Neutral Citation Number: [2023] EWHC 1896 (Comm)

Case Nos: CL-2019-000603 and CL-2019-000727

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 24/07/2023

Before :

DAME CLARE MOULDER DBE
SITTING AS A JUDGE OF THE HIGH COURT

- -

Claim No: CL-2019-000603

Between :
MR FLAVIO DE CARVALHO PINTO VIEGAS and 1,516 others — **Claimants/ Respondents**

- and –
(1) THE ESTATE OF MR JOSÉ LUIS CUTRALE (represented by MRS ROSANA FALCIONI CUTRALE)
(2) MR JOSÉ LUIS CUTRALE (Jnr) — **Defendants/ Applicants**

Claim No: CL-2019-000727

And Between
MR JOSÉ ANTONIO RUIZ SANCHES and 30 others — **Claimants/ Respondents**

- and –
(1) THE ESTATE OF MR JOSÉ LUIS CUTRALE (represented by MRS ROSANA FALCIONI CUTRALE)
(2) MR JOSÉ LUIS CUTRALE (Jnr) — **Defendants/ Applicants**

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Alain Choo Choy KC, Russell Hopkins, Juliet Wells and Anirudh Mathur (instructed by **Pogust Goodhead trading as PGMBM Law Limited**) for the **Claimants/Respondents**
Brian Kennelly KC, Thomas Fletcher and Gayatri Sarathy (instructed by **Linklaters LLP**) for the **Defendants/Applicants**

Hearing dates: 26-29 June 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 24 July 2023 at 10:30am.

Dame Clare Moulder DBE :

Introduction

1. By applications dated 19 November 2021, 11 and 21 March 2022 under CPR rr.3.4(2) and/or 17.2, the Defendants apply to strike out, and/or disallow amendments purporting to add or substitute, certain claims brought by the Claimants (the "Strike Out Applications").

2. Claim Form no. CL-2019-000603 (the "Viegas Claim") and CL-2019-000727 (the "Sanches Claim") relate to an alleged cartel between several Brazilian undertakings from 1999 to 2006. The First and Second Defendants, Mr Cutrale Snr and Mr Cutrale Jnr respectively were during this period directors and shareholders of Sucocítrico Cutrale Ltda, a company incorporated and domiciled in Brazil which produces orange juice and is one of the undertakings that is alleged to have participated in the cartel.

3. The Claimants are connected with orange farmers domiciled in Brazil.

4. Mr Cutrale Snr passed away on 17 August 2022. Mrs Rosana Falcioni Cutrale was appointed to represent his estate.

5. The Viegas claim was originally issued on 27 September 2019 on behalf of 170 claimants. It was then amended prior to service to add further claims on 22 November 2019 and 23 January 2020. As amended, the Viegas Claim Form includes claims by some 1,495 individuals, 21 companies and one foundation.

6. The Sanches Claim was issued on 22 November 2019 on behalf of 30 individuals and one company. The Sanches Claim has never been amended.

7. A further claim (CL-2022-000620) was issued protectively on 18 November 2022 (the "Nicolau Claim"). By a consent order those proceedings are stayed temporarily pending an order that finally disposes of the Strike Out Applications (as defined above).

Procedural history

8. The Viegas and Sanches Claim forms were served on the First Defendant in England on 27 January 2020 and on the Second Defendant in Switzerland on 26 February 2020.

9. The Defendants challenged jurisdiction. Henshaw J held on 5 November 2021 that the Court had jurisdiction over the First and Second Defendants but not Sucocítrico Cutrale Ltda (the "Jurisdiction Judgment"). The Second Defendant sought permission to appeal this finding by an application to the Court of Appeal made on 26 November 2021 (the "Jurisdiction Appeal"), which was refused on the papers by order of Males LJ dated 25 February 2022.

10. The First Defendant issued his First Strike Out Application on 19 November 2021. The Second Defendant issued his strike out application on 11 March 2022, after

Males LJ refused him permission (on 25 February 2022) to appeal the Jurisdiction Judgment. The Second Defendant's application sought relief in materially similar terms to his father's (as it stood following amendments to the draft order communicated to the Claimants on 18 February 2022 and 11 March 2022, and filed on 11 March 2022). The applications are referred to as the "First Strike Out Application".

11. On 21 March 2022, both Defendants filed the Second Strike Out Application, seeking relief on different and wider (but in some respects overlapping) grounds.

Expert evidence

On limitation

12. The parties had obtained evidence on the issue of limitation under Brazilian law from Mr. Drago instructed by the Claimants and Dr Coutinho instructed by the Defendants. However, as referred to below, by the time of the hearing the Defendants' case on limitation was agreed to be arguable and therefore it was not necessary to refer to this evidence or for the experts to give oral evidence.

On succession

13. On Brazilian law issues of inheritance and succession, Professor Leonardo Faria Schenk, instructed by the Claimants, produced a report dated 12 May 2023.

14. Mr Arnaldo Penteado Laudisio, instructed by the Defendants, produced a report dated 10 March 2023 and a second report dated 1 June 2023

15. The experts produced a Joint Expert Report dated 9 June 2023.

Grounds

16. Although the Claimants noted in their skeleton that the Defendants have not sought the Court's permission to amend the scope of the relief sought under CPR 3.1(2)(m) and that the Claimants would argue that the Defendants' approach is prejudicial and that the Court should not entertain their arguments or the relief sought to the extent that they go beyond the matters set out in their application notices and accompanying witness statements, no such objection was pursued at the hearing. I infer that the Claimants took the pragmatic view that they have been able to address the new issues both in the expert evidence and in submissions.

17. In the absence of any objection to the expanded scope of the applications before the Court, it is convenient to identify the issues to be determined by reference to the draft order submitted with the Defendants' skeleton as follows:

    a. Limitation (paragraph 1 of the draft order).

    b. Claims issued on behalf of persons who were deceased (paragraph 2 of the draft order).

c. Whether English grants of representation were required for claims brought by representatives of the estates:

i. when Brazilian inventory proceedings had not commenced or were open, by heirs in their own names

ii. when the litigation rights had not been transferred to the relevant heir and recorded in the *Formal de Partilha* under Brazilian law, by heirs in their own names

(paragraphs 3,4 and 5 of the draft order).

d. Claims which were brought without the informed consent of the Claimant or without the Claimant's solicitors having the authority to issue and pursue proceedings on their behalf (paragraph 6 of the draft order) and in particular (subparagraphs 6.3 and 6.4 of the draft order):

i. Claims where the authority was derived from an assignment of the right to conduct the claim to third parties (trade associations and the funder, Prisma).

ii. Claims by heirs where the authority to issue the claim was derived from a power of attorney and the heir was not authorised to enter into the power of attorney.

e. Amendments to the Viegas Claim in reliance on the grounds dismissed in *Rawet v Daimler AG* [2022] 1 WLR 5105 (paragraph 8 of the draft order). As referred to below these grounds were not argued before this Court but the Defendants wish to reserve their right to pursue the issues on appeal.

18. In addition the Defendants seek relief from sanctions (if required) (paragraph 14 of the draft order). This arises primarily in relation to the issue of limitation as this is the only ground pursued before this Court which is brought solely on the basis of CPR 17.2 and not in the alternative under CPR 3.4(2).

CPR 17 and 19

19. The relevant provisions of CPR 17 and CPR 19 are as follows:

17.1— Amendments to statements of case

17.1

(1) 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.

(2) If his statement of case has been served, a party may amend it only—

(a) with the written consent of all the other parties; or

(b) with the permission of the court.

(3) If a statement of case has been served, ***an application to amend it by removing, adding or substituting a party must be made in accordance with rule 19.4.***

(4) A party who files a notice under Part 38 discontinuing all or part of a claim may amend their statement of case without the court's permission to give effect to the discontinuance.

(Part 22 requires amendments to a statement of case to be verified by a statement of truth unless the court orders otherwise.)

17.2— Power of court to disallow amendments made without permission

17.2(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.

…

17.4— Amendments to statements of case after the end of a relevant limitation period

17.4 (1) This rule applies where—

(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.

(Rule 19.6 specifies the circumstances in which the court may allow a new party to be added or substituted after the end of a relevant limitation period (GL).)

CPR 19

19.2

(1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period(GL)).

(2) The court may order a person to be added as a new party if—

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

(3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.

(4) The court may order a new party to be substituted for an existing one if—

(a) the existing party's interest or liability has passed to the new party;

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

…

19.4— Procedure for adding and substituting parties

19.4(1) The court's permission is required to remove, add or substitute a party, unless the claim form has not been served.

(2) An application for permission under paragraph (1)—

(a) may be made by—

(i) an existing party; or

(ii) a person who wishes to become a party; and

(b) must be—

(i) supported by evidence; and

(ii) made under Part 23 .

(3) An application for an order under rule 19.2(4)—

(a) may be made without notice; and

(b) must be supported by evidence.

(4) Nobody may be added or substituted as a claimant unless—

(a) they have given their consent in writing; and

(b) that consent, and the proposed amended claim form and particulars of claim, have been filed with the court.

(5) If an order is made adding or substituting a person as a claimant prior to the filing of their consent—

(a) the order; and

(b) the addition or substitution of the new party as claimant,

shall not take effect until the signed, written consent of the new claimant is filed.

…

19.5…

19.6— Special provisions about adding or substituting parties after the end of a relevant limitation period

(1) This rule applies to a change of parties after the end of a period of limitation under–

(a) the Limitation Act 1980;

(b) the Foreign Limitation Periods Act 1984; or

(c) any other enactment which allows such a change, or under which such a change is allowed.

(2) The court may add or substitute a party only if–

(a) the relevant limitation period (GL) was current when the proceedings were started; and

(b) the addition or substitution is necessary.

…

Daimler

20. Two of the grounds for the Strike Out Application were:

a. under CPR r.17.1(1) the Original Claimants were not permitted to amend the Claim Form to add the claims by the Additional Claimants. It was said by the Defendants in their evidence that CPR r.17.1 may have permitted the Original Claimants to amend **their** statements of case before they were served on the Defendants. However, the amendments purporting to add the Additional Claimants were not amendments by the Original Claimants of **their** statements of case, but amendments seeking to join the Additional Claimants as new parties to the claim.

b. in the alternative, contrary to CPR r.19.4(4) the Additional Claimants did not file with the court their consents in writing to be added as claimants.

21. It is common ground that this strand affects all 1,361 Cs added to the Viegas Claim pre-service under CPR 17.1. These are the grounds that were dismissed by the Divisional Court in *Rawet v Daimler AG* [2022] 1 WLR 5105. The Defendants are not pursuing these grounds but are reserving their position to seek permission to appeal to the Court of Appeal.

22. In *Daimler* the Divisional Court decided that *G4S* was wrongly decided on these issues. No arguments have been advanced as to why the Court should depart from the findings of the Divisional Court in *Daimler* and therefore the application on these grounds falls to be dismissed.

Limitation

Introduction

23. The Defendants seek an order that the amendments to the Viegas Claim on 22 November 2019 and 23 January 2020 are disallowed pursuant to CPR r.17.2(1) on the basis that there is an arguable case that the limitation period for those claims has expired. This ground impacts the greatest number of claims (1,361 in total who were added to the Viegas Claim prior to service), including the majority of those falling under other grounds.

24. There is also the issue of whether relief from sanctions is required to pursue this ground. Although logically any grant of relief is required prior to considering the substantive question, I have dealt with both issues but for convenience deal first with the substantive issue as it sets out the context for the procedural issue.

25. As set out above CPR 17.2 (1) provides:

> "*17.2(1) If a party has amended their statement of case where permission of the court was not required, the court may disallow the amendment*."

26. It appeared to be common ground that the test which the Court should apply under CPR 17.2 (1) is as set out in the Commentary in the White Book at 17.2.1:

> "*An application under this rule is appropriate if the amendment challenged is one which, if permission to amend it had been necessary, that permission would not have been granted.*"

27. The Defendants rely on the principle which they submitted is that expressed by the Court of Appeal in *Cameron Taylor Consulting Ltd v BDW Trading Ltd* [2022] EWCA Civ 31 at [19] and [38]:

> "*[19] ...whether it was arguable that the relevant limitation period had expired when the amendments and re-amendments were made ...*"
>
> "*[38] If 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. Leave to amend will be given if the claimant can show that the defendant does not have a reasonably arguable limitation defence*".

Arguable case on limitation

28. Although evidence was before the Court as to the Brazilian law on limitation and its application to the facts of this case, it was accepted for the purposes of the hearing that the Defendants' case on limitation was "arguable" (Claimants' skeleton paragraph 40) and therefore it is not necessary to consider this issue in order to decide whether to disallow the amendment.

29. However it is relevant to the discussion below to note that the Defendants' pleaded case on limitation is that all claims were time barred under Brazilian law by February 2009 (Defence 74-77).

Claimants' submissions

30. It was submitted for the Claimants that the correct test is set out in *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 WLR 1409 at pp.1424-1425 (and the authorities cited therein) and *Chandra v Brooke North (A Firm)* [2013] EWCA Civ 1559, at [64] and [68] and that the Court should refuse leave to amend only where the defendant does not have an arguable case on limitation which would be prejudiced by the new claim i.e. where the operation of section 35 (1) of the Limitation Act 1980 (the "Limitation Act") would or may give the Claimants an advantage.

