many kinds of application for an extension of time in cases of breach do amount to applications for relief from sanctions, such as an application for an extension having failed to serve witness statements in the time ordered (*Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] CP Rep 36). Similarly an application to set aside a default judgment has the same character (see the recent *FXF v English Karate Federation Ltd (Practice Note)* [2024] 1 WLR 1097). However it does not follow that breach of any rule, practice direction ('PD') or order which required something to be done within a certain time necessarily requires a relief from sanctions application, and in that respect I agree with both Martin Spencer J in *Mark v Universal Coatings & Services Ltd* [2019] 1 WLR 2376 at para 54 and with Judge Paul Matthews sitting as a judge of the Chancery Division in *In re Wolf Rock (Cornwall) Ltd* [2020] Bus LR 2348 at para 26. Simply because a rule, PD or order uses a word like 'must' does not on its own engage the relief from sanctions doctrine. As Martin Spencer J observed in *Mark v Universal*, one needs to look at what the default position would be if no extension of time (or other relief) was granted. If a sanction is in effect, either as a result of the express terms of a rule, PD or order, or by implication, then relief is required, but if not, not. For example in the context of witness statements (see *Chartwell*), rule 32.10 provides that if a witness statement is not served in time the witness may not be called to give evidence, unless the court gives permission. This therefore makes provision for a sanction for failure to comply with the order setting a deadline for service of witness statements."

54. As Birss LJ, with whom Asplin and Males LJJ agreed, explained in paragraph 1 of his judgment in *Yesss*, the question there was "whether a late application for permission to rely on expert evidence in a new discipline not addressed by the existing directions is an application for relief from sanctions under CPR r3.8 and r3.9 to which *Denton* and *Mitchell* [*v News Group Newspapers Ltd (Practice Note)* [2013] EWCA Civ 1537, [2014] 1 WLR 795] apply". The Court of Appeal answered the question in the negative, holding that CPR 35.4 (which provides that "[n]o party may call an expert or put in evidence an expert's report without the court's permission") was not a sanction for the relevant breaches: see paragraph 44.

55. Birss LJ summarised the relevant legal principles in paragraph 33 as follows:

> "In summary, in my judgment, the general approach to working out whether a case is covered by r3.9 is to start by identifying if a rule, PD or order has been breached. If there is none then the rule does not apply. If there has been a breach then the next task is to identify any sanction for that breach which is expressly provided for in the rules, PDs or in any order. If there is no such express sanction then, outside the third category identified in *FXF* and the specific recognised instances of implied sanctions identified in *Sayers*, and *Altomart* (i.e. notices of appeal and respondent's notices), there is no relevant sanction for the purposes of r3.9, and so that rule does not apply. Only if there is both a breach and a sanction does r3.9 apply. It is worth noting that these circumstances are all concerned with sanctions which take effect as a result of a breach without further intervention. The court can always decide later to impose a sanction for a breach, such as a fresh order expressed as an unless order or an order for costs thrown away, but for either of those things to happen, a fresh decision would been needed."

The "third category" which had been identified in *FXF v English Karate Federation Ltd* [2023] EWCA Civ 891, [2024] 1 WLR 1097 was "cases where a further step is taken in consequence of the non-compliance, such as the entry of a default judgment … or the striking out of a claim for non-attendance at trial": see paragraph 59 of Sir Geoffrey Vos MR's judgment.

56. In paragraph 29 of his judgment in *Yesss*, Birss LJ reiterated that "not every rule, PD or order made or applicable in the civil justice system, even if it is couched in mandatory terms, has or needs to have a sanction already built in somewhere in the rules (or PDs or anywhere else) which is triggered when that provision is breached". In paragraph 31, he said:

> "Bearing in mind the importance of clarity in the procedural framework to be followed by court users, the hurdle for identifying something as an unexpressed but implicit sanction must be a high one. It has been identified in the two circumstances mentioned in the cases above. I prefer to say that the scope for identifying any further implied sanctions over and above these two must be very narrow. Bearing in mind that the *Denton* 'ethos' may apply even when r3.9 is not engaged, the need for further extensions of this concept is likely to be very limited."

57. In *Various Claimants v G4S plc* [2021] EWHC 524 (Ch), [2021] 4 WLR 46 ("*G4S*"), Mann J held that the defendant had "to make, and succeed in, an application for relief from sanctions" if it was to mount a challenge under CPR 17.2 outside the 14-day period to which it refers. Mann J said in paragraph 72 that the 14-day period "is a time limit which falls within the sort of provision to which the principles just expounded applies". In the preceding paragraphs, Mann J had referred to the way in which the

"doctrine of implied sanction" had been described in the White Book and to *R (Hysaj) v Secretary of State for the Home Department (Practice Note)* [2014] EWCA Civ 1633, [2015] 1 WLR 2472. Neither *Lufthansa* nor *Yesss* had, however, yet been decided.

58. It is evident from *Yesss* that the scope for identifying further implied sanctions is "very narrow". I do not think the "high" "hurdle for identifying something as an unexpressed but implicit sanction" can be surmounted in the case of CPR 17.2(2). In my view, therefore, CPR 17.2(2) is subject to neither an express sanction nor an implied one. That being so, the question whether a defendant should be permitted to make an application under CPR 17.2(2) after the period specified in it has expired must be determined by reference to the overriding objective. It may still be relevant to consider the matters reflected in the *Denton* three-stage test (seriousness and significance of the delay, the reasons for it and other relevant circumstances), but, unlike an application for relief from sanction, the matter should not be approached on the basis that the "starting point" is that "the sanction has been properly imposed and complies with the overriding objective" (to use words of Lord Dyson MR in *Mitchell v News Group Newspapers Ltd (Practice Note)* [2013] EWCA Civ 1537, [2014] 1 WLR 795, at paragraph 45).

Issue (v): Should an extension be granted?

59. As I have mentioned, the defendants did not contend before the Judge that CPR 17.2(2) is not subject to an implied sanction and so, unsurprisingly, she considered whether relief from sanction should be granted, not whether the defendants should be permitted to apply late in circumstances where there was no implied sanction. In the circumstances, we must address the latter question ourselves.

60. The matters which might be said to point towards allowing the defendants to pursue their CPR 17.2 applications include these:

    i) There is a risk that relation back will serve to deprive the defendants of limitation defences if the amendments made to the Viegas Claim Form on 22 November 2019 and 23 January 2020 are not disallowed;

    ii) The claimants had the chance to protect themselves by issuing a new claim form rather than amending the existing one. They could be expected to have realised that the amendments might be challenged (especially since limitation points had previously been taken in proceedings in Brazil) and the cost of issuing a fresh claim would have been relatively modest;

    iii) In the event, the Nicolau Claim was not issued until 18 November 2022 even though the defendants had told the claimants in a letter from their solicitors dated 7 June 2021 that they reserved the right to apply to strike out the amendments to the Viegas Claim Form on the basis of *G4S*;

    iv) There was sense in deferring any application under CPR 17.2 until after the jurisdiction question had been resolved, not least because it could reasonably have been thought that launching one earlier could be argued to amount to submission to the jurisdiction;

v) Mr Cutrale Snr issued his strike out application within 14 days of Henshaw J giving judgment on jurisdiction; and

vi) Mr Cutrale Jnr issued his strike out application promptly after learning that the Court of Appeal had refused him permission to appeal from Henshaw J's decision.

61. On the other hand:

i) Had the defendants made or even mooted applications to disallow the amendments to the Viegas Claim Form within the 14-day period for which CPR 17.2 provides, the claimants could be expected to have issued protective proceedings at that stage and, if they had done so, claims which would now be time-barred might not have been;

ii) The defendants did not warn the claimants of the possibility of an application under CPR 17.2 before June 2021; and

iii) There is no *evidence* as to why the defendants did not apply under CPR 17.2 sooner.

62. On balance, I would nonetheless have been minded to permit the defendants to pursue their strike out application but for one thing. In the course of the hearing before us, the claimants said that, if this were necessary for the amendments made to the Viegas Claim Form on 22 November 2019 and 23 January 2020 to be allowed to stand, they were willing to undertake to the Court that they would not rely on relation back and would treat the amendments as effective from the dates that they were respectively made. On that basis, there can be no danger of relation back depriving the defendants of any limitation defence. In those circumstances, the just course is, I think, plainly to refuse the defendants permission to apply under CPR 17.2.