31. It was submitted for the Claimants that since the Defendants do not contend that their limitation defence would be prejudiced by or as a result of relation back, section 35(5)(b) of the Limitation Act and CPR 19.6(5)(3) are not engaged and that the Court should dismiss this limb of the Defendants' case.

Section 35 of the Limitation Act

32. Section 35 of the Limitation Act provides for the principle of "relation back" whereby the amended claim is deemed to have commenced on the same date as the original claim:

> "*(1) For the purposes of this Act, any new claim made in the course of any action shall 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." [emphasis added]

33. The addition (or substitution) of new claimants falls within the definition in subsection (2) of a "*new claim*":

"*(2) In this section a new claim means any claim by way of set-off or counterclaim, and*

any claim involving either—

(a) the addition or substitution of a new cause of action; or

(b) the addition or substitution of a new party;

and "third party proceedings" means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings." [emphasis added]

34. However subsection (3) provides:

"(*3) 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***.

For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action." [Emphasis added]

35. The exceptions referred to in subsection (3) are qualified by subsections (4) and (5) and are not relied upon in the present application:

"*(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.*

(5) The conditions referred to in subsection (4) above are the following—

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action."

Relevant authorities

36. Since section 35(3) applies only where a limitation period has expired, the case law has set out the approach of the Courts when faced with an application to amend at which point no determination will have been made as to whether the limitation period has expired.

Chandra

37. In *Chandra* the Court of Appeal set out the approach which should be adopted by the courts endorsing the test laid down by the Court of Appeal in the earlier decision in *Welsh Development Agency*. The relevant passages are as follows:

> "*[63] The starting point for consideration of this issue is the Court of Appeal's decision in Welsh Development Agency v Redpath Dorman Long Ltd [1994] 1 WLR 1409. In that case the Welsh Development Agency ("WDA") engaged engineers to design the sub-structure of twelve factory units. Subsidence later occurred in the floors of two units. WDA commenced proceedings in negligence against the engineers for negligent design of the floor units. Two years after commencing proceedings WDA applied for leave to amend their statement of claim (i) to add a claim in respect of floor settlement in the other ten factory units and (ii) to add separate claims for negligent mis-statement. The official referee allowed the amendments in respect of the other ten factory units, holding that this new claim arose out of similar facts. He refused leave to add the new claims for negligent mis-statement. The official referee held that, having regard to section 14A of the 1980 Act, it was unclear whether the claims for negligent mis-statement were barred by limitation.*
>
> *[64]. The Court of Appeal dismissed appeals by both parties and upheld the official referee's judgment. In particular, the Court of Appeal endorsed his approach to new claims which do not arise out of similar facts. The Court of Appeal held that where it was arguable that a new claim was statute barred, leave to amend should not be given. The plaintiff should not gain the benefit of relation back under section 35 (1) of the 1980 Act. On the other hand 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. See the judgment of the court at 1425 G-H.*
>
> *[65]. WDA was a case which proceeded under the old Rules of the Supreme Court, which were swept away in April 1999. Nevertheless the provisions of the former RSC Order 20 rule 5 are, for present purposes, substantially the same as CPR rule 17.4: see Part 1 above. Both the old rules and the new rules are intended to implement section 35 of the 1980 Act. The guidance given by the Court of Appeal in WDA remains effective, as is correctly stated in*

paragraph 17.4.2 of the commentary in Civil Procedure (the White Book)." [emphasis added]

38. The Court of Appeal in *Chandra* then considered the two possible approaches which a court could take when faced with a proposed amendment which the defendant said was barred by limitation, namely to consider the amendment application or to determine limitation as a preliminary issue. However in the view of the Court of Appeal (at [70]) the latter course in practice would "*seldom be appropriate*". The relevant parts of the judgment are as follows:

> "*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 WDA 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.*
>
> *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*." [emphasis added]

39. In my view the test laid down in *Welsh Development Agency*, and approved by the Court of Appeal in *Chandra* as "*effective guidance*" (at [65]),was that the test as to whether leave to amend had two elements: firstly, whether the defendant had a "reasonably arguable limitation defence" and secondly, whether that defence would be prejudiced by the operation of relation back (the burden of proof being on the claimant):

> "*The Court of Appeal held that where it was arguable that a new claim was statute barred, leave to amend should not be given. The plaintiff should not gain the benefit of relation back under section 35 (1) of the 1980 Act. On the other hand 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.*" (*Chandra* at [64])

40. Insofar as the Defendants sought to rely on [67] of the judgment in *Chandra* as setting out a narrower test ("*The court will limit itself to considering whether the defendant has a "reasonably arguable case on limitation"…*"), it is in my view clear that this sentence needs to be read in context and, read in the context of the earlier passages set out above, does not support the Defendants' contention that no prejudice arising from the operation of relation back needs to be shown. At [67] the Court was considering how a court should approach the question of whether the limitation period has expired, the answer being that it should consider only if the contention that the limitation period had expired was arguable.

41. If further support is needed for the conclusion that the relevant test includes the need for the defendant's case on limitation to be "*prejudiced by the new claim*", it can be found by looking at the cross reference at the end of that sentence in [64] of *Chandra* which states "*see WDA at 1425 H*". In *Welsh Development Agency* at p1425H the Court of Appeal stated:

> "*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.*" [emphasis added]

42. The need for "prejudice" is further made clear by the succeeding paragraphs of the judgment in *Chandra* when it refers to the "remedy" if permission for the amendment is refused as to being 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.*" [68] [emphasis added]

43. 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.

44. The Defendants submitted that they may be prejudiced by the operation of relation back in relation to the amendments given that the Claimants' case in response is that limitation did not commence until 2018 and thus may have expired in 2021 (after the issue of the original claim but prior to 2022 when the Nicolau claim was issued).

45. However on the authority of the Court of Appeal decisions in *Welsh Development Agency* and *Chandra* the test is not simply whether the limitation period has arguably expired but also whether the Defendants' case will be prejudiced by relation back of the new claim.

Cameron Taylor

46. The issue is then whether the cases which the Defendants relied on which post-dated *Chandra* have modified or amended the law in this respect.

47. The Defendants submitted that the most recent authorities do not support the requirement of "prejudice": *Cameron Taylor* at [38].

48. In *Cameron Taylor* the issue for the Court of Appeal was whether the approach taken by the first instance judge was wrong in law. The issue on appeal was expressed in the judgment of Coulson LJ (with whom Males LJ and Whipple LJ agreed) as follows:

> "*24. The first part of the appeal arises out of CTC's unsuccessful application to disallow the amendments of 17/18 March 2020. Ms Parkin submits that it is reasonably arguable that the relevant limitation period had expired by the time the amendments were made. She contends that the judge applied the wrong test in law and that, if he had applied the right test, he would have been bound to hold that the 15 year limitation period identified in s.14B of the Limitation Act 1980 had, at least arguably, expired.*
>
> *25. Mr Hargreaves' response was a refined version of the argument which found favour with the judge. He said that, on a proper analysis of the applicable law, what he described as the "constrained case" proposed by BDW (in other words, making no allegations about drawings issued before 18 March 2005) provided a complete answer to Ms Parkin's application.*" [emphasis added]

49. Having referred to the competing arguments, Coulson LJ then considered the relevant law setting out section 35, the relevant provisions of the CPR and the authorities. It is notable that Coulson LJ began his review of the authorities by referring to passages from *Welsh Development Agency* and *Chandra*:

> "[34] *Although it was not referred to by the judge, the starting point in considering the interplay between limitation arguments and amendments is Welsh Development Agency v Redpath Dorman Long Limited [1994] 1 WLR 1409, where the Court of Appeal upheld the earlier decision of the official referee refusing the proposed amendments concerned with negligent mis-statements. In an important passage, Glidewell LJ said at 1425G-H:*
>
> "*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. We should add that the court in Holland v. Yates Building Co. Ltd., The Times, 5 December 1989, also relied on the judgment of Glidewell L.J. in the Leicester Wholesale Fruit Market case as being of general application and not limited to its own particular facts.*"
>
> *[35] WDA was decided under RSC Order 20 rule 5. But there was no substantive difference between the old rule and the CPR. As Jackson LJ pointed out in Chandra v Brooke North (A Firm) and Anr [2013] EWCA Civ 1559, the guidance in WDA is still directly applicable to the CPR…*". [emphasis added]

50. Coulson LJ went on to state at [38]:

> "*I consider that the right approach is that explained in WDA and subsequently reiterated by Jackson LJ in Chandra. If 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. Leave to amend will be given if the claimant can show that the defendant does not have a reasonably arguable limitation defence. In my view, precisely the same test applies in a situation, such as the present one, where s.14B is invoked.*" [emphasis added]

51. Coulson LJ then concluded at [55]:

> "*For these reasons, therefore, it seems to me that it is 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. Applying the test in WDA and Chandra, I consider that the judge erred in concluding otherwise, and permission to make the amendments of 17/18 March 2020 should have been refused. If my Lord and my Lady agree with that conclusion, the result of the first part of the appeal is that, insofar as they affect CTC, the amendments of 17 and 18 March 2020 must be disallowed.*"

52. The Defendants in their skeleton relied on paragraph 19 of the judgment in *Cameron Taylor*. However that paragraph did not purport to set out the test applied by the Court of Appeal but merely the issue before the first instance judge. The relevant extract is as follows:

> "*The first issue for the judge to decide, which was common to both applications, was whether it was arguable that the relevant limitation period had expired when the amendments and re-amendments were made on 17/18 March 2020…*"

53. It was submitted for the Defendants in oral closings that paragraph 38 of the judgment sets out the relevant test and contains no reference to any requirement to show prejudice.

54. However in my view paragraph 38 of the judgment has to be read in light of the issue before the Court of Appeal. Coulson LJ was reviewing the approach of the first instance judge to the issue of limitation and concluded that rather than consider the

merits of the claimant's arguments that it had a complete defence to the limitation issue, the judge should only have considered whether the defendant's case on limitation was reasonably arguable. As set out in the judgment, Coulson LJ stated that the relevance of the claimant's submissions that it had a complete defence to the limitation issue went only to the question of whether the limitation defence was reasonably arguable ([41]-[49] of the judgment). Accordingly in my view that paragraph does not provide a basis for departing from the test laid down in *Welsh Development Agency* and *Chandra* and disregarding the issue of prejudice which was clearly set out in those cases as discussed above. It is clear from the judgment of Coulson LJ that he was applying the test in *Welsh Development Agency* and *Chandra* but on the issue before him the focus was not on whether the defendant was prejudiced by the operation of relation back but whether the limitation defence was reasonably arguable.

55. It was also submitted for the Defendants that there were "*several cases where an application to amend has been refused on the basis that the defendants had an arguable case that the limitation period had expired in relation to the amendment, notwithstanding, … that the defendant in those cases had taken a general limitation defence*." [emphasis added]. The Defendants identified two recent first instance decisions - *G4S* and *Jalla v Royal Dutch Shell plc* [2020] EWHC 459 (TCC).

G4S

56. In *G4S* various claimants issued a claim against G4S on 10 July 2019 based on the fact that in the period since 2011 they had all bought and held shares in G4S and they had suffered loss in that their shares lost value as a result of the announcements about what was said to be a fraud. This issue date was significant because it was the last day of the limitation period if the starting point was the announcement of 11 July 2013. The claim form was not served until 30 April 2020. In that intervening period, the claim form underwent a series of amendments as to claimants and some claimants were added.

57. The following extracts from the judgment set out the issue which the judge was considering:

> "*17 In many instances there will be a dispute as to whether the limitation period has expired at the date of the attempted amendment. It was said by G4S, and accepted by the claimants, that where there was such a dispute which affected an amendment (i.e. it is reasonably arguable that the claim is statute-barred), and the amendments would not otherwise fall within the provisions allowing a post-limitation amendment, then the usual course was for the court to refuse permission to amend and leave the claimant to issue a fresh claim form. This appears from Chandra v Brooke North [2013] EWCA Civ 1559 at [66]–[69]…*
>
> *19 It is therefore necessary to consider whether there is, as at any relevant date, an arguable limitation defence. G4S takes a limitation point in its Defence, saying that the limitation period started running in May 2013 when Mr Grayling made his first announcement. That is when loss accrued so far as*

> *diminution in value of the shares is concerned. It is not suggested that the claimants can have known about the wrongdoing before then, but that is the first date on which it can be said that the claimants can have sufficient knowledge that they had a claim. That, G4S would say, is at least arguable, with the effect that there was an arguable limitation defence as at 11 July 2019, which is when the first amendments were made. Alternatively there is a good arguable case that the limitation period started running on 11 July 2013 when the second announcement was made. G4S say that that, again, puts all the amendments outside the limitation period.*
>
> *21 It is not for me actually to decide the limitation point in this case, or even to go into it in depth. The question which matters is whether it is arguable that the limitation period had expired by 11 July 2019, or to put it another way whether it had started running by 11 July 2013. It seems to me clear that that is arguable…*
>
> *22 …It cannot be said that the section 32 clock clearly did not start running until the end of August 2013 at the earliest. It is arguable (it is unnecessary to go further) that it started running on 11 July 2013, if not earlier. Mr Onslow's argument may be right, and it may be wrong, but it is arguable….*". [emphasis added]

58. At [88] Mann J concluded on this issue:

> "*…If I am wrong in my conclusion that a party cannot add itself under CPR r 17.1 at all, then Mr Rabinowitz can challenge the additions as being made outside an arguable limitation period (Chandra, above). That point is in my view clearly correct…*"

59. In *G4S* the defendant's case was that the limitation period had expired either in May 2019 i.e. prior to the issue of the original claim or in July 2019 after the issue of the claim but before the amendments. Thus on the defendant's case it was arguable in relation to the amendments that the limitation period had expired.

60. It was submitted for the Defendants that in *G4S* the date of May 2013 was important because that meant that the defendants in that case had a complete limitation defence to the whole claim as originally issued but that did not stop the Court from disallowing amendments on the basis there was a separate arguable limitation defence.

61. However two points can be made in response: firstly, it appears to have been accepted by the parties in that case that where it was reasonably arguable that the claim was outside the limitation period that the court should refuse to allow the amendment (see paragraph [17] set out above); and secondly, it would appear that the judge for the purpose of his analysis took the date of 11 July 2019 as the relevant date (see [21] and [22] of the judgment, set out above), which was after the original issue of the claim. On that basis the defendant would be prejudiced by the operation of relation back since it would operate to treat the additional claimants as having been added prior to the expiry of the limitation period whilst the original claim would have been in time.

62. Although therefore the judgment in *G4S* does not clearly support the Claimants' interpretation of the test, it is in my view not inconsistent with the interpretation for which the Claimants contend namely that prejudice is part of the test.

Jalla

63. The other recent first instance decision relied on by the Defendants is the decision in *Jalla*. It was submitted that the defendants in that case had a general limitation defence covering the whole of the claim but that did not stop them resisting later amendments on the grounds they had an arguable limitation defence to the later amendments. Having established they had an arguable limitation defence the court conducted itself as if it had no discretion.

64. It was submitted for the Claimants that both *G4S* and *Jalla* were cases where the position on limitation is unclear and the competing arguments mean that the operation of relation back could have an effect that was prejudicial to the defendant.

65. *Jalla* was a case with a large number of claimants and different arguments on when limitation may have expired:

> "*25…neither Chandra nor Blue Tropic (nor any other authority of which I am aware) addresses the specific questions which may arise in the context of a representative action constituted as the present one. The Chandra approach is ideally suited to a claim by an individual claimant against an individual defendant where refusing the application and leaving the claimant to protect himself by issuing separate proceedings is straightforward. Arguably different considerations apply in a case such as the present which is the vehicle for 27,000 individual claims each of which is dependent upon proof of actionable damage specific to that claim. At least the theoretical possibility exists, therefore, of time running from different times for different claims and claimants…*"

66. Against the particular facts of that case (which was not under the general provisions of 17.2) it is unclear whether the test set out in *Chandra* for cases under the general provision of 17.2 was relevant. It may be that as submitted by Mr Choo Choy, it is a case in which on the facts prejudice could result depending on the ultimate findings at trial.

White Book Commentary

67. The Defendants also sought to gain support from the commentary in the White Book at 17.4.2 which it was submitted made no reference to any need for prejudice.

68. Paragraph 17.4.1 is headed "*Effect of rule*" and sets out the general effect of the power to allow amendments which fall within CPR 17.4 after a limitation period has expired and sets out the nature of the exceptions:

"*17.4.1 The term "limitation period" is defined in the Glossary (see Vol.1, Section E). Section 35 of the Limitation Act 1980 limits the court's power to allow amendments after a relevant limitation period has expired unless the application is to amend in one of the following ways:*

(1) raising, by amendment, an original set off or counterclaim;

(2) raising a new claim arising out of the same facts, or substantially the same facts as an existing claim;

(3) correcting the name of a party;

(4) altering the capacity in which a party is joined.

..." [emphasis added]

69. Paragraph 17.4.2, under the heading "*Resolving disputes as to whether a limitation period has expired*", then addresses how the court will determine whether a limitation period has expired, namely by determining whether there it is "reasonably arguable" that the limitation period has expired by the date that the permission is given:

"*Where it is reasonably arguable that the relevant limitation period has expired before an amendment is made, the burden is on the applicant to show that the amendment falls within the provisions of rr.17.4 or 19.6. A new claim under s.35(3) is not made until the statement of case is actually amended, which, by definition, cannot be earlier than the date upon which permission to make specific amendments is given. Unless the case falls within one of the exceptions, such permission cannot be given after the relevant limitation period has expired. It is immaterial that the limitation period had not expired on the date the application to amend was made (Welsh Development Agency v Redpath Dorman Long Ltd [1994] 1 W.L.R. 1409; [1994] 4 All E.R. 10, CA) or on the date upon which the court adjourned a hearing on the basis that the specific amendments sought would be revised and brought back to court later for approval (Bajwa v Furini [2004] EWCA Civ 412).*

Where there is a dispute as to whether or not a new claim sought to be raised by amendment is statute-barred, the claimant must prove (i) that the defendant's limitation defence is not reasonably arguable, or (ii) that, in any case, the amendment falls within the provisions of rr.17.4 or 19.6. If they cannot establish either (i) or (ii) permission to amend should be refused leaving the claimant to bring fresh proceedings on the new claim (Chandra v Brooke North [2013] EWCA Civ 1559; [2014] T.C.L.R. 1, Ballinger v Mercer Ltd [2014] EWCA Civ 996; [2014] 1 W.L.R. 3597).

In Cameron Taylor Consulting Ltd v BDW Trading Ltd [2022] EWCA Civ 31, the Court of Appeal considered both rr.17.4 and 19.6 (adding or substituting parties post limitation) and iterated that common to both was a need to decide whether it was arguable that limitation had expired ([19]).

"If 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. Leave to amend will be given if the claimant can show that the defendant does not have a reasonably arguable limitation defence" per [38].*" [emphasis added]

70. I accept that the Commentary at paragraph 17.4.2 makes no reference to any requirement for prejudice. However it is difficult to reconcile the test as stated in *Chandra* at [64] with the formulation in paragraph 17.4.2 by reference to *Chandra*. I note that the commentary in 17.4.2 is primarily concerned with the exceptions in CPR 17.4, CPR 17.4 (and 19.6) being the rule which implements the exceptions provided for in section 35 (3) ("*Except as provided by section 33 of this Act or by rules of court...*") and the conditions set out in subsections 35 (4) and (5). CPR 17.4 is not concerned with the general prohibition in section 35 (3) ("…*neither the High Court nor [the county] court shall allow a new claim within subsection (1)(b) above…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*".)

71. Thus it could be said that the Commentary does not need to address whether for the purposes of the general prohibition "prejudice" to the defendant's case on limitation needs to be shown.

72. Insofar as the Commentary at 17.4.2 sets out paragraph [38] of the judgment in *Cameron Taylor*, this is in the context of the preceding sentence which refers to the need for the court to decide whether it was arguable that limitation had expired (the approach which Coulson LJ in *Cameron Taylor* held should have been taken by the first instance judge).

73. In my view the Commentary whilst providing some support for the Defendants' case cannot be given greater weight than the underlying authorities and therefore I do not accept that it should be treated as anything other than a summary of the relevant approach and thus has to be read subject to and in the light of the authorities.

74. The Defendants also sought to rely on *Bajwa v Furini* [2004] EWCA Civ 412 referred to in the commentary at 17.4.2. However as the commentary makes clear, that case was concerned with CPR 17.4 and held that unless the case falls within one of the exceptions, permission cannot be given after the relevant limitation period has expired.

Discussion

75. It was submitted for the Defendants in oral closing that Section 35 (3) of the Limitation Act provides that the courts should not allow a new claim where the limitation period had expired unless separate conditions were satisfied (CPR 17.4 and 19.6) which are not relevant to this case. Accordingly unless the Claimants can establish that the Defendants do not have a reasonably arguable case that the new claim is statute barred the court must refuse permission to amend and leave the relevant Claimants to commence a new claim in which the limitation defence can be fully argued.

76. In my view, as set out above, Section 35 (3) on its face does not state that the court should not allow a new claim where the limitation period had expired unless separate conditions were satisfied. It provides:

> "*(3) 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***." [emphasis added]

77. On the Defendants' case the relevant sub section is an absolute prohibition (other than as provided in the exceptions referred to in the opening phrase). However I do not accept this submission as the Defendants' submission would appear to give no meaning to the phrase "*which would affect a new action to enforce that claim*" and would instead operate as an absolute ban on any new claim after the expiry of the limitation period.

78. It was further submitted for the Defendants that if the Claimants are right, where a general limitation defence is taken to the entirety of the claim from its original issue, the defendant may never rely on CPR 17.2 (1) and that is wrong as a matter of principle and by reference to the authorities.

79. It was submitted for the Claimants that the lack of prejudice is material to the court's discretion whether or not to refuse the amendment (under CPR 17.2). If the defendant's case is that the entirety of the claim is time barred long before the original action had begun, it can make no difference to the ability of the defendant to advance its defence on the basis of limitation whether the amendment was deemed to take effect from the original date of the claim. It was submitted for the Claimants that their approach was not to provide a blank cheque for relation back in all circumstances.

80. In my view Section 35 is concerned with the operation of relation back where it would prejudice the defendant. If the defendant's limitation defence is prejudiced by the operation of relation back then the amendment should not be allowed and the claimant should be required to start a new claim and at trial the issue of whether it is time barred at the date of its issue will be determined. I do not therefore accept that such a conclusion would be wrong as a matter of principle. For the reasons discussed above I also do not accept that it is wrong by reference to the authorities.

81. It was submitted for the Defendants that it would prejudice the Defendants if the claims purportedly added to the Viegas Claim were treated as having been issued on 27 September 2019, rather than 18 November 2022. The Claimants' position is that the relevant limitation period did not start to run until, at the earliest, 6 March 2018 and thus on the Claimants' case, the limitation period would have expired on 6 March 2021 (subject to their argument that the limitation period was "restarted" by the filing of "protests", which the Defendants dispute), before the Nicolau Claim was issued on 18 November 2022.

82. 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.

Conclusion

83. On an application under CPR 17.2 to disallow an amendment, *Chandra* and *Cameron Taylor* require the Court to decide whether the Defendants have an arguable case that the limitation period has expired. That has been conceded for the purposes of this application.

84. As set out above, the Court of Appeal in *Chandra* stated 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*". [64]

85. The Court of Appeal decision in *Chandra* is binding authority on this Court and the subsequent authorities do not purport to distinguish *Chandra* but to apply it.

86. 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.

87. For the reasons set out above, I find that the Court has a discretion in the circumstances of this case to allow the amendments to add additional Claimants and in the absence of any prejudice to its pleaded case, I find that the Court's discretion should be exercised such as to refuse the Defendants' application to disallow the amendments to the Viegas Claim on 22 November 2019 and 23 January 2020 pursuant to CPR r.17.2(1) on the basis of limitation.

Relief from sanctions

Introduction

88. As referred to above, in addition to the substantive issue of limitation, the issue arises as to whether the Defendants require relief from sanctions and if so whether such relief should be granted.

89. The Defendants' primary position in its skeleton (paragraph 88) was that the Strike Out Applications were brought in time because the First Strike Out Application was brought within 14 days of the determination of the Defendants' jurisdiction challenge and the Second Strike Out Application was brought within 14 days of the Claimants' response to the strike out application of Mr Cutrale Senior.

90. Alternatively, they seek relief from sanctions pursuant to CPR r.3.8(1) in respect of any non-compliance with CPR r.17.2(2).

91. If (contrary to the Defendants' primary position) relief from sanctions is necessary, it was submitted for the Defendants that there was good reason for the breach and the interests of justice lie in granting the relief sought in accordance with the guidance given in *Denton v TH White Ltd* [2014] 1 WLR 3296.

92. The application for relief is principally relevant to the limb of the First Strike Out Application which seeks an order that the amendments to the Viegas Claim are disallowed on the basis that there is an arguable case that the limitation period has expired, since that is the only ground that is brought pursuant to CPR r.17.2(1) alone (rather than pursuant to CPR r.3.4(2) or in the alternative CPR r.17.2(1)).

Chronology

93. The amendments to the Viegas Claim were made on 22 November 2019 and 23 January 2020. The Viegas and Sanches Claim forms were served on the First Defendant in England on 27 January 2020 and on the Second Defendant in Switzerland on 26 February 2020.

94. The Defendants' solicitors reserved the rights to bring the First Strike Out Application on 7 June 2021 by letter which read so far as material:

> "*…we reserve our clients' rights to bring an application for strike out in relation to the Claimants that were added to claim CL-2019-000603 by way of purported amendment to the claim form on 22 November 2019 and 23 January 2020, including on the basis of the judgment in Various Claimants v G4S [2021] EWHC 524 (Ch).*" [emphasis added]

95. At paragraphs 230 to 231 of the Jurisdiction Judgment, Henshaw J noted that:

> "230. *109 Claimants were purportedly added to the Viegas claim by amendments under CPR r.17.1 on 23 January 2020. The Defendants submit that: (i) it was not permissible to add these Claimants by way of amendment under CPR r.17.1 and the Defendants reserve the right to apply to strike out these claims in the event that the present application under CPR Part 11 is unsuccessful (see Various Claimants v G4S [2021] 4 WLR 46);*
>
> *[…]*
>
> *231. The Defendants also do not accept that the Viegas claim is properly pursued on behalf of Claimants added or altered by purported amendments under CPR r.17.1 on 22 November 2019, and reserve the right to strike out such claims in the event that the present application is unsuccessful…*".