Conclusion

63. Having regard to the undertaking which the claimants have offered, I would dismiss the defendants' appeals against the dismissal of their applications to disallow pursuant to CPR 17.2 the amendments which were made to the Viegas Claim Form on 22 November 2019 and 23 January 2020.

The claimants' appeal: ground 1 (amending to specify representatives)

64. 12 of those named as claimants in the Viegas Claim Form had died before it was issued. In each instance, however, the claim form was amended before service in such a way as to show a living person claiming as representative of the estate of the deceased individual. For example, Sergio Sessa Stamato was originally listed as a claimant, but by the time the Viegas Claim Form was served "The estate of" had been added in front of his name and "represented by Elizabeth de Faccio Stamato" had been inserted after it. As served, therefore, the claim form identified "The estate of Sergio Sessa Stamato, represented by Elizabeth de Faccio Stamato" rather than Sergio Sessa Stamato himself as a claimant.

65. The claimants contend that they were entitled to make these amendments pursuant to CPR 17.1(1). That provides:

> "A party may amend their case, including by removing, adding or substituting a party, at any time before it has been served on any other party."

66. However, the Judge concluded in paragraph 160 of the Judgment that "the claims brought by deceased persons were nullities and the substitution of their respective representatives or heirs was ineffective to revive or cure the nullity and must be struck out". The Judge had said in paragraph 147:

> "I accept that it could be said to place form over substance to accept that before service of the claim, new claimants can be added to the claim form (as decided in [*Rawet v*] *Daimler*) and claimants can be substituted (as contemplated expressly by the revisions to CPR 17.1) but that claimants cannot be substituted if the original claimant was deceased. However, in my view the Defendants must be correct in their analysis that you cannot substitute a nullity; there is nothing to be substituted."

67. The Judge was led to her conclusions by *Kimathi v Foreign and Commonwealth Office (No 2)* [2016] EWHC 3005 (QB), [2017] 1 WLR 1081 ("*Kimathi*") and *Jogie v Sealy* [2022] UKPC 32. In *Kimathi*, 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 took it to be established law that "a claim cannot be brought in the name of a deceased person" (paragraph 5) and rejected a submission that the "defect" could be cured under CPR Part 3: "there is no such discretion", he said, "where the claim is a nullity". In *Jogie v Sealy*, at paragraph 55, Lord Burrows (with whom Lady Rose agreed) endorsed Stewart J's analysis and, having quoted from Lord Burrows' judgment, I said in *Jennison v Jennison* [2022] EWCA Civ 1682, [2023] Ch 225 ("*Jennison*"), in a judgment with which King and Coulson LJJ agreed, at paragraph 59:

> "I, too, consider that Stewart J was right that the 'wide discretion' conferred by CPR Pt 3 cannot be used to validate a nullity. CPR r 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] 1 WLR 2819 that CPR r 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 paras 18 and 20. Even so, CPR r 3.10 is not applicable where the proceedings that have purportedly been brought are to be regarded as a nullity. CPR r 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'."

68. Supporting the Judge's decision in the present case, Mr Kennelly argued that CPR 17.1(1) does not permit a pre-service amendment to substitute a representative for a deceased person in relation to the same claim. A claim brought in the name of someone who is dead, Mr Kennelly submitted, is a nullity and cannot be revived.

69. While, however, the claims purportedly brought by people who had died will have been nullities, there is no question of the Viegas Claim Form having been a nullity. If the claim form had not been amended, the names of the 12 deceased "claimants" would have fallen to be struck out, but that could not have affected the claims of the numerous other claimants or the validity of the claim form itself. That being so, as the Judge recognised, CPR 17.1(1) authorised one or more further persons to be added as claimants before the claim form was served. In *Rawet v Daimler AG* [2022] EWHC 235 (QB), [2022] 1 WLR 5105, the Divisional Court held that "a claim form may be amended to add in another party before it has been served" (per Dingemans LJ at paragraph 62), CPR 17.1(1) referring to "a document (in the present case, a claim form), and not … to the claim or claims contained in that document" (per Picken J at paragraph 45).

70. In my view, the amendments made to the Viegas Claim Form in relation to the 12 dead "claimants" are to be seen as having effected such additions. Although as a matter of drafting they were made by inserting words next to the names of those "claimants", there is no need to justify them as "substituting" parties. The fact that the claims purportedly made by the deceased "claimants" were nullities does not matter. The changes to the claim form served to *add* further claimants to a claim form which was of undoubted validity notwithstanding the fact that a few of those specified as claimants had died.

71. In this respect, accordingly, I part company from the Judge. The difference of view is of no consequence, however, if the persons now said to be representing the estates of the dead "claimants" are not entitled to do so. Whether or not they are turns on the outcome of the parties' other grounds of appeal.

The claimants' appeal: grounds 2 and 3 (standing of heirs)

Introduction

72. 639 of the claimants listed across the claim forms bring claims as heirs on the basis that they are entitled to do so under Brazilian law. Some of these are expressly stated in the claim forms to be representing the estates of deceased persons, but in many other instances the claim forms simply give the claimants' names. Three claimants were granted letters of administration in this jurisdiction on 11 July 2023, but that of course long post-dated the issue of the claim forms. None of the relevant claimants had obtained a grant of representation in this jurisdiction when the claims were instituted.

73. The Judge concluded that the heirs could not pursue their claims in this jurisdiction in the absence of grants of representation here. "Insofar as the claim is brought before the distribution of assets to the beneficiaries", she said in paragraph 198 of the Judgment, "this stage is the administration of the estate 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".

74. The claimants, however, challenge the Judge's conclusions.

The parties' cases in outline

75. The claimants maintain that the issue which arises in this context is whether the heirs are entitled to sue in their own names as the present owners of the causes of action which the deceased persons had. That issue, they argue, is properly to be characterised as one of succession to movables of an intestate rather than, say, one relating to the administration of estates. That being so, it is governed by the law of the deceased persons' domicile, which was Brazil. Under that law, the deceased persons' causes of action passed to their heirs immediately on death. The heirs are therefore to be regarded by the Courts of England and Wales as well as those of Brazil as entitled to bring these claims. There is no need for any grant of representation in this jurisdiction or anywhere else. The Judge, it was submitted, should have recognised the heirs' acquisition of rights in accordance with the "droit de saisine" principle found in Brazilian law as "succession" for the purposes of the private international law of England and Wales. The claimants stressed that as a matter of Brazilian law the heirs can claim in their personal capacities in the exercise of rights as co-owners without having to obtain anyone else's agreement or authority and in the same manner as the deceased persons could have claimed had they still been alive.

76. The defendants, on the other hand, support the Judge's conclusions. By bringing claims in respect of loss allegedly suffered by deceased persons, the defendants contend, the heirs are in the eyes of English law seeking to administer the estates, and the question whether they have title to do so is to be characterised as an issue relating to the administration of the assets of deceased persons and so governed by English law. Even as a matter of Brazilian law, the heirs do not at present have unconditional ownership of causes of action of the deceased persons: an heir will acquire an individualised interest, if at all, only when a distribution process is undertaken in the future. At that stage, an heir may perhaps *succeed* to a claim. That point has not yet been reached, however. As matters stand, the defendants say, there has been no distribution and no succession. The estates have not passed beyond administration.

77. It was common ground before us that the claims which the claimants are seeking to pursue are to be regarded as situate in this jurisdiction. In this connection, the defendants submitted that choses in action such as the claims "generally are situate in the country where they are properly recoverable or can be enforced" (see *Dicey, Morris & Collins on the Conflict of Laws*, 16th ed., at rule 136) and that the bringing of a claim in a particular jurisdiction reduces it into possession in that jurisdiction. The defendants relied in this respect on *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629 (affirmed: [1982] AC 679), where Lord Denning MR said at 652:

> "The right of action of Trendtex against C.B.N. was a chose in action. It was reduced into the possession of Trendtex by the issue of the writ in the High Court in England. It was situate in England."