96. The First Strike Out Application was brought by the Defendants within 14 days of the final determination of the Defendants' challenge to the jurisdiction of the English court. Mr Cutrale Snr's strike out application was filed and served within 14 days of the Orders of Henshaw J dated 5 November 2021.

97. Mr Cutrale Jnr's strike out application was filed and served within 14 days of the Order of Males LJ dated 25 February 2022.

98. The Second Strike Out Application was filed and served within 14 days of the Claimants' response to the Mr Cutrale Snr's strike out application.

Relevant law

99. CPR 3.9 provides:

> "*(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.*"

100. In *Denton v TH White Ltd* [2014] 1 WLR 3296 the Court of Appeal set out a three stage test to be adopted on considering an application for relief from sanctions:

> "[*24]…The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".*"

101. At the third stage the Court is required to consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. The Court must also always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.

Claimants' Submissions

102. It was submitted for the Claimants (paragraph 32 of its skeleton) that:

a. there is nothing in the CPR to suspend the running of time under CPR 17.2(1) whilst an application for a jurisdictional stay is pending;

b. any challenge in relation to an arguable limitation defence would not have involved taking a step in relation to the pursuit of the substance of the claims;

c. an application under CPR 17.2(1) can be made expressly without prejudice to any such stay application so as to avoid any unintended submission to jurisdiction: e.g. *PJSC Bank Finance and Credit v Zhevago* [2021] EWHC 2522 (Ch), §§57-69. Provided that is understood and agreed by the parties and recorded by the court there would not be a problem;

d. the Defendants did not articulate to the Claimants the precise grounds upon which a strike out might be taken but left the application for two years;

e. the Court should weigh the severity of the remedy sought by the Defendants with the dilatory and tactical way it has been pursued. The Claimants have been prejudiced by the Defendants holding back this application for almost two years. A further claim form could have been issued much sooner.

Defendants' submissions

103. It was submitted for the Defendants that:

a. relief is not necessary because although on its face CPR 17.2 (2) requires an application to be made within 14 days it does not address the circumstances in which an application challenging jurisdiction under CPR Part 11 has been made and it cannot have been intended that CPR 17.2 would deprive a party of its right to challenge jurisdiction or that it would apply only to parties which do not raise jurisdiction challenges. It was therefore submitted that implicitly CPR 17.2 must allow for jurisdiction challenges.

b. If relief is necessary and is not granted, there would be significant prejudice to the Defendants because they would be deprived of the benefits of a limitation defence: see, by analogy, *G4S* at [86]:

> "*I consider the most significant factor to be the proportionality point. G4S has a strong point when it says that the effect of not allowing it to make its rule 17.2 challenge late would be to deprive it of the benefits of the Limitation Act which it clearly seeks to invoke and has clearly sought to invoke since the application was made. I consider that a weighty matter. Of course, the claimants would be entitled to say that they would be deprived of the benefit of a rule which, if it works as they say it should, would rescue them from the clutches of the Limitation Act on the facts as they have turned out to be in this case, but I do not consider that factor to be as strong. In that context I bear in mind that the whole problem has arisen because of the obvious last minute rush to issue proceedings and gather in claimants, in the face of an obvious potential limitation date, and an apparent failure to get all the claimant's ducks in pen, let alone in a row, when that could have been done some time before. That does not attract a lot of sympathy*."

c. There is no prejudice to the Claimants- the Defendants reserved their rights by letter dated 7 June 2021 and there was no objection raised.

Discussion

Is relief from sanctions required?

104. CPR 17.2 (2) provides that:

> "*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.*"

105. In *G4S* at [67] it was held that the "*may*" in CPR 17.2(2) is permissive as to the making of the application but the 14 days has to be complied with if the permission is to be used.

106. As to whether it should be implied that the 14-day period is extended where there is a challenge to jurisdiction, this raises the question as to whether a pending jurisdiction challenge precluded the making of the application under CPR 17.2.

107. The Defendants relied on a passage in *Grant on Civil Fraud (2018)* at [39-069] that a strike out application can amount to a voluntary submission to the jurisdiction. The Defendants also relied on a passage from *Briggs Civil Jurisdiction and Judgments* at [27.12]:

> "*To ask the court to strike out the claim on the basis that it has no real prospect of success or on the basis that the claim form discloses no reasonable ground for bringing the claim is to ask the court to adjudicate the substance of the claim. There is more than a risk that this will be seen as accepting and submitting to the merits jurisdiction of the court. A cautious view, but a sensible one, would be that such an application should not be made until the procedure and the CPR Part 11 has come to an end…*" [emphasis added]

108. The Defendants also relied by analogy (paragraph 63 of its Supplemental Skeleton) on *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2017] EWHC 1416 (Comm) at [18]:

> "*…I do not accept the argument that the Fifth Defendant is making the wrong application; the authorities, including the excerpts from Briggs and Dicey cited by Mr Abraham in his second witness statement, make clear the very great degree of caution which a party who is challenging jurisdiction must exercise. The point appears to be open; neither party referred me to authority which dealt with this point in terms. 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.*" [emphasis added]

109. However firstly I note that it may be said that the nature of the challenge on the basis that the limitation period has arguably expired can be distinguished from the situation identified in *Briggs*, namely an application to strike out the claim on the basis that it has no real prospect of success in that in the latter the court is required to adjudicate on the merits of the claim.

110. In addition I note that *Grant* states at [39-070] that the examples he identifies (including an application for strike out) will not amount to a submission if the party at all times clearly and expressly reserves his objection to jurisdiction.

111. The Claimants referred the Court to a recent example in *PJSC Bank Finance and Credit v Zhevago* [2021] EWHC 2522 (Ch) at [57]-[69]. The issue for the Court was "*whether, as the claimants contend, it is not open to the fifth defendant to seek a stay*

of these proceedings under CPR Part 11 on the grounds of forum non conveniens because, by applying at the same time to strike out the proceedings, the fifth defendant has submitted to the jurisdiction of this Court."

112. Sir Julian Flaux C identified the test at [66]:

> "*In my judgment the test derived from Rein v Stein applied in Williams & Glyn's and Rubin 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 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…*".

113. Then at [67] Sir Julian Flaux C found that the fifth defendant had not by his conduct submitted to the jurisdiction. Although I accept, as was submitted by the Defendants this was a finding on the facts of the case, it is notable that Sir Julian Flaux C made reference to the fact that it would have been open to the fifth defendant to state in the application notice that the application to strike out was without prejudice to his challenge to the jurisdiction:

> "*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 <u>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,</u> 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 . 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*." [emphasis added]

114. The Defendants submitted that the relevant question for the purposes of the relief is not whether the Defendants would in fact have been found to have submitted to the jurisdiction if they had made a strike out application at an earlier stage, but rather whether it was reasonable for them to have taken the view that there was a sufficient risk of such a finding.

115. The Claimants submitted that the Defendants should have brought the application and either agreed a postponement or sought directions from the Court. The Defendants responded that this itself could have resulted in the Court finding that they had submitted to the jurisdiction.

116. Whether or not the nature of the challenge in this case would have been found to be submitting to the jurisdiction, the Defendants have not provided an answer as to why the Defendants could not and did not take the route of making the application under CPR 17.2 and expressly reserving their rights in respect of the jurisdiction challenge.

117. As stated in *G4S* at [80]:

> "*the rule [in CPR 17.2(2)] is there for a purpose, which is presumably to require prompt challenges to pre-service amendments so as not to hold up the proceedings and achieve clarity at an early stage*".

118. In my view 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. Accordingly I see no reason to imply into the rules an extension of the deadline in CPR 17.2(2) and relief from sanctions is required for the First (and Second) Strike Out Application to be brought out of time.

Denton: Stage 1

119. Turning then to apply the three stage test in *Denton* on an application for relief from sanctions. In relation to the first stage, whether the breach was serious, the submission at paragraph 89 of the Defendants' skeleton, that the breach was not serious, was effectively abandoned in the Defendants' supplemental skeleton and Mr Kennelly KC accepted orally that it was a "lengthy" delay.

Stage 2: why the failure or default occurred:

120. Moving to the second stage, it was submitted for the Defendants (paragraph 63 of its Supplemental Skeleton) that making a strike out application would have risked the Claimants arguing that Defendants had submitted to the jurisdiction and it was reasonable for them to take the view that there was a sufficient risk of such a finding to justify waiting for the Jurisdiction Challenge to be resolved.

121. For the reasons discussed above I do not accept that the Defendants could not have made the application under CPR 17.2 and expressly reserved their position as to jurisdiction. It also begs the question as to why the Defendants considered it necessary, on 7 June 2021, to write to seek to reserve their position in respect of CPR 17.2.

122. For these reasons I find that there was no good reason for the delay in bringing the First Strike Out Application. I note that there was no stay in place in relation to the application for permission to appeal the order of Henshaw J of 5 November 2021 so there was even less justification for the Second Defendant to delay making his First Strike Out Application until March 2022.

123. In relation to the Second Strike Out Application (to the extent it relies on CPR 17.2) the position is even clearer. It was submitted for the Defendants that it was only apparent that certain aspects of this Second Strike Out Application were necessary following receipt of the Claimants' evidence in response to the First Defendant's Strike Out Application, served on 7 March 2022. In particular, it is said in the evidence that at that point the Claimants' solicitors confirmed that it would not address the issue of whether the Additional Claimants had given their informed consent to their addition to the Viegas Claim for the purposes of the First Defendant's Strike Out Application. That is not a reason which would justify the delay in issuing the application under CPR 17.2 on the basis that the limitation period had expired.

Stage 3 - all the circumstances

124. In *Denton* the Court of Appeal said in relation to the third stage:

> "*35…The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.*
>
> *36 But it is always necessary to have regard to all the circumstances of the case…*" [emphasis added]

125. Whether or not therefore I am correct in my conclusion that there was not a good reason for the delay, at the third stage the court has to consider all the circumstances so as to enable the court to deal justly with the application.

126. I do not regard this as a case where the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost. The Defendants were entitled to bring the challenge and it is far from certain that it would have been dealt with prior to the jurisdiction challenge.

127. Further this is not a case where the rules have been ignored or overlooked.

128. The real issue in this case at the third stage is the relative prejudice to the parties if relief is refused or granted.

Prejudice to the Defendants

129. It was submitted for the Defendants (paragraph 67 of the Supplemental Skeleton) that if relief is not granted, they would be deprived of the benefits of "*a limitation defence*".

130. However given the Defendants' pleaded case on limitation, the position is very different from the factual situation in *G4S* where the judge found that:

> "*G4S has a strong point when it says that the effect of not allowing it to make its rule 17.2 challenge late would be to deprive it of the benefits of the Limitation Act which it clearly seeks to invoke and has clearly sought to invoke since the application was made.*" [86]

131. In the present case, it cannot be said that the Defendants would be prevented from asserting its pleaded case on limitation which as referred to above is that the limitation period expired by 2009. The effect of its challenge under CPR 17.2 if relief is granted is:

    a. either (if the Defendants are correct on the substantive issue of limitation), to disallow the claims of the additional Claimants; or

    b. if (as the Court has found on the substantive issue), to relate back the date of the additional claims to 2019.

On either analysis the Defendants are not deprived of their limitation defence since as discussed above, it is irrelevant to their pleaded case on limitation. On this basis the position in this case can be distinguished from the position in *G4S* where relief from sanctions was granted.

Prejudice to the Claimants

132. By contrast the prejudice to the Claimants if relief is granted would arise as follows: if the Defendants are right on the substantive application under CPR 17.2 on the basis of the expiry of the limitation period and (contrary to the Court's findings above) the additional claims fall to be disallowed because the limitation period has arguably expired (regardless of any prejudice to the Defendants as a result of the operation of relation back), the bulk of the Claimants fall to be removed from the Viegas Claim.

133. The prejudice arises not as a result of the Defendants exercising their right to challenge the amendments on the basis of limitation but by reason of the way the application has been pursued. In *Chandra* the Court of Appeal said that:

> "*...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*." [69]

134. As referred to above, the Defendants only sent a letter reserving their rights in June 2021, well over a year after service of the claim form on the Second Defendant and the letter did not clearly set out the grounds of any such challenge on the basis of limitation referring only to strike out and not to disallowing the amendments and somewhat opaquely to "*including on the basis of the judgement in [G4S]*".

135. It was submitted for the Defendants (paragraph 66 of its Supplemental Skeleton) that the Defendants were not required to intimate the full scope of the applications they made at an earlier stage.

136. Whilst I accept that there was no such requirement, it seems to me that prejudice arises to the Claimants as a result of the fact that the application and the reservation of rights was not made earlier and the reservation of rights was only in general terms. As a result whilst it was open to the Claimants to have lodged a fresh claim form when it amended the claims in order to stop the limitation clock, it was not apparent that a challenge on the basis of limitation would be made and, bearing in mind the number of claimants, it is difficult to see that the expense of such a step was necessary or proportionate.

137. Whilst the Claimants have now issued protective proceedings in the form of the Nicolau Claim, had the application for disallowance been made in a timely manner, within 14 days of service (27 January 2020), protective claim forms could have been issued in early 2020. The Claimants have now been denied that opportunity. At least

for those Claimants who did not file formal protests, limitation expired on 6 March 2021, even on the Claimants' case, and that itself was a full year after it served those amendments.

Conclusion

138. In deciding whether to grant relief from sanctions the Court has to consider all the circumstances so as to enable the Court to deal justly with the application. The focus is on the limitation ground since as noted above, this is the only ground of the application which is advanced solely by reference to CPR 17.2.

139. 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.

Whether claims brought by deceased persons were nullities

Introduction

140. This ground of the Strike Out Applications seeks an order that the claims issued 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, are struck out pursuant to CPR r.3.4(2).

141. It is common ground that it affects 19 Claimants (18 from the Viegas Claim and one from Sanches). It is conceded by the Claimants (paragraph 7 of its skeleton) that the seven claims which were brought and remain in the names of Claimants who were deceased fall to be struck out.

Defendants' submissions

142. It was submitted for the Defendants that:

a. CPR r.17.1(1) does not permit an amendment pre-service, the effect of which is to substitute a claim brought in the name of a deceased person with another person purporting to act as representative.

b. A claim issued on behalf of a deceased person is a nullity: *Kimathi v FCO* [2017] 1 WLR 1081. There is no jurisdiction under CPR Part 3 to cure a nullity: *Kimathi* at [18]; *Jogie v Sealy* [2022] UKPC 32 at [55].

c. There is no reference to any such jurisdiction in CPR r.17.1. and no reason in principle or practice why the relevant amendments should be treated (as proposed

by the Claimants) as if they were removing the original claim and adding a new claim.

Claimants' submissions

143. The Claimants do not dispute the proposition that a claim cannot be brought or maintained in the name of a dead person. However it was submitted for the Claimants that:

a. Neither *Kimathi* nor *Jogie* was considering substitution under the auspices of CPR 17.1; what was in issue in those cases was whether there is a general discretion (i.e. post-service) to cure a nullity by reference to CPR 3.

b. Unilateral amendment under CPR 17.1 pre-service, and the jurisdiction to permit amendments or to cure defects post-service, are very different matters. The reason why CPR 17.1 permits unilateral amendment to a claim form prior to service is "obvious": it is because "before a statement of case has been communicated, the opponent has not had a chance to rely on it and therefore an amendment would in no way affect their position" (Zuckerman on Civil Procedure, 4th Ed. §7.42).

c. The Defendants do not dispute (nor could they) that the effect sought by the Claimants in the 12 disputed cases could have been achieved under CPR 17.1 by simply removing the deceased person's claim and adding a separate claim by their relevant representative or heir. Once it is accepted (in light of *Daimler*) that new claimants may be added pre-service pursuant to CPR 17.1, it is difficult to see why their claims cannot be added merely because the original claimants were deceased when the action was originally commenced. The Defendants' objection is purely formal, requiring the consequence of such amendment to be judged by its form rather than its effect. Such an approach is artificial and out of keeping with the spirit of the CPR and the reasoning in *Daimler* and should be rejected.

Discussion

144. The convenient starting point is *Kimathi* where the judge summarised the relevant authorities supporting the principle that a claim cannot be brought in the name of a deceased person:

> "5 *The first principle is that a claim cannot be brought in the name of a deceased person. There is authority for this, which dates from (at least) the early 19th century: see, for example, Watson v King (1815) 4 Camp 272; "How can a valid act be done in the name of a dead man"; Clay v Oxford (1866) LR 2 Exch 54, 55 and Tetlow v Orega Ltd [1920] 2 Ch 24. A more recent statement is that of Morritt LJ (with whom Simon Brown and Waite LJJ agreed) in In re NP Engineering and Security Products Ltd [1998] 1 BCLC 208 where the Court of Appeal said, at p 214: "It is well established that proceedings are only a nullity if the plaintiff is dead or non-existent in the sense of being a body corporate that has been dissolved at the time when the proceedings are commenced".*"

145. In *Kimathi* the judge rejected the contention that he could exercise his discretion to cure a nullity:

> "*17 The claimants' alternative submission was that the court has a discretion, pursuant to its general case management powers, to cure the defect. I was referred to the decision of Peter Smith J in Meerza v Al Baho [2015] EWHC 3154 (Ch)… The Meerza case did not deal with the position where the claim was brought in the name of the deceased claimant. It is not therefore authority in respect of the first principle referred to in para 5 above. The living claimant in the Meerza case sued without having obtained the appropriate letters of administration. That is not this case.*
>
> *…*
>
> *19 In my judgment, there is no such discretion where the claim is a nullity, as the Millburn-Snell case and the more historic decisions make clear it is. If the Meerza case is not distinguishable I find myself constrained to depart from the reasoning and judgment of Peter Smith J. In their skeleton argument, the claimants said that the court can assist to ratify a claim that would otherwise be a nullity and relied upon the case of Adams v Ford [2012] 1 WLR 3211. There a solicitor took a pragmatic approach to include people in the claim form from whom he did not have authority. An application to strike out was refused. However, this decision of the Court of Appeal reinforces my judgment but there is no such power. Contrary to what the claimants asserted, the Court of Appeal first approached the question of whether what the solicitor had done there was a nullity and expressly decided that it was not: see paras 27—32. It is implicit in the judgment of Toulson LJ that had the proceedings been a nullity then they would not have been salvageable, save as to those claimants who had authorised the issue of proceedings: see para 36*." [emphasis added]

146. *Kimathi* was approved by the Privy Council in *Jogie* at [55]:

> "*55. Millburn-Snell has subsequently been applied, albeit with very little discussion, by the Court of Appeal in Hussain v Bank of England Plc [2012] EWCA Civ 264, para 39; and at first instance in, for example, Kimathi v Foreign Commonwealth Office (No 2) [2016] EWHC 3005 (QB); [2017] 1 WLR 1081, paras 6, 17-19 . In the latter case, Stewart J rejected the view, that had been accepted by Peter Smith J in Meerza v Al Baho [2015] EWHC 3154 (Ch), para 46 , that the courts had a discretion under CPR Part 3 (dealing with the courts' case management powers) to apply the overriding objective to overcome the nullity of a claim, by allowing an amendment as to the capacity of a claimant (who had only subsequently been granted letters of administration) where it was just to do so (e.g. where it would cause no prejudice that could not be dealt with by a costs order). As Stewart J said at para 19:*
>
> "*In my judgment, there is no such discretion where the claim is a nullity, as the Millburn-Snell case and the more historic decisions make clear it is. If the Meerza case is not distinguishable I find myself constrained to depart from the reasoning and judgment of Peter Smith J.*"

Stewart J regarded it as an untenable argument that Millburn-Snell was decided per incuriam because the Court of Appeal had not considered the application of the overriding objective and CPR Part 3. I agree with Stewart J's analysis." [emphasis added]

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 *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.

148. In *Jogie* the Privy Council referred to the argument that this approach was overly technical and rejected it as follows, referring to the judgments of the Court of Appeal in *Millburn v Snell* and concluding that the common law rule can be defended in that requiring the appropriate person (i.e. the administrator) to commence proceedings "*ensures orderly proceedings, avoids duplication, and means that the estate is represented by the most appropriate person*":

> "*50. Rimer LJ [in Millburn] said the following at para 16:*
>
> "*I regard it as clear law, at least since Ingall, that an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity.*"
>
> *And at paras 29-30:*
>
> "*What [Ingall] decided, by a decision binding upon us, is that a claim purportedly brought on behalf of an intestate's estate by a claimant without a grant is an incurable nullity. Subject only to whatever rule 19.8(1) may empower, it follows that the claim the claimants issued was equally an incurable nullity. ... I ... consider that rule 19.8(1) has no application to the present case ... rule 19.8(1) does not, in my view, have any role to play in the way of correcting deficiencies in the manner in which proceedings have been instituted. It certainly says nothing express to that effect and I see no reason to read it as implicitly creating any such jurisdiction. It is, I consider, concerned exclusively with giving directions for the forward prosecution towards trial of validly instituted proceedings when a relevant death requires their giving. In the typical case, that death will occur during their currency and will usually be of a party. More unusually, it may have preceded them. But on any basis it appears to me clear that it is no part of the function of rule 19.8(1) to cure nullities and give life to proceedings such as the present which were born dead and incapable of being revived. In ordinary circumstances there is no reason why anyone with a legitimate interest in bringing a claim on behalf of an intestate's estate should not first obtain a grant of administration and so clothe himself with a title to sue. I am unable to interpret rule 19.8(1) as providing an optional alternative to such ordinary course.*"
>
> *51. Lord Neuberger MR added the following in his short concurring judgment at para 41:*

> "*Arguments such as that which the defendant successfully raised before the judge in this case are never very attractive, and one of the purposes of the CPR is to rid the law of unnecessary technical procedural rules which can operate as traps for litigants. However, whatever one's views of the value of the principle applied and approved in Ingall v. Moran [1944] KB 160, it is a well-established principle, and, once one concludes that it has not been abrogated by CPR rule 19.8 , it was the judge's duty to follow it, as it is the duty of this court, at least in the absence of any powerful contrary reason. The need for consistency, clarity and adherence to the established principles is much greater than the avoidance of a technical rule, particularly one which has a discernible purpose, namely, to ensure that an action is brought by an appropriate claimant.*"
>
> *52. One can elaborate further on what Lord Neuberger said by recognising that, contrary to what is sometimes thought, the common law rule can be defended at least as a general rule. This is because requiring the appropriate person (i.e. the administrator) to commence proceedings ensures orderly proceedings, avoids duplication, and means that the estate is represented by the most appropriate person.*
>
> *53. As regards a fresh action being validly commenced by the appointed administrator, the Court of Appeal recognised that this is probably what would now happen. If so, the court recognised that, to save needless expense, appropriate directions should be given for the claim to move rapidly to trial without requiring a timely repeat of the steps already taken.*" [emphasis added]

149. Mr Choo Choy KC relied on passages in *G4S* where a sub fund had been named as the Claimant and the sub fund did not have legal personality. The Claimants sought to amend under (*inter alia*) the then rule 19.5(3)(a):

> "*(2) The court may add or substitute a party only if— (a) the relevant limitation period was current when the proceedings were started; and (b) the addition or substitution is necessary.*
>
> *(3) The addition or substitution of a party is necessary only if the court is satisfied that— (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party…*".

150. Mann J said in this regard:

> "*203 The position under rule 19.5(3)(a) seems to me to be different. I think it correct to regard this as a substitution even though the existing claimant does not exist. The non-existence of the originally pleaded claimant is not a bar to the notion of substitution (see the Sardinia Sulcis and Rosgosstrakh Ltd v Yapi Kredi Finansal Kiralama AO [2017] EWHC 3377 (Comm)), a conclusion to which I would have come even in the absence of authority. The more difficult question is whether the error made was one as to name (appropriately expanded, as the authorities require) or a mistake as to identity. Mr Rabinowitz submitted that where a claimant thinks about which claimant to join, and makes a wrong decision, that is not an error of nomenclature but is*

> *an error of identity. Again, I would agree with him on a literal meaning of the words, and I suspect a philosopher would too, but the law has adopted an expanded meaning of the concept of an error as to naming—see the discussion of the authorities above. According to the claim form, the claim was being brought by a fund which claimed a shareholding in G4S. In my view that is a description which is sufficiently specific to this case (per Stocker LJ in Sardinia Sulcis).*" [emphasis added]

151. Mr Choo Choy further submitted that:

> "*…there are subtle differences between that line of authority [Jogie and Ingall] where the claim essentially is always maintained by the same person, but the issue is as to whether that person has the relevant capacity. And the typical fact situation where Jogie has been applied, and Ingall before it, are situations where the relevant capacity is not held, but is subsequently acquired when it's too late. But it doesn't say anything about the addition of a new claim in the name of a new claimant*."

152. The fact pattern in *Kimathi* was that a claim had been brought in the name of a deceased claimant (and thus was not a case where the claim was maintained by the same person) and the judge held that the claim was a nullity. In my view his conclusion in this regard was not challenged by the Privy Council in *Jogie* and the Privy Council is clear that a claim which is a nullity cannot be revived or cured.

153. The Claimants also sought to rely on *AIG Europe Limited v McCormick Roofing Limited* [2020] EWHC 943 (TCC) where the judge permitted a substitution even though the company did not exist at the time the proceedings were commenced and were a nullity. However, as the Defendants pointed out in oral closings, in *MOL (Europe Africa) Ltd v Mark McLaren Class Representative* Ltd [2022] EWCA Civ 1701, *AIG* was held by the Court of Appeal to have been wrongly decided.

154. The decision in *AIG* was summarized by the Court of Appeal in *MOL* as follows:

> "86 *The application was heard by Roger ter Haar QC sitting as a Deputy High Court Judge, who permitted the substitution sought. He did so primarily on the basis of CPR rule 19.5(3)(b) (which is the equivalent of Rule 38(7)(b) of the CAT Rules) …*
>
> *87. … the Deputy Judge rejected the contractors' argument that CPR 19.5(3)(b) was inapplicable because Limited had ceased to exist at the time that the proceedings were commenced and hence the proceedings were a nullity. The Deputy Judge did not, however, explain his conclusion other than to state that:*
>
> *"A situation where the proceedings would otherwise be a nullity is well within the situation in respect of which CPR Rule 19.5(3)(b) is intended to provide a remedy"*."