In the course of his oral submissions, Mr Choo Choy confirmed that he accepted that the claims which the claimants are seeking to advance in these proceedings are to be considered to be situate here.

Characterisation

78. As is explained in *Dicey, Morris & Collins on the Conflict of Laws*, at paragraph 2-001, "the rules which have been evolved to deal with choice of law problems are expressed in terms of juridical concepts or categories and localising elements or connecting factors". "Characterisation" involves determining which juridical concept or category is applicable in the relevant situation. If, to take an example given in *Dicey, Morris & Collins on the Conflict of Laws*, at paragraph 2-003, a person domiciled in England (where a will is revoked by marriage) makes a will disposing of land in Utopia (where marriage does not result in revocation) and then marries, "the answer to the question whether the will is revoked could depend on whether the issue is characterised as one relating to succession or to matrimonial law (proprietary consequences of marriage)".

79. In *Macmillan Inc v Bishopsgate Investment Trust plc (No. 3)* [1996] 1 WLR 387 ("*Macmillan*"), Staughton LJ said at 391-392 that finding which system of law should be applied where a case involves a foreign element involves the following three stages:

> "First, it is necessary to characterise the issue that is before the court. Is it for example about the formal validity of a marriage? Or intestate succession to moveable property? Or interpretation of a contract?
>
> The second stage is to select the rule of conflict of laws which lays down a connecting factor for the issue in question. Thus the formal validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to moveables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law.
>
> Thirdly, it is necessary to identify the system of law which is tied by the connecting factor found in stage two to the issue characterised in stage one. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. The choice of the proper law of a contract, on the other hand, may be controversial."

80. Staughton LJ noted with apparent approval at 392 the observation in *Dicey & Morris, The Conflict of Laws*, 12th ed., that, while the problem of characterisation had "given rise to a voluminous literature", "the way lies open for the courts to seek commonsense solutions based on practical considerations". Another member of the Court, Auld LJ, said at 407:

> "Subject to what I shall say in a moment, characterisation or classification is governed by the lex fori. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the

> claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system: see *Cheshire & North's Private International Law*, 12th ed., pp. 45–46, and *Dicey & Morris* , vol. 1, pp. 38–43, 45–48."

81. In *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825 ("*Five Star Trading*"), Mance LJ said in paragraph 26 that the three-stage process to which Staughton LJ had referred in *Macmillan* "falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum, here England". Mance LJ went on in paragraph 27:

> "While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most *appropriate* law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived."

82. Briggs, *"Private International Law in English Courts"*, observes at paragraph 3.49:

> "the available categories are those created by the common law rules of private international law; and the placing within one or more of them is done according by reference to the same rules – for those who find analogies helpful, English law designs the pigeonholes, and an English sorter decides which facts belong in which pigeonhole".

Domestic law

83. Under the law of England and Wales, personal representatives of deceased persons can be of two types: executors and administrators.

84. An executor is appointed by will and is considered to gain title as soon as the testator dies. That being so, an executor can issue legal proceedings at once. An executor needs, however, to obtain probate by the time the matter reaches trial since "the production of probate is the only way in which, by the rules of the court, he is allowed

to prove his title": see *Chetty v Chetty* [1916] 1 AC 603, at 608-609, per Lord Parker of Waddington, giving the judgment of the Privy Council.

85. In contrast, an administrator acquires title only when granted letters of administration and, until then, legal title to the estate of a person who has died intestate vests in the Public Trustee under section 9 of the Administration of Estates Act 1925. An administrator therefore has no right to bring a claim before letters of administration are issued. Once a grant has been obtained, "the title of the administrator to the property of the deceased relates back to the death", "enabl[ing] the administrator to sue on a cause of action which arose between the date of the death and the date of the grant, as well as on a cause of action which arose before the death, provided the cause of action survives": see *Jogie v Sealy*, at paragraph 162, per Lord Leggatt. At common law, however, relation back will not serve to save proceedings commenced in advance of the grant: as Lord Burrows said in *Jogie v Sealy*, at paragraph 68(i), "the subsequent grant of administration does not retrospectively validate the proceedings". I shall have to return later in this judgment to the extent to which that position has been altered by section 35(7) of the 1980 Act and CPR 17.4(4).

86. An executor has "full ownership, without distinction between legal and equitable interests": see *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 ("*Livingston*"), at 707, per Viscount Radcliffe, giving the judgment of the Privy Council. An executor holds the property "for the purpose of carrying out the functions and duties of administration, not for his own benefit", but "[w]hat equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration": see *Livingston*, at 707. The assets comprised in an unadministered estate are "as a whole … in the hands of the executor, his property" and, until administration is complete, "no one [is] in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be": see *Livingston*, at 708. At 712, Viscount Radcliffe explained:

> "When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of a full beneficial owner. What matters is that the court will control the executor in the use of his rights over assets that come to him in that capacity; but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets. Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines."

87. While *Livingston* concerned an executor, the same principles have since been taken to apply in relation to intestacies and administrators. Thus, in *Eastbourne Mutual Building Society v Hastings Corporation* [1965] 1 WLR 861 Plowman J concluded that a sole next-of-kin could not be said to have had an interest in a house which had formed part of the unadministered estate of his wife. In *Re Leigh's Will Trusts* [1970] Ch 277, at 281-282, Buckley J considered *Livingston* to have established the following propositions:

> "(1) the entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased's legal personal representative for the purposes of administration without any differentiation between legal and equitable interests; (2) no residuary legatee or person entitled upon the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased; (3) each such legatee or person so entitled is entitled to a chose in action, viz. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate; (4) each such legatee or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered."

88. The Administration of Estates Act 1971 provides for the recognition in England and Wales of Scottish confirmations and Northern Irish grants of representation. A grant of representation under the law of any other country has no operation of itself in England or Wales: see *Dicey, Morris & Collins on the Conflict of Laws*, 16th ed., at rule 159. However, the Colonial Probates Act 1892 allows grants of probate and letters of administration in most Commonwealth countries to be resealed by a British Court and "thereupon" to "be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that court". Further, a person to whom a grant of representation has been made in a country elsewhere in the world can apply for a grant in this jurisdiction pursuant to rule 30 of the Non-Contentious Probate Rules 1987. That provides:

> "(1) Subject to paragraph (3) below, where the deceased died domiciled outside England and Wales, a district judge or registrar may order that a grant, limited in such way as the district judge or registrar may direct, 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 district judge or registrar may direct; or
>
> (c) if in the opinion of the district judge or registrar the circumstances so require, to such person as the district judge or registrar may direct.
>
> …

> (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."

89. In the circumstances specified in rule 30(3) of the Non-Contentious Probate Rules 1987, therefore, a grant can be obtained without any order being made under rule 30(1). In other cases, a person entrusted with the administration of the estate of someone who died domiciled abroad by a Court of the domicile can apply for an order that a grant be made to him pursuant to rule 30(1)(a).

Brazilian law

90. There was expert evidence as to Brazilian law before the Judge from Professor Leonardo Faria Schenk, instructed by the claimants, and Mr Arnaldo Penteado Laudisio, instructed by the defendants.

91. As the experts explained, under what is termed "saisine" a person's assets and rights are immediately and automatically transmitted to his heirs on death under Brazilian law in accordance with article 1,784 of the Brazilian Civil Code. Pursuant to article 1,791 of the Civil Code, the inheritance is transferred "as a unitary whole" with the rights of co-heirs governed by rules of joint ownership. As Professor Schenk observed, "[u]ntil distribution (the moment at which each heir obtains individualised title to property), all heirs own everything and are submitted to the same rights and obligations as those of joint property owners".

92. Brazilian law restricts the extent to which a person can dispose of property by will. Where there is a "lawful" heir, no more than half of the inheritance can be passed to "testamentary" heirs. The balance passes to the "lawful" heirs listed in article 1,829 of the Civil Code. That provides for "lawful succession" to be granted "in the following order" to (i) "the descendants, jointly with the surviving spouse", (ii) "the ascendants, jointly with the spouse", (iii) "the surviving spouse" and (iv) "collateral kin".