155. At [103], having considered the authorities before the Deputy Judge, the Court of Appeal in *MOL* concluded:

> "*Accordingly, in our judgment, the decision in AIG cannot be supported on the basis of the authorities to which the Deputy Judge referred. In our view, it was wrongly decided and should not be followed. The decision in AIG therefore casts no doubt upon the correctness of the Judgment that Rule 38 of the CAT rules does not permit the inclusion in the collective proceedings of claims by the personal representatives of persons who died before the Claim Form was issued on 20th February 2020*."

156. It was submitted by Mr Choo Choy that *Sardinina Sullis* referred to by the judge in *G4S* (above) was a line of authority which has not been overruled. I was not taken during submissions to that case. If and insofar as there is any inconsistency between the position under the specific Rules of substitution of a "non-existent claimant" named by mistake, in my view the weight of authority so far as the general rule is concerned is that a claim brought by a deceased person is a nullity and such a claim cannot be revived or cured by substitution. Rimer LJ in *Millburn* and quoted in *Jogie* stated:

> "*on any basis it appears to me clear that it is no part of the function of rule 19.8(1) to cure nullities and give life to proceedings such as the present which were born dead and incapable of being revived. In ordinary circumstances there is no reason why anyone with a legitimate interest in bringing a claim on behalf of an intestate's estate should not first obtain a grant of administration and so clothe himself with a title to sue*". [30]

157. It seems to me that even though the authorities were not concerned with CPR 17.1, it would be inconsistent with the views expressed by Rimer LJ and quoted in *Jogie* to conclude that the ability to substitute a claimant under CPR 17.1 can "*give life to proceedings such as the present which were born dead*".

158. Although there is now the express provision in CPR 17.1 which permits substitutions pre service, I accept that there are cases (such as the examples at the Commentary to the White Book at paragraph 19.2.5 dealing with substitution post service) where the existing party's interest or liability has passed to a new party, where the original claim is not a nullity and substitution will therefore be possible.

159. Further even if the Claimants in question who were substituted could have been validly added under CPR 17.1, this was not what was done and even though this may appear to place form over substance, in the light of the authorities the legal characterisation is different and results in different legal consequences.

Conclusion

160. For all these reasons I conclude 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.

Whether English grants of representation are required

Introduction

161. The Defendants seek strike-out of claims brought by the personal representatives of deceased persons on the ground that English grants of representation had not been obtained by the representatives before issue or (where applicable) the November 2019 or January 2020 amendments. It is common ground that it affects 105 Claimants (94 from the Viegas Claim and 11 from the Sanches Claim).

162. The Defendants also seek strike out of claims brought by heirs in their own names in respect of losses suffered by deceased persons unless the litigation rights of the deceased person were transferred to the relevant heir as recorded in the Brazilian register (*Formal de Partilha*) on the basis that they lack capacity to sue in their personal capacity as a matter of Brazilian law and in any event as a matter of English law they are representatives and required an English grant of representation.

163. The issue in relation to the heirs covers 3 different stages in the Brazilian process following a death: where inventory proceedings in Brazil had not yet opened; where inventory proceedings were open and an *inventariante* appointed; where inventory proceedings were closed but no entry in the register has been made.

164. It was conceded for the Claimants that of the 105, 37 who, at least as matters currently stand, have only advanced a claim expressly as a personal representative of the estate are not sustainable without an English grant of representation. However it was submitted that those Claimants, being heirs of the deceased persons are entitled to amend their claims by deleting the words of representation and advancing their claims in their own names as heirs of the deceased persons. It was acknowledged by the Claimants that under the line of authority from *Ingall v Moran* [1944] KB 160 the claim was a nullity which could not be revived by relying on a change of capacity but it was submitted that *Ingall* does not address the scenario where the claimant always had capacity.

Submissions

165. I note at the outset of this section that there were wide ranging submissions particularly on the part of the Claimants, with regard to the appropriate choice of law and the approach to categorisation. I have considered the transcripts of the oral hearing in preparing this judgment. However having reviewed the submissions, I have not felt it necessary to address in this judgment all the arguments which were advanced but have confined the judgment to addressing what I regard as the key points leading to my conclusions set out below.

166. The Claimants submitted that the Court had to categorise the nature of the proceedings. The Defendants submitted that the categorisation was itself a question of English law.

167. The Defendants submitted that:

    a. Title to sue in England is governed by English law: *Jennison v Jennison* [2023] 2 WLR 1017 and *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank Plc* [2015] EWHC 3052 6 (Ch).

    b. This is correct as a matter of principle because the cause of action (being a chose in action) is situated in England (*Dicey* Rule 136: "*Choses in action generally are*

situate in the country where they are properly recoverable or can be enforced") and any cause of action vested in a deceased person devolves upon his properly authorised personal representative: *Law Reform (Miscellaneous Provisions) Act 1932* section 1(1): "…*on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate*."

c. Bringing claims for the estate is the administration of the estate: *Cheshire & North Private International Law (15th ed)* at p1333: "*Administration therefore is usually followed by succession. The personal representative usually exercises his power to collect assets and to clear debts, pursuant to the law of administration, before distributing assets to beneficiaries under the law of succession*."

168. The Claimants submitted that:

a. The decision in *Jennison* related to the administration of an estate situated in England and the title of a purported representative to the estate; in *Pakistan* what the judge was dealing with was a dispute as to who should be the personal representative in relation to that estate, and the estate was a disputed fund in England within the jurisdiction.

b. What matters for the purpose of characterisation is that the heirs' claims are not brought as representatives of the estate, but as personal claims of the heirs in respect of the deceased person's losses. The mere fact that the claim is being pursued in England should not be treated as giving rise to an estate in England so that the pursuit of the claim is to be treated as being the administration of the estate.

c. Under Brazilian succession law:

i. the heirs have a personal entitlement to sue on or in respect of the assets, including any causes of action of the deceased, because all of a deceased person's assets, including any causes of action, against third parties immediately and automatically vest in the deceased person's heirs upon death (the legal principle of droit de saisine).

ii. the transfer of the deceased person's assets to that person's heirs takes the form of the heirs' acquisition of joint ownership of those assets as an undivided mass, pending the formal sharing of the inheritance among the heirs.

iii. until such formal sharing, the heir's rights of joint ownership include the right to take legal proceedings in an heir's individual name in order to claim the assets from third parties or defend those assets against third parties and thereby preserve the inheritance, of which the heir is a co-owner.

Discussion

169. The first question is the question of characterisation.

170. It was submitted for the Claimants that the relevant issue here is properly characterised as being whether an heir is personally entitled to sue on the Brazilian causes of action of the deceased persons.

171. It was submitted that:

    a. this characterisation fairly and accurately reflects the nature of the heirs' claims. They are claiming in their own names pursuant to the causes of action of the deceased persons, and in respect of the losses of the deceased persons;

    b. the challenge that is advanced is to their alleged personal entitlement to be able to sue in their own names and in their own right;

    c. the context for the claim supports their characterisation in that the heirs claim pursuant to the saisine principle as they have automatically stepped into the shoes of the deceased persons in relation to the causes of action.

172. It was therefore submitted for the Claimants that the underlying issues about whether and, if so, how the heirs have succeeded to the deceased person's causes of action are plainly and naturally an issue of succession.

173. I accept the submission for the Defendants that the question of characterisation, is a question for the *lex fori*, the *lex fori* being English law: Auld LJ in *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1996] 1 WLR 387 at p407B.

174. Thus it is a question of English law whether this is a succession issue or an administration issue.

175. The key authorities relied on by the Defendants were *Jennison* and *Pakistan*. In *Jennison* the claimant was appointed sole executrix by a will. The defendants challenged the standing of the claimant to bring the action as a personal representative on the basis that at the time of issue of the claim she had not obtained resealing of the grant of probate. In that case the Court of Appeal concluded that English law was 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 was immaterial. Further the question whether the claimant was to be considered to have acquired title to the deceased's cause of action against the defendants as the executrix appointed under his will was held to be properly characterised as one relating to the administration of a deceased person's assets. The relevant passages in *Jennison* are as follows:

> "*48. It is plain that, if the Chetty v Chetty approach is applied in relation to the will of a testator who was domiciled in New South Wales, a court in this jurisdiction will potentially treat an executor as having title to the estate when a New South Wales court would not. As Ms Meager accepted, on her case the claimant could have issued her claim before obtaining a grant of probate in New South Wales and, hence, at a time when, under New South Wales law, the deceased's estate was vested, not in her, but in the NSW Trustee in accordance with section 61 of the NSW Act. The claimant would have needed to be in a position to prove her title by the time the case came on for trial, by means of either an English grant of probate or a New South Wales grant and*

> *resealing, but, in the eyes of an English court, she would have had standing from the time of the deceased's death.*
>
> *49. There is, however, no doubt that English and Welsh law can diverge from that of New South Wales on whether a person appointed as an executor by a New South Wales testator has acquired title to assets in the estate. As Dicey, Morris & Collins on the Conflict of Laws states at Rule 156, "any property of the deceased which at the time of his or her death is locally situate in England" "vests automatically in his or her personal representative by virtue of an English grant". Supposing, therefore, that the claimant had obtained a grant of probate in this jurisdiction and not in New South Wales, she would undoubtedly have been considered to have title to property of the deceased in this country despite the estate being vested in the NSW Trustee as a matter of New South Wales law.*
>
> *50. As mentioned in paragraph 20 above, "[t]he administration of a deceased person's assets is governed wholly by the law of the country from which the personal representative derives his or her authority to collect them". It seems to me that the question whether the claimant is to be considered to have acquired title to the deceased's cause of action against the defendants as the executrix appointed under his will is properly characterised as one relating to the administration of a deceased person's assets. It appears to me, too, that, notwithstanding that the claimant obtained a grant of probate in New South Wales, it is from this jurisdiction that she derives her authority to collect assets here: after all, a foreign grant of representation is not without more recognised as having any force in England and Wales. That being so, the law of England and Wales is, I think, to be applied to the issue of whether the claimant acquired title to the deceased's estate on his death and New South Wales law on the point is immaterial. On that footing, the Chetty v Chetty approach is in point and the claimant is to be regarded as having acquired title to the cause of action against the defendants on the deceased's death and so as having had standing to issue the present claim when she did*." [emphasis added]

176. The Claimants sought to limit the ambit of the decision in *Jennison* as a decision which was implicitly characterising it as one of administration by virtue of the fact it was dealing with the authority of a personal representative:

> "[50] …*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...*".

177. However support for the Defendants' position can be taken from both the decision of Henderson J in *Pakistan* and *Cheshire & North Private International Law (15th ed)*.

178. In *Pakistan* it was argued that:

> "*[Muslim personal law applicable to the succession to the 7th Nizam's estate] 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…*". [27]

179. I note that the argument therefore in that case was similar to the present case in that it was said that the relevant property would have vested automatically in his heirs. However the judge rejected the submission that there was nothing to prevent the Nawab from making a direct claim to the relevant property as "*misconceived*" on the basis of both the authorities and as a matter of principle.

180. The relevant passages are at [27] – [31] as follows:

> "*27. I also need to deal briefly with an argument advanced by Mr Brown 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. 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.*
>
> *28. That argument, it seems to me, is not sustainable on the basis of authority which is both clear and binding on me. Under the English conflict of laws, the stage of administration of an estate is governed by the law of the place where the assets are situated, which, in the current context, means England. Procedural questions arising in the administration are, likewise, dealt with by the law of the place where the administration is taking place. It is only when one gets on to the question of succession and who is entitled beneficially to share in the estate that one looks to the law of the domicile of the deceased, where one is concerned, as here, with personal property.*
>
> *29. The disputed fund is situated in this jurisdiction. That remains the case, regardless of how it may vest in accordance with the Muslim personal law of the 7th Nizam. The authorities establish that claims to property in this jurisdiction can only be advanced by and through a properly constituted personal representative. That proposition is most succinctly stated by Warrington LJ in the case of Re Lorillard [1922] 2 Ch 638 at 645-6, where he said:*
>
> *"The principle is that the administration of the estate of a deceased person is governed entirely by the lex loci and it is only when the administration is over that the law of his domicile comes in."*
>
> *30. I was also referred to a first instance authority in the British Virgin Islands to similar effect, and to the decision of the House of Lords in New York Breweries Co. Ltd v Attorney General [1899] AC 62.*

> *31. On the basis of those authorities, and as a matter of fundamental principle, it seems to me that the argument advanced by Mr Brown is misconceived and does not provide an arguable basis for his client to claim directly in his alleged capacity as an heir.*" [emphasis added]

181. The Claimants sought to limit the import of this case submitting that it was "*a very brief argument based on very limited evidence apparently as to what Muslim personal law was*" and that the judge implicitly characterised it as an issue of administration probably because the application was concerned with who was the appropriate representative to be appointed.

182. It does not seem to me that the application in that case turned on the strength of the evidence as to the domestic law of succession. Further and more significantly it is clear that the judge at that point in the judgment was dealing not with the appointment of the appropriate representative but a separate argument that there was no estate for an English personal representative to administer and nothing to prevent the Nawab from making a direct claim to the relevant property.

183. It was submitted for the Defendants that:

> "*as a matter of English law in this court, you have to ask if the heirs have succeeded to the assets in the sense understood in this jurisdiction. And that's what the High Commissioner of Pakistan demonstrates*."

184. It was submitted for the Claimants that the pursuit of the heir's claims against the defendants in an English court is not properly to be characterised for this purpose as the administration of the deceased person's estate in England. It was submitted for the Claimants that because of *saisine*, the heirs or any one of them becomes immediately and automatically entitled to exercise the rights for himself.