93. The Brazilian Code of Civil Procedure makes provision for "inventário" proceedings to be filed within two months from the "opening of the succession" and to be

concluded within the next 12 months unless the deadlines are extended. Professor Schenk explained that the "inventário" is the "in or out-of-court procedure aimed at listing and detailing the deceased's assets, arising from the opening of the succession, enabling the payment of possible creditors of the deceased and the distribution of the other assets and rights to their successors".

94. Where a judicial "inventário" has been initiated, an "inventariante" (or administrator) is appointed in accordance with article 617 of the Code of Civil Procedure. The "inventariante" is charged with, among other things, administering and protecting the estate, representing it in Court and paying its debts: see articles 618 and 619 of the Code of Civil Procedure.

95. In Professor Schenk's words, "[t]he co-ownership status of the inheritance terminates with distribution". As Professor Schenk explained, "[a]micable distribution may be done whenever the interested parties have legal capacity and agree with its provisions" while "the distribution will be done in court if the heirs disagree or if the rights of a person lacking legal capacity need to be safeguarded".

96. Professor Schenk and Mr Laudisio differed as to whether proceedings relating to an estate can be taken by heirs as well as the "inventariante". The Judge preferred the evidence of Professor Schenk and found in paragraph 225 of the Judgment that heirs have "concurrent standing to bring a claim whilst inventory proceedings are open (and prior to them being opened) and when closed prior to the distribution of the assets and the transfer being recorded in the *Formal de Partilha*".

97. Turning to "the nature of the rights of the heirs as a matter of Brazilian law prior to the distribution of the assets and the transfer being recorded in the *Formal de Partilha*", the Judge concluded as follows:

> "243. It seems to me on the evidence of Brazilian law that, notwithstanding the personal interest of the heir in the pool of assets, the rights of the heir are to act 'to defend the assets and rights that compose the inheritance' (paragraph 19 of Professor Schenk's report). He is defending the interests of the whole (because he does not have an individualised interest) and this coupled with the fact that the proceeds do not automatically form part of the estate but are subject to the distribution process lead me to conclude that the heir cannot be said to have an absolute entitlement to the property.
>
> 244. … Professor Schenk accepted in cross examination that the estate exists from the death of the deceased, until the point at which the assets are distributed. On the Brazilian law evidence prior to the transfer of the litigation rights of the deceased person to the relevant heir as recorded in the Brazilian register (*Formal de Partilha*) the heir brings the claim on behalf of the estate as a whole and accordingly in my view this

should be characterised as part of the administration of the estate."

98. It is worth, I think, setting out the Judge's account of the evidence of Professor Schenk which led her to these conclusions:

> "229. The position is summarised by Professor Schenk in the Joint Expert Report at paragraph 3.1:
>
> > *'The rights are transferred to the heirs at the time of death (with the opening of the succession, according to the saisine principle). Since then, before the distribution, the heirs are the owners of the assets that make up the estate and, have concurrent standing to issue a claim, on their own behalf, in defence of the common patrimony. After distribution, when the indivisibility in respect of the shared property and rights ends, the standing belongs only to the heir to whom the property or right has been attributed.'* [emphasis added]
>
> 230. This is also clear from his evidence in paragraph 2.4 of the Joint Expert Report:
>
> > *'…The heirs are the true owners of the assets and rights that form part of the estate from the moment of death (saisine principle). The ownership of assets and rights and the status of indivisibility of the inheritance until its distribution, with the application of the legal rules of condominium (Art. 1,314 and 1,791, sole paragraph, CC), guarantee the heirs concurrent standing to bring a claim in their own name and in defence of the common heritage.'* [emphasis added]
>
> 231. In cross examination Professor Schenk's evidence was as follows:
>
> > *'The Article 1.791, the single paragraph of the Brazilian Civil Code that declares the immediate transmission of rights to the heirs, this makes reference to the "condomínio" regime which is also in the Brazilian Civil Code. This allows clearly, especially when seen according to the constitutional principle of access to justice, that the heir can exercise the defence of his own interests compatible with the indivisibility principle. And we have also seen in the cases brought in my report that the defence -- the*

> *defence of their share is in their own name and as a consequence it involves the defence of the whole inheritance.'* [emphasis added]

232. In cross examination Professor Schenk was referred to paragraph 19 of his report:

> *'The estate is the name given to the inheritance in Brazilian procedural law. The estate is a group of assets, with transitory existence, authorised by procedural law to sue and be sued until the distribution of the inheritance to the heirs. The estate does not have legal personality and, therefore, is not a holder of rights. The assets and rights comprising the estate belong to the heirs in joint ownership. The estate does not prevent the heirs from acting in their own name to defend the assets and rights that compose the inheritance, as we will see in item 6.1.2 of this Report.'*

233. Professor Schenk accepted that when the heir brings a claim, he is defending the assets and rights that compose the whole of the inheritance, not just for his benefit, but for the benefit of the other co-owners of those assets. [emphasis added]

234. Professor Schenk was also referred to paragraph 40 of his report in which he said that the proceeds of any claim will not automatically be part of the property of the heir but will be subject to the sharing and distribution amongst the heirs:

> *'As a consequence of granting the heir authorisation for the judicial defence of the common patrimony (that belongs to all the other heirs in joint ownership until the distribution), the proceeds awarded to the heir in the legal claim will not be considered, automatically, as personal patrimony of that heir. The Brazilian succession law mandates that the asset or right granted in court (litigious rights or asset) be subjected to the inventário proceeding. This means the award would need to be shared among the other heirs, through individualisation of each heir's shares via a distribution or new distribution, as explained in item 6.1.5 of this Opinion. This legal requirement aims at protecting the interests of the heirs who chose not to file a claim in defence of the common patrimony.'* [emphasis added]

235. However Professor Schenk's evidence in cross examination was that the heir was nevertheless exercising his own rights and not representing the interests of the estate.

> *'... the concurrent standing of the heir in reference to the estate does not mean the heir is necessarily representing the interests of the inheritance in court. The estate represents the indivisible mass in court, the heir acts in his own or her own behalf, defending their own interests. And as I will explain in paragraph 40 of my opinion, because the heir is defending his own share of the inheritance, defending the inheritance as a whole, such benefit might be attained and will be shared amongst other co-heirs. In the inventário proceeding, of course, or in another inventário of redistribution. But these are different elements representing the estate in court and the exercise by the heir of his or her own right, his or her own prerogative, to defend his or her interests.'*

236. It was put to Professor Schenk that the heir is not just defending his own interest but the interests of all the inheritance.

237. Professor Schenk's response was that:

> *'...The heir is defending the interest of the whole, because it's not possible to individualise one's share. The heir defends the whole as a reflex of defending one's own share of the inheritance as the law states. The ideal inheritance share -- there is an ideal share. The heir is the owner of an ideal share of the inheritance. So the heir is defending the ideal share in one's own behalf. As a reflex, the heir defends the interests of the inheritance as a whole.'*

238. Although Professor Schenk was of the view that the heir was bringing a personal claim not a representative one, he accepted in his report that the heir was defending the inheritance as a whole. Further it seems to me that even if it is a personal claim, it cannot be said that the heir is absolutely entitled to the claim as a matter of Brazilian law. As Professor Schenk stated:

> *"The Brazilian succession law mandates that the asset or right granted in court (litigious rights or*

> *asset) be subjected to the inventário proceeding. This means the award would need to be shared among the other heirs, through individualisation of each heir's shares via a distribution or new distribution'.* [emphasis added]

239. Professor Schenk was also taken in cross examination to a decision of the Superior Court of Justice (No. 1.736.781- SE) where the issue was whether the lawful heiress of the co- owner of one of the real estate properties in dispute held legal standing to, in her own name, defend the deceased's interests, before the distribution is conducted. In holding that she had standing to sue, the judge said that:

> *'It should be emphasised that the standing to sue of the heir, as already decided by this 3rd Panel, is limited to the defence of the interest of the estate itself, not including the defence of individual interests, as follows:*
>
> [citing from an earlier judgment]…
>
> *2. The standing to sue, as a result of the right of saisine and the indivisibility of the inheritance, may be extended to the co-heirs before the distribution is carried out. However, this exceptional extension of legal standing is limited only to protect the interests of the estate…".*'"

Authorities

99. *Dicey, Morris & Collins on the Conflict of Laws* explains in rule 164 that "[t]he 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". In contrast, "[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" (*Dicey, Morris & Collins on the Conflict of Laws*, at rule 158) and "[a]ll matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*)" (*Dicey, Morris & Collins on the Conflict of Laws*, at rule 3).

100. There was reference to the distinction between succession and administration in *Preston v Melville* (1841) 8 Cl & F 1 and *Re Lorillard* [1922] 2 Ch 638. In *Preston v Melville*, Lord Cottenham LC said at 12–13 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". In *Re Lorillard*, Warrington LJ said 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".

101. The most relevant in this context of the other cases to which we were referred were (in chronological order) *Vanquelin v Bouard* (1863) 15 CBNS 341 ("*Vanquelin*"), *Haji-Ioannou v Frangos* [2009] EWHC 2310 (QB), [2010] 1 All ER (Comm) 303 ("*Haji-Ioannou*"), *High Commissioner for Pakistan v National Westminster Bank plc* [2015] EWHC 3052 (Ch) ("*High Commissioner for Pakistan*") and *Jennison*.

102. In *Vanquelin*, V, who was domiciled in France, had drawn certain bills upon the defendant and indorsed them to B. The bills having been dishonoured, B obtained judgment in France against both the defendant and V. V having died, his widow, the plaintiff, paid B what was owing under the judgment and had delivered to her the bills and the record of the judgment. She then brought proceedings in this jurisdiction, but the defendant objected that she was suing in a representative capacity without obtaining letters of administration here.

103. The Court of Common Pleas gave judgment in favour of the plaintiff on the relevant demurrers. For present purposes, it is what was said about the second count that is material. In that connection, Erle CJ said at 366:

> "As to the demurrer to the second count, it is clear that the plaintiff took the bills on the death of her husband, and, if nothing more appeared, she could only enforce them here by clothing herself with the character of his representative. But the law of domicil attaches to these parties; and there is a distinct averment that the plaintiff was, according to the laws of France, 'the donee of the universality of the personal and real estates belonging to the succession of the deceased, and thereupon became entitled to all debts, claims, and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely in the same manner to all intents and purposes as they were vested in the deceased, and the plaintiff was and is entitled to demand and sue for the same *in her own name and in her own right*, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and the plaintiff became entitled to sue the defendant thereupon *in her own name and in her own right*.' I think it sufficiently appears upon this record that the plaintiff was entitled to sue upon these bills in her own right; the fact of her being the donee of the universality of the personal and real estates belonging to the succession of her deceased husband giving her by the law of France rights different from those which an executor or an administrator has in this country."

Erle CJ added at 369:

> "The sixteenth plea, to the second count, is that the plaintiff is not executor or administrator of Vanquelin, deceased. For the reasons before given in dealing with the second count, I think that, as the plaintiff is the donee of the universality of the personal and real estates belonging to the succession of the deceased, and became thereby entitled to all debts, &c., to

> which he was entitled, which by the French law became vested in her personally and absolutely in the same manner as they were vested in him, and she was entitled in France to demand and sue for the same in her own name and right, it is quite immaterial whether or not she was executrix in this country."

104. Williams J. another member of the Court, confessed at 372 to feeling "some difficulty" but did "not feel justified in differing" from his brethren. He said at 372-373:

> "Now, the construction which the rest of the court put upon that [i.e. an averment in the second count] is, that it appears that the plaintiff has, by some course of conduct and proceeding which is not (and need not be) particularized in the declaration, herself become accordingly to the law of France the owner of these rights, and may enforce them, by reason of her undergoing personal and individual liability in respect of them. I must confess I was strongly impressed with the notion that this was only a disguised averment framed with a view to evade the rule which requires administration in order to entitle a party to sue in respect of the personal rights or property of a deceased person, but in substance amounting to no more than a statement that the plaintiff was the legal personal representative of her deceased husband. But I am disposed to assent to the view taken by my Lord and my Brother Keating, viz. that it does amount to an averment that, according to the law of France, the plaintiff, by reason of the liability which her relation to the deceased's property entailed upon her, acquired a personal and individual right to enforce this claim, and need not clothe herself with the character of his personal representative."

105. For his part, Keating J, the third member of the Court, said at 373-374:

> "As to the second count, it must not be supposed that there is any difference amongst the members of the court as to the rule which governs the mode of enforcing personal rights or claims to property of deceased persons. That rule is well established, and nothing in this judgment is intended to shake it. But I agree with my Lord that the second count does sufficiently shew upon the face of it that, according to the law of France, the plaintiff was entitled (in France) to this succession, and to sue in respect of it in her own name and in her own right. It seems to me that that is alleged in the count with sufficient distinctness, and that it is admitted by the demurrer."

106. There follows in the report a note to the effect that counsel for the defendant "asked leave to add a plea traversing the law of France as to the matters alleged in the second count".

107. In *Haji-Ioannou*, LH had obtained judgment against the defendant in Greece but died intestate on 17 December 2008 two days after applying for the judgment to be

registered in this jurisdiction. The judgment was registered by a Master on 13 January 2009, and on 3 June 2009 LH's widow and children were substituted as applicants. The defendant, however, contended that the widow and children did not have an interest in the judgment satisfying the requirements for registration and that the order for substitution should be set aside.

108. It was common ground that "the right of succession to the judgment is determined according to the law of the deceased's domicile" (see paragraph 40) and the judge, Slade J, held that LH was domiciled in Monaco at the date of his death (see paragraph 56). On that basis, Monegasque law of succession fell to be applied (see paragraph 57) and so the widow and children "acquired qualité d'héritier, the status or quality of heirs, on 17 December 2008, the date of LH's death" (see paragraph 64). Even so, the widow and children did not acquire an interest in the judgment entitling them to have it registered until 18 May 2009 when they accepted their inheritance rights (see paragraph 79).

109. Slade J explained in paragraph 65:

> "No authority was shown to me to support the proposition that the acquisition of the status as heir without accepting the associated inheritance constituted the interest required by art 38 [of Council Regulation (EC) 44/2001 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)] to register a judgment. In my judgment the evidence of Monegasque law is to the effect that obtaining the status of heir and acceptance of inheritance rights are two separate and distinct steps. An heir may not accept his inheritance rights. Regarding such a person as having an interest in property, a judgment, which he has not and may never accept, would not, in my judgment, be consistent with the registration and enforcement scheme of the Regulation. The property of a deceased, a judgment, which an heir does not accept may well devolve on another person. It would be curious if the heir who has declined the inheritance as well as the individual who has acquired legal title to it could register the judgment for enforcement. In my judgment the applicants have not established that the acquisition by them of the status of heirs in itself conferred the interest in the Frangos judgment required for its registration in accordance with art 38."

Slade J went on in paragraph 68:

> "I am not satisfied on the evidence before me … that the applicants acquired an interest in the Frangos judgment for the purposes of art 38 on or before 13 January 2009. They acquired such an interest when they formally accepted their inheritance rights by the acte de notoriété of 18 May 2009. This declared the applicable law and the proportions of 'toute propriété de la succession mobilière de' LH of each of the applicants."

110. Slade J said this about *Vanquelin* in paragraph 74:

> "In my judgment *Vanquelin v Bouard* (1863) 15 CBNS 341, 143 ER 817 … illustrates the difference between administration and succession in the context of a deceased domiciled and with moveable assets abroad. It also provides an apposite example of how the courts in England will permit a party who has an absolute entitlement to a deceased's property in accordance with the law of their domicile to enforce in this country that party's claim in a personal and not a representative capacity."

111. The upshot was that the registration order was set aside but that providing for substitution remained in place.

112. *High Commissioner for Pakistan* concerned money which had been paid into an account with Westminster Bank Limited in 1954, ostensibly by the seventh Nizam of Hyderabad: see [2015] EWHC 55 (Ch), at paragraphs 2 to 7. In the judgment to which we were taken, Henderson J had to consider, among other things, how the estate of the seventh Nizam should be represented. He concluded that a Mr Lintott should be appointed as the sole administrator under section 116 of the Senior Courts Act 1981 and declined to join Nawab Khan, a descendant of the seventh Nizam, in a representative capacity: see paragraphs 17 and 23. Henderson J said in paragraph 23:

> "In so far as [Nawab Khan] claims as an heir of the 7th Nizam, he is, in my judgment, in the same position as all others interested in the estate as heirs. They can and should be represented at stage one by Mr Lintott in his role as administrator."