185. However it is clear from *Pakistan* that as a matter of English law the automatic transfer under the principle of *saisine* is not recognised as succession.

186. This is reflected in *Cheshire & North Private International Law (15th ed)* at p1325:

> "*The modern legal systems which have had their origin in English law differ fundamentally from the civil law jurisdictions with regard to the procedure by which property is administered after the death of its owner. In England the only person entitled to deal with the property is the person to whom a grant has been made by the court…*
>
> *In the civil law countries, in the rare case where personal representatives are appointed, their duties and functions are generally of a supervisory nature widely different from those of their English counterparts. The 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...*
>
> *The striking difference between English and civil law practice is that in the latter case the property passes on death directly to the successor, but in England it cannot be dealt with by anyone without a public grant. The*

> *automatic transfer recognized by civil law systems cannot operate on property of the deceased situated in England. Succession to movables is governed by the law of the deceased domicile, but no matter what that domicile may be, nobody can rightfully and effectually obtain possession of movable property situated in England unless he gets an English grant of probate or of administration. An English grant is always required in order to provide authority to administer English asset.*" [emphasis added]

187. It was submitted for the Defendants that succession as a matter of English law revolves around the distribution of specific assets to specific beneficiaries. Succession takes place when those assets cease to form part of the deceased person's estate and form part of the beneficiary's personal estate.

188. The Defendants relied on the following passage at p1333 in *Cheshire & North*:

> "*Administration therefore is usually followed by succession. The personal representative usually exercises his power to collect assets and to clear debts, pursuant to the law of administration, before distributing assets to beneficiaries under the law of succession*."

189. It seems to me that the above passage merely reflects what "usually" happens namely that administration is followed by succession. However in my view the distinction between administration and succession lies not in the timing but in the nature of the process. In the immediately preceding passage *Cheshire & North* make the point as follows:

> "*Administration concerns the procedure to deal with the deceased's estates including grants of representation, the representative's power to collect the deceased assets and pay debts, order of priority for the payment of creditors, and the power of the representative to handle the deceased assets such as postponing the sale. Succession concerns the substantive rights such as the beneficial entitlement to the deceased's estate.*" [emphasis added]

190. In the following paragraph *Cheshire & North* [p1333] state:

> "*Disputes on classification may also arise in cases where an heir, to whom the deceased's estates may pass directly under the foreign law, applies to enforce foreign judgments concerning the deceased's estate in England or bring actions in England to recover the deceased assets. It has been argued that these actions do not concern succession but administration of estates and the foreign heir has no interest to bring any action in relation to the deceased's property in England before obtaining a grant from the English courts. The courts, though accepted the classification as a matter of administration, recognised the heir's interest to enforce a personal rights (sic) acquired pursuant to the choice of law of succession.*"

191. The authority cited for that proposition is *Haji-loannou (Deceased) v Frangos* [2009] EWHC 2310 which in turn refers to *Vanquelin v Bouard* 15 CB (NS) 841.

192. At [74] in *Haji-loannou* Slade J said:

> "*In my judgment the case of Vanquelin v Bouard 15 CB (NS) 841 (19.11.1863), relied upon by Mr Millett, 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 representative capacity*." [emphasis added]

193. It is convenient to refer to the summary of the issues in *Vanquelin* by reference to *Cheshire & North* [p1336]:

> "*A widow in France became donee of the universality of the succession of her deceased husband. By French law she was, as such donee personally liable for her husband's debts and personally entitled to his property. She paid to an indorsee the amount of a bill of exchange that her husband had drawn and later brought an action in England to recover this amount from the acceptor.*
>
> *It was held that there were two grounds on which the widow must succeed. First the right that she sought to enforce was one that she had acquired personally since it arose from a payment made by her after her husband's death. Secondly her position as donee gave her, according to French law, a personal right to recover the sum from the acceptor*."

194. In his judgment Erle CJ in *Vanquelin* at page 827 set out his reasoning on the second count, that the widow had a personal right to recover the debt and was not suing as a representative:

> "*the ground of the demurrer to these two counts is that the plaintiff is in effect suing in a representative character which he cannot do without having obtained letters of administration in this country. The allegation in both counts is that, being donee of the universality of the personal and real estate belonging to the succession of her deceased husband, the plaintiff became according to the laws of France entitled to all the property and rights of the deceased absolutely in her own right and not in any representative capacity. I am of opinion that that averment if it were necessary to stand upon it must be taken to be true and so it appears upon the record that the law of France in which country all the parties were domiciled would give her a locus standi to sue there in her personal capacity... 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 domicile 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.*" [emphasis added]

195. Citing *Vanquelin* under the heading "*Foreign Administrators*" *Cheshire & North* state [p1335]:

> "*Although a foreign administrator is not permitted to sue in England as the representative of the deceased, he may enforce by action a right that is personal to him and which he is entitled to assert in his own individual capacity, even though it is connected with the estate that he is administering.*" [emphasis added]

196. It was submitted for the Claimants that the heirs' claims are not claims brought in a representative capacity on behalf of the estate. They are personal claims brought by the heirs in their own right as co-owners of the inheritance.

197. It was submitted for the Defendants that the Claimants can only succeed if they persuade the Court that the relevant Claimants became beneficially entitled to the causes of action, as a consequence of the *saisine* principle, such that succession to those causes of action took place immediately on the death of the deceased person and that if the heir succeeded personally to the cause of action immediately upon the death of the deceased, that cause of action did not form part of the deceased person's estate but forms part of his personal estate such that the heir is entitled to continue his claims through to judgment and if the heir succeeds, and obtains damages, he receives those damages as part of his personal estate.

198. As referred to above, on the authorities, the fact that the assets passed to the relevant Claimants as a consequence of the *saisine* principle does not affect the analysis under English law. Insofar as the claim is brought before the distribution of the assets to the beneficiaries 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.

199. If notwithstanding the recent decisions in *Pakistan* and *Jennison*, the issue of the entitlement of the heirs to bring the claim should be characterised as an issue of succession rather than administration, it would seem that as stated in *Haji-Ioannou*, the heir would have to have, as a matter of Brazilian law (the law of the domicile), "*an absolute entitlement to a deceased's property in accordance with the law of their domicile*" or as stated in *Vanquelin* the cause of action would have to have "*vested in the plaintiff personally and absolutely in the same manner to all intents and purposes as they were vested in the deceased*".

Brazilian law

200. Turning then to consider the position under Brazilian law, the issue as to whether heirs can commence proceedings in a personal rather than representative capacity as a matter of Brazilian law was broken down by the Defendants (paragraph 54 of its skeleton) into two sub-issues:

    a. whether heirs have standing to commence proceedings on behalf of deceased persons as a matter of Brazilian law, or whether when inventory proceedings are

open only the *inventariante* has standing to commence proceedings on behalf of the deceased estate and when inventory proceedings are closed, whether the heir is only entitled to commence proceedings if the litigation rights were transferred to them following the distribution of the assets and recorded in the *Formal de Partilha*;

b. whether Brazilian law permits heirs to pursue claims in their personal capacity i.e. solely for their own benefit rather than a representative capacity i.e. for the benefit of those interested in the estate of the deceased person.

201. The Defendants submitted that when one looks at Brazilian law, a "personal action" tells you nothing about the substance of whether the action is brought in a personal capacity or in a representative capacity. If the heir holds it for his own personal rights and the rights of co-heirs, it is not an absolute personal entitlement.

202. The view of the Defendants' expert, Mr. Laudisio, was that there are limited exceptional circumstances where a person other than the *inventariante* can represent the estate but those circumstances do not apply on the present facts and that heirs are only entitled to bring claims in their personal capacity once the litigation rights have been transferred and recorded in the *Formal de Partilha*.

203. However after cross examination of the Brazilian law experts it seemed to me that in closing oral submissions the Defendants no longer based any great reliance on the first sub-issue. To the extent that Brazilian law is relevant, the Defendants' case rested rather on the second issue.

Concurrent standing

204. In light of the approach taken by Mr Kennelly KC in oral closing submissions I will not deal in any length with the Brazilian law evidence whether heirs had concurrent standing to bring a claim whilst inventory proceedings are open. However it is necessary to address it briefly as it underpins the Defendants' application for strike out in relation to the claims brought by heirs where the heirs appointed one of the Relevant Bodies pursuant to a power of attorney (considered below).

205. The evidence of Professor Schenk in the Joint Expert Report was that:

> "*1.2 The heirs have, concurrent standing to sue, with the estate (represented by the provisional administrator or the inventariante), to bring claims in their own name in defence of the interests of the entire estate, provided that there is no distribution*."

206. Mr Laudisio's evidence on this issue was that:

> "*The law authorises the inventariante to represent the estate in court, as provided for in Articles 75 and 618 of the Brazilian Civil Procedure Code. There is no article in the law that grants concurrent standing to the heirs. There is jurisprudence that authorises the heirs to propose measures to defend the estate's assets in urgent and specific situations, but these decisions are not binding under the Brazilian legal system.*"

207. In short I preferred the evidence of Professor Schenk on this issue to that of Mr Laudisio for the following reasons.

208. Professor Schenk's area of practice clearly covered succession law: from his CV in his report I note that he is currently a partner at the law firm, Terra Tavares Ferrari Schenk Elias Rosa Advogados, his practice encompasses the representation of clients in proceedings related to Succession Law, Commercial Law, Administrative Law and Regulatory Law and since 2013 he has been a Professor of Civil Procedural Law at UERJ's Law School, where he teaches subjects at graduation, master's, and doctoral levels, including subjects related to *Inventário* and Estate Distribution.

209. Mr Laudisio was a Brazilian lawyer with more than 37 years of experience. For 8 years (to 2000) he was a judge in the Federal Court of São Paulo dealing mostly with civil, fiscal and social security issues. He stated that he "regularly presided over cases involving questions of Brazilian probate law. In social security cases in particular, it was common to encounter the issue of the death of the claimant during the proceedings. In these cases there were various succession law issues which had to be addressed and decided upon." Since then Mr Lausidio had worked first in house and then on his own account. Although he asserted that he comes across questions of Brazilian probate law I entertained some doubts, given the nature of his experience as a judge and in legal practice, as to whether he could in fact give expert evidence on these highly specialist issues.

210. Accordingly where there was a conflict in the evidence of the two experts, I was inclined to prefer the evidence of Professor Schenk. This was reinforced by the substantive evidence which Mr Laudisio gave in cross examination in relation to the cases relied upon by Professor Schenk, which evidence I found inherently unsatisfactory and not persuasive.

211. In essence Mr Laudisio's evidence in cross examination on the cases identified was that each of the decisions were not decided on the basis of the stated reasoning in the judgment but were dependent on the particular context, even though on the face of the judgment the matters he relied upon were not referred to. Whilst this might explain a particular decision, given the reasoned judgment setting out the relevant law, this seemed unlikely to have been the position in each of the cases.

212. One example was Special Appeal 1192027 in which the appellant, filed an action for the recognition of property rights claiming that upon the death of her parents she had inherited jointly with her siblings ownership of a farm, a portion of which had been taken by a company. The company's contention was that the daughter, heir, of the deceased parents, lacked standing because she was not the *inventariante* and the *inventariante* were two other individuals. The Court held that "*... the estate is represented in court by the executor. However, such representation does not exclude, in cases where the distribution has not occurred yet, the legal standing of each heir to claim in court the property received as inheritance. Thus, there is a joint standing to claim*." Although there was no reference to a need for urgency in the reasoning Mr Laudisio said that was the reason for the decision.

> "*Q. There is no reference in the court's reasoning either to urgency being the basis of the heir's entitlement to sue, or the particular nature of the property, is there?*

A. Maybe there is not here, but the action itself shows the urgency of the situation…".

213. In relation to another of the cases when asked why his interpretation did not reflect what was stated in the judgment, his evidence was that in the cases, "*they are putting the law into the facts. We cannot say that they are generally giving, analysing the law itself…*" a response which was not compelling or persuasive.

214. Whilst cases do not amount to binding precedent under Brazilian law, the evidence of Professor Schenk was that they were guidance to lower courts and judges and the cases identified and considered in detail in cross examination clearly showed multiple instances where heirs had been permitted to bring proceedings in their own right and clear general statements of the right to do so under Brazilian law.

215. In relation to the issue of assignment (discussed substantively below) it was notable that in cross examination Mr Laudisio disagreed with the position set out by the Defendants in their Supplemental Skeleton at 56.1 as representing his written evidence on Article 1.793 (dealing with the requirement for judicial authorisation for assignments). This evidence was a departure from the position stated as his view in the Joint Expert Report, a departure which did not appear to be adopted by counsel for the Defendants in oral closings. His oral evidence in this regard which appeared to ignore the clear language of the relevant Article (as well as contradicting his own written evidence) also served to undermine Mr Laudisio's overall credibility as an expert.

216. By contrast I found the evidence of Professor Schenk persuasive. As well as relying on the case law he addressed the Articles on which Mr Laudisio relied, Articles 75 and 618 of the Brazilian Civil Procedure Code ("BCPC").

217. BCPC Article 75 specifies who can issue claims in various situations. In the case of claims vesting in an estate, it states that the person with standing to sue is the *inventariante*. There is no mention of heirs having standing to sue.