113. In paragraph 27, Henderson J turned to deal with an argument by Nawab Khan's counsel "this morning" that "the Nawab can claim directly against the fund in his position as an heir, assuming it to be established on the facts that he is an heir". As Henderson J explained:

> "The argument was, put briefly, that he would be able to rely on the Muslim personal law applicable to the succession to the 7th Nizam's estate. The evidence, in its current and limited form, indicates that his personal law would not recognise the concept of administration of an estate and the relevant property would have vested automatically in his heirs. Therefore, the argument runs, there is no estate for an English personal representative to administer, and nothing to prevent the Nawab from making a direct claim to the relevant property."

114. Henderson J considered the argument to be "misconceived" and that it did "not provide an arguable basis for [Nawab Khan] to claim directly in his alleged capacity as an heir": see paragraph 31. Henderson J had said this in paragraphs 28 and 29:

> "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.'"

115. In *Jennison*, the claimant brought proceedings as her late husband's personal representative alleging breaches of trust in connection with land in England. She had been appointed as her husband's sole executrix under his will and had obtained probate in New South Wales, where he had been domiciled. The grant of probate was resealed in this jurisdiction under the Colonial Probates Act 1892, but not until after the claim had been issued and the law of New South Wales, unlike that of England and Wales, did not consider an executrix who had not obtained probate to have legal title to the testator's estate.

116. This Court concluded that, while the grant of probate in New South Wales would not of itself have entitled the claimant to bring proceedings in this jurisdiction, she had acquired the ability to do so in the eyes of the law of England and Wales as soon as her husband had died by dint of becoming his executrix; it did not matter that the position was different under the law of New South Wales. I said this:

> "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 [counsel for the claimant] 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 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. 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."

117. We accordingly held that the claimant had standing when the claim was issued: see paragraph 51.

Analysis

118. There is no doubt that, for the purposes of characterisation, the law of England and Wales distinguishes between, on the one hand, the administration of an estate and, on the other, succession. It is clear, too, that under the law of England and Wales "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". If, therefore, the relevant issue is one of succession, Brazilian law must be applicable. The deceased persons from whom the heirs claim to have inherited causes of action were domiciled in Brazil, the causes of action represent "movables" and Mr Choo Choy confirmed that the deceased persons did not make wills extending to those causes of action.

119. Relying on the observations of Auld LJ in *Macmillan* and those of Mance LJ in *Five Star Trading*, Mr Choo Choy stressed that characterisation should "not be constrained by particular notions or distinctions" of the law of England and Wales but be approached in a "broad internationalist spirit". However, it is not apparent to me that the point is of any real significance in deciding the scope of the "administration of estates" and "succession" categories in the present context. The evidence as to Brazilian law shows how another legal system approaches inheritance, but I do not see that it casts any real light on where English law should draw the line between "administration of estates" and "succession". Nor did I understand Mr Choo Choy to identify any other way in which the adoption of an "internationalist spirit" would help with that delineation.

120. In broad terms, it seems to me that, under the law of England and Wales, matters relating to the collection of a deceased person's assets and the payment of debts are considered to relate to the "administration of estates" and the distribution of assets after that is considered to relate to "succession". As Warrington LJ said in *Re Lorillard*, "it is only when the administration is over that the law of the domicil comes in". Likewise, Henderson J said in *High Commissioner of Pakistan* that "[i]t 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".

121. A similar distinction emerges, as it appears to me, from *Haji-Ioannou*. Slade J did not consider LH's widow and children to have gained an interest in the judgment at issue when they "acquired qualité d'héritier, the status or quality of heirs", but only when they accepted their inheritance rights. Slade J observed that "the courts in England will permit a party who has *an absolute entitlement* to a deceased's property in accordance with the law of their domicile to enforce in this country that party's claim in a personal and not a representative capacity" (emphasis added).

122. I do not think *Vanquelin* is authority to the contrary. That case proceeded on the basis that, as a matter of French law, the plaintiff was "the donee of the universality of the personal and real estates belonging to the succession of the deceased, and became thereby entitled to all debts, &c., to which he was entitled, which by the French law became vested in her personally and absolutely in the same manner as they were vested in him, and she was entitled in France to demand and sue for the same in her own name and right" (in the words of Erle CJ) and "entitled (in France) to this

succession, and to sue in respect of it in her own name and in her own right" (to quote Keating J). The explanation for the Court's decision is, as it seems to me, that it was assuming that, under French law, the plaintiff had become entitled to the claim she was bringing on an out-and-out basis and so *succeeded* to it. It can be seen from the note at the end of the report that the defendant was seeking to put French law in issue. What matters, however, is what the Court took French law to be.

123. If, as I consider to be the case, the collection of a deceased person's assets and the payment of debts must be distinguished from the distribution of assets after that, the question whether the heirs have title to sue must, I think, fall to be treated as one relating to the administration of the deceased persons' estates rather than one of succession. While a person's assets are immediately and automatically transmitted to his heirs under Brazilian law and, on the Judge's findings, an heir can bring proceedings relating to the estate, an heir does not acquire an "individualised interest" until "sharing". Up to that point, any claim that an heir makes is "in defence of the common patrimony", "the common heritage" and "the whole inheritance" even if just "[a]s a reflex" (to quote Professor Schenk). Heirs can doubtless be expected to bring proceedings in their own interests, but "the proceeds awarded to the heir in the legal proceedings will not be considered, automatically, as personal patrimony of that heir" (in Professor Schenk's words). A particular heir may find that the fruits of a claim pass to one or more other heirs or are used to discharge debts. It is only when the "sharing" is carried out that an heir obtains an "individualised" absolute interest in an asset which had belonged to the deceased person. It is only then, too, that in the eyes of English law there is "succession" rather than the "administration of estates".

124. In the present case, there is no suggestion that any relevant cause of action of a deceased person has been the subject of a "sharing". As matters stand, therefore, the heirs are, for the purposes of characterisation, to be viewed as seeking to administer the estates of the deceased persons, not as having succeeded to any causes of action of the deceased persons. It follows that Brazilian law is not applicable and that the heirs cannot advance the claims in this jurisdiction without obtaining letters of administration here.

125. That conclusion is supported by practical considerations as well as principle. Where a claimant has obtained letters of administration in respect of someone who was domiciled abroad, the other parties and the Court can be confident of the claimant's title without undertaking any investigation into the law of the domicile or the basis on which the claimant might have acquired the benefit of the cause of action under that law. If, in contrast, someone other than an executor could bring proceedings in this jurisdiction without obtaining a grant of representation, there could be considerable uncertainty and a need to make potentially difficult and expensive inquiries into the relevant foreign law and the circumstances of the deceased person and the claimant. Suppose, for example, that a claimant asserted that he was entitled to claim as an heir under Brazilian law on the footing that he was an "ascendant" of the deceased person. To satisfy himself as to the claimant's standing, the defendant might have to find out about both Brazilian law and the deceased person's family (to check that there was no one higher up the order for which article 1,829 of the Brazilian Civil Code provides). Were it to turn out that, on the facts or law, a claimant was not entitled to claim under the foreign law (say, because there was in fact a living descendant), a defendant who had paid the claimant might find himself with no defence to a claim from a true heir.

There might also be complications if separate proceedings were brought by different heirs.

126. It is noteworthy that Brazil is by no means the only country in which a deceased person's property passes to heirs at once on death. In *Re Achillopoulos* [1928] Ch 433, Tomlin J noted at 443 that "[t]he evidence with regard to Greek law" was "that under the law of that country there is no system at all by which somebody is granted a formal position corresponding with executor or administrator in this country; on the contrary, those persons who are the heirs are fixed by law with rights and duties corresponding with the rights and duties of the executor or administrator under English law, including the duty of paying the debts". *Cheshire, North & Fawcett, "Private International Law"*, 15th ed., explains at 1325 that "[t]he general civil law rule is that the entire property of a deceased person passes directly to his heirs, testate or intestate, or to his universal legatee, subject, of course, to their acceptance".

127. In the circumstances, there must over the years have been many occasions on which heirs of persons domiciled in countries with laws comparable to those of Brazil have wished to make claims here on the strength of causes of action of the deceased persons. The dearth of authority dealing with such situations is in all probability attributable to a perception that heirs need to obtain letters of administration in this jurisdiction if they are to bring proceedings. In my view, that is indeed the law.

128. In the course of the hearing, we floated the possibility of an heir being treated in the same way as an executor on the basis that the positions of the two are comparable. Mr Kennelly was, however, rightly dismissive of the idea. Plainly, there are similarities between the position of an heir under Brazilian law and that of an executor under the law of England and Wales: both are considered to acquire title on death subject to certain obligations. However, executors are, as it seems to me, a special case in the eyes of the law of England and Wales. Not only can they be identified from the will but there is provision in such a case for the grant of probate rather than letters of administration. With an heir, on the other hand, there is no will and can be no grant of probate. Further, allowing an heir to claim as the equivalent of an executor would give rise to the practical problems already discussed.

Conclusion

129. I agree with the Judge that the heirs cannot pursue their claims in the absence of grants of representation in this jurisdiction.

The claimants' appeal: grounds 4 and 5 (giving time to obtain grants)

130. As Lord Burrows explained in *Jogie v Sealy*, at paragraph 68(i):

> "the common law position is that proceedings commenced by a claimant on behalf of the estate are a nullity unless brought by an administrator who has been granted letters of administration (subject to, for example, a grant of administration ad litem having been made). Relation back does not apply and, therefore, the subsequent grant of administration does not retrospectively validate the proceedings."

131. Authority for that can be found in *Ingall v Moran* [1944] 1 KB 160 ("*Ingall*") and cases such as *Finnegan v Cementation Co Ld* [1953] 1 QB 688 in which *Ingall* has been followed. Further, "the common law position remains as it was in *Ingall*" except to the limited extent to which section 35(7) of the 1980 Act and what is now CPR 17.4(4) have effected a change: see *Jogie v Sealy*, at paragraph 68(ii).

132. Section 35(7) of the 1980 Act and CPR 17.4(4) have their origins in the Law Reform Committee's 21st Report (on Limitation of Actions) (1977) (Cmnd 6923). The Law Reform Committee concluded in paragraph 5.15 of that report that "the rule-making power should be extended to allow the capacity in which a party sues to be amended after the limitation period has expired, so as to enable him to sue as administrator, notwithstanding that, at the date the proceedings were instituted, he could not have sued as such". It therefore recommended in paragraph 6.1(47) that "[a] plaintiff should be able to amend his pleadings out of time so as to sue in another capacity (including that of an administrator), and the rule-making powers of the Supreme Court and County Court Rule Committee should be extended for this purpose". That recommendation was implemented by section 35(7) of the 1980 Act, which states that "rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action". The relevant rule is now CPR 17.4(4). I have quoted that in paragraph 19 above, but it is convenient to set it out again:

> "The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired."

133. In *Jogie v Sealy*, Lord Burrows observed at paragraph 54 that CPR 17.4(4) "represents a legislative reform of the common law so as to remove the most drastic unfortunate consequence of *Ingall*". Lord Burrows endorsed the view which Arden LJ had expressed in *Haq v Singh* [2001] EWCA Civ 957, [2001] 1 WLR 1594 that CPR 17.4(4) covered "a change of capacity in having later become an administrator on intestacy but after the expiry of the limitation period": see paragraphs 47 and 54. However, Lord Burrows stressed the limited scope of CPR 17.4(4). He said in paragraph 46:

> "But it is very important to clarify that this legislative reform applies only in the extreme situation where a limitation period has expired. Section 35(7) of the Limitation Act 1980 and CPR rule 17.4(4) do not give the courts a general power to allow an amendment to alter the capacity in which the claimant is bringing a claim."

134. In their skeleton argument, the defendants argued that, contrary to the comments of Lord Burrows, "the principle in *Ingall v Moran* is not displaced where CPR r.17.4(4) applies". However, Mr Kennelly did not press the point in his oral submissions. As he recognised, "unless there is a decision of a superior court to the contrary effect, a court in England and Wales can normally be expected to follow a decision of the [Judicial Committee of the Privy Council]": per Lord Neuberger in *Willers v Joyce (No 2)* [2016] UKSC 44, [2018] AC 843, at paragraph 16.

135. In the present case, the claimants relied on CPR 17.4(4) to argue before the Judge that claims by heirs should not be struck out notwithstanding the absence of grants of representation in this jurisdiction. In their skeleton argument for the consequentials hearing on 15 September 2023, the claimants submitted as follows:

> "the proper course is to refrain from strike-out, and to afford the Cs an opportunity to obtain English grants and thereafter apply under CPR 17.4(4) for permission to amend their capacity so as to identify those grants. Since the applications under CPR 17.4(4) would naturally fall to be determined at the point when limitation is decided, it is submitted that that would be appropriate cut-off point for the Cs to obtain the requisite grants and lodge their applications. Should it transpire that limitation has not expired, it would be incumbent on the Cs at that stage to start new claims with the benefit of the grants they (will) have obtained."

136. The Judge rejected this contention and ordered claims by heirs to be struck out. She said in the Consequentials Judgment:

> "48. Although the Claimants submit that there would be an '*unjustifiable windfall*' if the Court was to strike out the claims immediately, the Claimants acknowledge that this is only on the basis that they are entitled to the grants, and any application under CPR 17.4(4), if made, would be granted, and, most significantly, it transpires that limitation has, indeed, expired. As a result, the Claimants do not go further than refer to the '*as yet unresolved limitation dispute*'.
>
> 49. As to whether limitation may expire in the future, thereby precluding the bringing of a new claim, it is, in my view, partly, if not largely, of the Claimants' making, in that it appears that at various stages throughout the proceedings the Claimants took the view that grants would be required, but subsequently decided, possibly for reasons of time and cost, not to seek grants except in limited instances ….
>
> 50. Irrespective of whether there was good reason for the Claimants not to pursue the obtaining of grants of representation, in the circumstances of this case, I do not accept that strike out would undermine the policy and intended effect of the legislative scheme: the Defendants' case is that limitation expired in 2009 and the Claimants have not pleaded a positive case that limitation has expired, relying in this context solely on what they termed an '*unresolved limitation dispute*'.
>
> 51. Assuming, in the light of certain (obiter) comments in *Jogie*, that the Court has a discretion as to whether or

> not strike out should be ordered in circumstances where a limitation period has arguably expired, in my view, this is a case where the Claimants are seeking to take advantage of a provision which they have not yet invoked. There is no application under CPR 17.4(4) and no grants have been obtained which would enable them to make such an application.
>
> 52. To the extent, therefore, that the Court has a discretion, I decline to exercise that discretion. In my view, no application has been made, and the general law should apply that the claim should be treated as a nullity."

137. The Judge referred in her judgment to evidence which Mr Jeremy Evans, a solicitor with the firm acting for the claimants, had given in a witness statement dated 7 March 2022. Mr Evans said in that:

> "68. Since issuing the Strike Out Application, Linklaters [i.e. the defendants' solicitors] has raised in correspondence (letter of 7 January 2022) further purported deficiencies relating to deceased claimants in a similar vein to those five Deceased Original Claimants above.
>
> 69. PGMBM [i.e. the claimants' solicitors] takes these matters extremely seriously, and has already despatched a team of London-based staff to Brazil to investigate the purported deficiencies. That team and others in my firm are currently obtaining relevant documents from personal representatives and/or heirs of any deceased individuals, with a view to obtaining English grants of representation as soon as possible for both the Deceased Original Claimants and the Deceased Additional Claimants.
>
> 70. My firm has also engaged specialist probate lawyers in England to assist in applying to the Court's Probate Registry. The outcome of this work is that claims of any Claimants who died before the Claim Form was issued, or whose estates may not have obtained the requisite grants of representation in England, will be regularised as soon as possible. The typical turnaround time for obtaining a grant of representation is around 12 weeks."