218. Article 75 provides:

"*The following shall be represented in court, as plaintiffs and defendants:*

I - the Federal Government, by the Office of the General Counsel to the Federal Government, either directly or through connected authorities;

II - the State and the Federal District, by their State Prosecutors;

III - the Municipal District, by its mayor or municipal aftorney;

IV - government agencies and foundations governed by public law, by whomever the law of federal entity appoints

V - the bankruptcy estate, by the bankruptcy trustee;

VI - the unclaimed or heirless estate, by its curator;

VII - the inheritance, by the administrator/inventariante;

…"

219. Professor Schenk's evidence in cross examination was that you can see that in Article 75 they are talking about representation and there are different bodies or companies or other entities created by the Brazilian law, and the legislator in this case needed to indicate someone with procedural capacity to represent them in court. These are cases where there is a need to specify the representative which has capacity to bring claim whereas it is not necessary for an heir which brings his claim as an owner.

220. BCPC Article 618 similarly states that it is the responsibility of the *inventariante* to represent the estate. Again, it makes no reference to the deceased's heirs having standing.

221. Article 618 provides:

> "*The inventariante is responsible for:*
>
> *I - representing the estate as plaintiff or defendant, in or out of court, observing, in relation to the ad litem, the provisions of Article 75, Paragraph 1;*
>
> *II - managing the estate, safeguarding the assets with the same level of diligence used as if such assets were their own;*
>
> …"

222. Professor Schenk's evidence in cross examination was that the heir does not assume the administration of the estate - these are separate things which do not exclude the possibility that the heir can bring a claim in his own name:

> "*The administration of the inheritance, which is the responsibility of the inventariante, doesn't confused with the right of the heirs to bring a claim as well… I agree that this is the responsibility of the inventariante and before assuming this role, the provisional administrator responsible for that, but they are separate things. The list of duties of the inventariante is definitely much wider. What I say in my report is this duty of the inventariante, which is wider, includes one of the items if the representation in court it does not exclude the possibility of the heir to also bring a claim in their own name, their share in the inheritance, their own share in the inheritance*."

223. Professor Schenk was also asked in cross examination about Article 1.991 of the Brazilian Civil Code which he did not refer to in his report:

> "*The administration of the inheritance will be exercised by the administrator [inventariante] of the estate from the execution of the commitment up to the ratification of the sharing of the inheritance.*"

224. His evidence was that there is no reference to the heirs in the administration of the assets because that is the duty of the *inventariante* or the administrator but this cannot be confused with the exercising of the right by the heir of defending in court their own rights which they have acquired with the inheritance.

225. I accept the evidence of Professor Schenk which was in my view persuasive and find that heirs had 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.*

Succession

226. Turning then to the second issue which is 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*.

227. The Defendants formulate the issue as whether Brazilian law permits heirs to pursue claims in their personal capacity i.e. solely for their own benefit rather than in a representative capacity i.e. for the benefit of those interested in the estate of the deceased person. In closing submissions it was submitted for the Defendants that:

> "*…even on Professor Schenk's case that the heirs have concurrent standing… any claim which the heir brings before the sharing takes place in order to defend the assets of the entire inheritance. The assets representing the estate of the deceased person are being defended. The heir is not bringing the claim in the same way as if he had personally suffered loss and damage… If an heir successfully pursues a claim before the sharing takes place, before the assets distributed, any sums which the heir receives will not be his own personal assets…The heir is required to treat those sums as forming part of the estate which are subject to the sharing*."

228. It was submitted for the Claimants that under Brazilian succession law:

a. the heirs have a personal entitlement to sue on or in respect of the assets, including any causes of action of the deceased, because all of a deceased person's assets, including any causes of action, against third parties immediately and automatically vest in the deceased person's heirs upon death under the legal principle of droit de saisine (Article 1.784 of the Brazilian Civil Code);

b. under Brazilian law the transfer of the deceased person's assets to that person's heirs takes the form of the heirs' acquisition of joint ownership of those assets as an undivided mass, pending the formal sharing of the inheritance among the heirs (Article 1.791); and

c. until such formal sharing, the heir's rights of joint ownership include the right to take legal proceedings in an heir's individual name in order to claim the assets from third parties or defend those assets against third parties and thereby preserve the inheritance, of which the heir is a co-owner (Article 1.314).

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…*".

Conclusion

240. The position under English law was set out by Henderson J in *Pakistan:*

> "*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…*". [28]

241. Applying the authorities of *Pakistan* and *Jennison* I find that 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 claim is brought by the heir as part of the administration of the estate.

242. In line with *Haji-Ioannou* the issue would only be one of succession where the heir:

> "*... 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 representative capacity*."

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. Even if, under English conflicts law, Brazilian law is the most appropriate law, it does not alter the conclusion on the characterisation. 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.

Whether there was authority for the Claimants' solicitors to bring claims

245. The Defendants seek to strike out the claims which were brought without the informed consent of the Claimant and/or without the Claimants' solicitors having the authority to issue and pursue proceedings on their behalf by reason of those claims having been brought:

    a. By persons who were deceased;

    b. On behalf of deceased persons where it is stated "instructions pending";

    c. By personal representatives of deceased persons where (i) that authority to issue and progress the claim was derived from an assignment of the right to conduct the claim to the Brazilian Association of Citrus Growers, the Federation of Agriculture of the State of São Paulo and/or Prisma Capital Ltd (the "Relevant Bodies") and (ii) the personal representatives were not authorised to assign the right to the Relevant Bodies; and

    d. By heirs of deceased persons where (i) that authority to issue and progress the claim was derived from the relevant heir appointing one or more of the Relevant Bodies as their attorney and (ii) the heir was not authorised to enter into the power of attorney.

246. It is conceded by the Claimants (paragraph 7 of its skeleton) that:

    a. the seven claims which were brought and remain in the names of Claimants who were deceased fall to be struck out.

    b. the two claims which were brought and remain in the form "instructions pending, a personal representative of the estate of [X]" (that is, without any named person as Claimant) fall to be struck out.

247. In relation to the powers of attorney it was accepted for the Defendants that this issue is dependent on whether the heirs have concurrent standing. This appeared to be accepted by Mr Laudisio in cross-examination:

> "*Q. All right. So in those cases, in those cases, where an heir can legitimately bring a claim in its own name in the exercise of its rights of co-ownership, presumably you accept that in those cases the heir must necessarily be entitled to authorise lawyers to act on its behalf?*
>
> *A. Yes, in this case, yes.*"

248. Given my findings above on the concurrent standing of heirs to bring claims, the application to strike out this category of claim must fail.

249. In relation to the assignments to the Relevant Bodies, the issues are whether such assignments require a public deed and/or judicial authorisation.

250. Mr Laudisio's oral evidence was that, in order for the assignment of litigation rights to be valid, prior judicial authorisation is required (although as noted above this

appeared to contradict his written evidence). Otherwise the assignment of the claim will be null and void. In addition it requires a public deed.

251. Professor Schenk's evidence (paragraphs 61-63 of his report) was that:

> "*61. Upon causa mortis succession, assets and rights of which the inheritance is composed become immediately part of the heirs' patrimony in an undivided manner, as seen in item 5.2 of this Opinion. Consequently, heirs may transfer these hereditary rights over the hereditary share to third parties, in whole or in part, onerously or gratuitously. This is the so-called assignment of hereditary rights, which can be made from the opening of the succession until the distribution (article 1,793, CC 74). For such assignment, a public deed is required, and prior judicial authorization is not needed. The absence of a public deed entails the nullity of the assignment (art. 166, IV, CC 75), although there are methods under Brazilian law by which the intended purpose of the act can still be achieved, as will be seen below.*
>
> *62. The Brazilian civil law also authorises the assignment of inheritance rights over individualised assets or rights. Prior court authorisation is ordinarily required for an heir to dispose of property (article 1,793, par. 3, CC 76). If there was no prior court authorisation, the assignment of an inheritance right over an individualised right or asset prior to the distribution shall be ineffective against the other heirs (article 1,793, par. 2, 77 CC). To emphasise, the absence of prior court authorisation does not entail the nullity of the assignment made on individualized assets or rights, only the ineffectiveness. This is in order to protect the legal situation of other heirs, insofar as, until the distribution among all the heirs occurs, it is not possible to specify what will be the effective patrimony to share, nor to know to which heir will belong each individualized asset or right.*
>
> *63. Thus, prior court authorisation for the assignment of inheritance rights over individualized assets or rights before distribution can be exempted if there is only one heir or if all heirs agree to the assignment. In these cases, the assignment made by public deed will be valid and effective, even if there was no prior court authorisation*". [emphasis added]

252. Article 1.793 provides:

> "*The right to the open succession, as well as the portion available to the co-heir, can be object of assignment by public deed.*
>
> *Paragraph 1…*
>
> *Paragraph 2 - The assignment, by the joint heir, of their hereditary right over any property of the estate considered singularly is ineffective.*
>
> *Paragraph 3 - Pending indivisibility, the disposition, by any heir, of a component asset of the inheritance, without prior authorisation from the succession judge does not produce any legal effects.*"

253. The Defendants challenged the evidence of Professor Schenk that the requirement of prior judicial authorisation may be waived with the consent of all the heirs or the single heir and that lack of judicial authorisation only renders the assignment ineffective against the other heirs. It was submitted that it is not credible that such rights can be assigned to third parties without complying with the express protections which are explicitly set out in the Brazilian legislation particularly when Professor Schenk accepts that where an *inventariante* assigns a claim it can only be done having heard from interested parties and with judicial authorisation.

254. In cross examination it was put to Professor Schenk that it is odd that where the *inventariante* wishes to assign a right before the sharing, the *inventariante* must have prior court authorisation, but the heir is not required to obtain prior court authorisation.

255. Professor Schenk rejected this:

> "*In this case here, the inventariante represents the estate and the estate administers the interest of the heirs. When the inventariante, who is a representative, wants to alienate an asset it needs law -- need judicial authorisation in his capacity as a representative. Now I want to draw your attention. Now we're looking at a very different situation here. The heir who received the asset at the point of the death of his father, for example, the heir immediately receives the inheritance rights. And if he wishes -- it's a personal right. It's a right that has been received with the inheritance. If the heirs wants to transfer, assign this right it to a third party, he can do so, because he is disposing of an interest which is his own. This is the difference.*"

256. As referred to above I consider that Professor Schenk had the requisite experience to give evidence on these issues and I accept the logic of his evidence on this point. As also discussed above, Mr Laudisio's oral evidence contradicted his own written evidence on this issue generally and I do not regard his evidence as reliable.

257. It was also put to Professor Schenk in cross examination that there is nothing in the language of Article 1.793(3) that prior court authorisation for the assignment of rights over individualised assets or rights before distribution can be exempted if there is only one heir or if all heirs agree to the assignment.

258. Professor Schenk's evidence was that this is the only possible interpretation for the Article 1.793 which is coherent with this system of indivisibility and that this interpretation was not exclusively his but has been reflected in a decision of the Justice Cueva.

259. It seems to me that his view was supported both by the principle of co-ownership and by the case to which he referred and I accept his evidence that no court authorisation is required if there is only one heir or if all heirs agree to the assignment.

260. It was put to Professor Schenk that a failure to obtain court authorisation would render the assignment a nullity by virtue of Article 166 of the Civil Code.

261. Professor Schenk rejected this as follows:

> "*Article 1.793 at the head of the article it demands a public deed for the assignment. A public deed or the absence of a public deed demands the application of Article 166. The absence of a public deed causes this section to be null… you can notice at the beginning of Article 166 that we read "it is null". That is different from when we read in 1.793, second and third paragraphs, when we read "inefficacy". And we make a distinction in Brazil three different plains or approaches for the business, the legal business, the existence of a legal business, validity of the legal business, and efficacy of the legal business. The inefficable legal business exists, is valid, but depends on the implementation of a condition to bring it to effect… I want to emphasise that whenever the legislature wants to change the consequence of the non-observation of a requirement, that is done in an express way, obvious way. Article 1.793 explicitly talks about inefficacy. So it is not right to understand the term inefficacy of Article 1.793, third paragraph, as it were, nullity. These are different concepts of the existence, validity and efficacy of the legal act. They're different.*"

262. In my view Professor Schenk gave a satisfactory and credible explanation as to why the position of the *inventariante* is different from the position of heirs and as a result why heirs can assign rights to third parties without the protections which apply to an *inventariante* and where the consent of the other heirs has been obtained, without the protections stipulated.

Relief and Directions

263. It seems to me that the question of relief and directions (paragraphs 10 to 11 of the draft order) should be dealt with at the consequential hearing when the parties have had an opportunity to consider the findings above. I am particularly conscious in this case that the scope of the applications broadened up to the point of the skeletons and whilst no objection was pursued by the Claimants in relation to the amended grounds, the consequences for individual Claimants and the various capacities in which they bring claims is still being reviewed by the Claimants' solicitors. I note that according to the Claimants' skeleton, many of the 1,525 claims by individuals are interconnected, because claims are advanced by business partners or different members of a family group who collectively owned an orange growing business, and/or because (as matters currently stand) several Claimants currently claim in right of the same deceased person. I also note that the evidence is that steps have already been taken to ensure that all of the claims in these proceedings are ratified.

264. In relation to the assignments, the consequences of these findings are a matter which will have to be resolved once further information is available as to the circumstances surrounding the assignments.