138. The circumstances in which an appellate Court will interfere with a Judge's exercise of discretion are, of course, limited. In *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, Lord Fraser said at 652:

> "the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an

> imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible".

In *Piglowska v Piglowski* [1999] 1 WLR 1360, Lord Hoffmann, having cited *G v G (Minors: Custody Appeal)*, observed at 1372 that "[a]n appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself".

139. In the present case, the claimants argued that the Judge's decision to strike out rather than to allow them to obtain grants of representation and make applications under CPR 17.4(4) was wrong as a matter of principle, failed to take account of relevant considerations and took account of irrelevant ones. The Judge should have approached matters, Mr Choo Choy submitted, on the basis that there was no reason to doubt that applications by the heirs for grants of representation would be successful, that the heirs would then be able to apply under CPR 17.4(4), that those applications would have at least realistic prospects of success, that the heirs' claims should not be treated as "nullities" merely because no application under CPR 17.4(4) had been made yet and that the fact that the claimants had not pleaded a positive case that limitation had expired did not preclude them from relying on the possibility of amendment under CPR 17.4(4).

140. In my view, however, the Judge was entitled to decide as she did. As she pointed out, the claimants were "seeking to take advantage of a provision which they have not yet invoked", having neither issued applications under CPR 17.4(4) nor even obtained grants of representation in all but three cases. That was the position notwithstanding the fact that the proceedings had been on foot for nearly four years; the latest of the three strike out applications had been issued some 18 months before the consequentials hearing; and the issue had been raised with the claimants in correspondence still earlier. On top of that, despite saying in March 2022 that such matters were taken "extremely seriously" and that "claims of any Claimants who died before the Claim Form was issued, or whose estates may not have obtained the requisite grants of representation in England, will be regularised as soon as possible", the claimants had made just three such applications a year and a half later. Further, while views may differ as to the significance of the fact that the claimants had not pleaded a relevant case on limitation, it was, I think, something which it was open to the Judge to take into account. There is, moreover, no reason to think that the Judge did not have in mind the prospect of applications for grants of representation succeeding or the possibility of successful applications under CPR 17.4(4) then being made.

Overall conclusion on the claimants' appeal

141. While I differ from the Judge in relation to the issue raised by ground 1 of the claimants' grounds of appeal, I agree with her that the heirs cannot pursue their claims in the absence of grants of representation in this jurisdiction and further consider that she was entitled to conclude that the appropriate course was to strike out such claims rather than giving the heirs a further opportunity to apply for letters of administration

and to make applications under CPR 17.4(4). My overall conclusion is therefore that the claimants' appeal should be dismissed.

The defendants' appeal: ground 3 (carve-outs)

142. Ground 3 of the defendants' grounds of appeal relates to paragraphs 5 and 6 of the order which the Judge made on 29 September 2023 following the consequentials hearing ("the September Order"). Paragraphs 1 to 3 of that order gave effect to the Judgment by providing for the striking out of (a) "claims originally brought in the names of persons who were deceased when the Viegas or Sanches claims were issued, or when the relevant claim was added to the Viegas claim", (b) "claims purportedly brought by individuals expressly on behalf of the estates of persons who were deceased when the Viegas or Sanches claims were issued, or when the relevant claim was added to the Viegas claim" and (c) "claims purportedly brought by heirs in their own names in respect of losses suffered by deceased persons". However, paragraphs 5 and 6 of the order contained "carve-outs". Thus, paragraph 5 provided that paragraphs 1 to 3 were not to affect any claims brought by individuals in respect of losses which they suffered personally and paragraph 6 made similar provision in respect of individuals claiming to be entitled to sue "pursuant to a purported donation of assets in the life of a deceased person".

143. The implications of paragraphs 5 and 6 of the September Order can be illustrated by an example. The Viegas Claim Form names as a claimant "The Estate of MARIA MENÉSIO SANGALLI, represented by BENEDITO HOMILDON SANGALLI". Were Mr Benedito Homildon Sangalli to assert that he had a personal claim against the defendants in respect of loss of his own rather than a claim as representative of Maria Menésio Sangalli, paragraph 5 of the September Order would allow him to pursue that notwithstanding his inability to claim as an heir.

144. The Judge's thinking in this respect can be seen from the Consequentials Judgment. She said in that:

> "12. The Claimants propose in their draft order that where a Claimant claims in respect of losses which they suffered personally, their claims shall to that extent not be struck out, and nothing in the Judgment or the order shall be taken to preclude them from pursuing their claims for such losses ….
>
> 14. It seems to me that if Claimants are claiming for loss suffered personally (claims which the Claimants refer to as 'producer losses'), they should not be struck out.
>
> 15. Within this category of producer losses (which may amount to several hundred) there appear to be a small number of Claimants who have expressly brought their claim on behalf of an estate. I accept the submission for the Claimants that a claim in respect of that person's personal losses is not affected by the nullity rule because that would only operate where the claimant had brought the claim on behalf of a deceased

> person (without a proper grant of representation) but not where the claim is in fact in respect of personal losses. Such a claim is therefore capable of amendment."

145. Mr Kennelly took issue with the "carve-outs". A claim brought as a representative, he argued, is a nullity and an individual said to represent a deceased person cannot "piggyback" on such a claim to put forward for the first time a personal one. It is open to someone asserting a personal claim to issue proceedings now, but, Mr Kennelly submitted, he cannot be allowed to back-date his claim to the issue of the Viegas Claim Form on the strength of the representative claim which he had previously advanced.

146. Mr Kennelly relied in support of his submissions on *Finnegan v Cementation Co Ld*. In that case, 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 on the basis that the Irish grant did not entitle her to act as the administratrix in England and she could not be treated as suing in her personal capacity instead. Singleton LJ said at 699:

> "This action … was brought by one who sued as an administratrix of the estate of her husband. She was not administratrix within the terms of the [Fatal Accidents Acts], for no letters of administration in this country had been granted to her. It was thought that as she had been granted letters of administration in Eire she was a person who was entitled to sue as administratrix in this country. If she had sued merely as the widow of her husband, the point which is now raised could not have been taken. There is no prejudice of any sort towards the defendants. The action was commenced in due time, but it was in the wrong form. The plaintiff sued in the wrong capacity, and time had run before the point was raised by the defendants. She cannot now raise an action in a new capacity."

Jenkins LJ agreed, expressing the view at 701 that it was "reasonably plain that what the plaintiff was purporting to do was to sue in the representative capacity of administratrix of her husband's estate and in no other capacity" and that the writ was "void ab initio". Morris LJ, too, thought it apparent that the plaintiff "was suing in a representative capacity" and rejected a submission that "some words in the statement of claim might merely be ignored and that there might be amendment, not by way of adding any words to the statement of claim, but by way of deleting certain words": see 703. "[W]hat [the plaintiff] is seeking to do", Morris LJ said, "is not merely to alter, modify or extend the claim, but to alter the capacity in which the action was brought by the plaintiff, and in regard to that matter the decision of this court in [*Hilton v Sutton Steam Laundry* [1946] KB 65] appears to me to be conclusive".

147. I agree with Mr Kennelly that the position is comparable in the present case. Where a claimant has been given as the estate of X represented by Y, that cannot be understood as encompassing a claim by Y in a personal capacity. Further, Y cannot become a claimant in his own right by deleting the references to representing the estate of X. The reality is that those who have previously featured in the list of

claimants in the Viegas Claim Form as representing estates but now wish to assert personal claims are seeking to introduce new claims by new claimants in circumstances where the requirements of CPR 19.6 ("Special provisions about adding or substituting parties after the end of a relevant limitation period") are not met.

148. In my view, therefore, paragraphs 5 and 6 of the September Order should be deleted. The "carve-outs" for which they provided were not appropriate.

Conclusions

149. I can summarise my conclusions as follows:

i) On the basis of the undertaking which the claimants have offered, the defendants' appeals against the dismissal of their applications to disallow pursuant to CPR 17.2 the amendments which were made to the Viegas Claim Form on 22 November 2019 and 23 January 2020 should be dismissed;

ii) The claimants' appeal should be dismissed;

iii) Paragraphs 5 and 6 of the September Order should be deleted.

Lord Justice Lewis:

150. I agree.

Lord Justice Nugee:

151. I also agree.