In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. 115

B E T W E E N:

DAVID WILLIAM COX

Plaintiff

and

(1) ROSANNA MARIA COX
(in her personal capacity and as an Executor and Trustee of the Last Will & Testament of William Milner Cox dated 19 July 2020)

(2) AMANDA JEAN SKINNER
(in her capacity as an Executor and Trustee of the Last Will & Testament of William Milner Cox dated 19 July 2020)

(3) DAVID GEORGE GOODWIN
(in his capacity as an Executor and Trustee of the Last Will & Testament of William Milner Cox dated 19 July 2020)

Defendants

JUDGMENT

Before:	**Hon. Alexandra Wheatley, Acting Puisne Judge**
Appearances:	**Mr David Kessaram of CHW Limited, for the Plaintiff** **Mr Jai Pachai of WQ Limited, for the First Defendant**
Date of Hearing:	29 January 2024
Date Draft Circulated:	22 May 2024
Date of Judgment:	28 May 2024

Executors and Trustees; Will; Administration of Estate; Section 22 of the Administration of Estates Act 1974; Standing of Beneficiary of an Estate to Bring an Action; Derivative/Representative Action; Exceptional and/or Special Circumstances; Personal Proprietary Interest; Inchoate Property; Unadministered Estate

JUDGMENT of Acting Justice, Alexandra Wheatley

Introduction

1. The Plaintiff in this matter filed a Specially Endorsed Writ of Summons on 31 March 2023 (**the Writ**). In the statement of claim therein (**the Claim**), the Plaintiff has asserted ownership against the First Defendant of two items of furniture and furnishings, namely a mahogany tall boy (**the Tall-Boy**) and a gilt French mantel clock (**the Mantel Clock**) (hereinafter collectively referred to as **the Chattels**).

2. The relief being sought by the Plaintiff in the Writ, inter alia, is as follows:

> "*1. A declaration that the Plaintiff is entitled to the mahogany tall boy and gilt French mantle clock pursuant to clause 5(c) of the deceased well pending the administration of the deceased's estate.*
>
> *2. An order that the First Defendant deliver up possession of the mahogany Tall-boy and gilt French mantle clock to the Plaintiff at Mayflower, 15 Mayflower Drive, Devonshire Parish forthwith to be held by and for the Plaintiff pending the administration of the deceased estate.*"

3. On 21 September 2023, a consent order (**the Consent Order**) was made agreeing for the trial of a preliminary issue and granting the First Defendant leave to amend her Defence.

4. In the First Defendant's Amended Statement of Defence filed on 25 September 2023 (**the Amended Defence**), the Plaintiff's Claim is denied not only of the basis that the Chattels are owned by her, but also that the Claim should be dismissed based on the Plaintiff's lack of standing and the court's jurisdiction to entertain his claim. Paragraph 1 (a) of the Amended Defence states as follows:

> "*Without prejudice to the following, the First Defendant denies that the Plaintiff has any standing to bring this action or that the Supreme Court of Bermuda has any jurisdiction or power to make the order sought by the Plaintiff for the reason that, as admitted in the Plaintiff's statement of claim, no probate has yet been made to the defendants as executors of the deceased will, such that all property of the deceased, including any right of action, rest and the defendants as executors of the deceased will and they are responsible to collect in the deceased estate, to clear it of debts and*

liabilities and to distribute the estate in accordance with his will as and when probate is granted." [Emphasis added]

5. The issue to be tried at this stage arises out of paragraph 1 (a) of the Amended Defence and is referenced follows in the Consent Order:

> *"5. The issue of standing/jurisdiction of the Court shall be determined as a preliminary issue prior to the substantive trial of this action;*"

Background

6. The basic facts of this case are not in dispute. On 30 July 2020, William Milner Cox (**Mr Cox**) passed away and left a will which was dated 19 July 2020 (**the Will**). In the Will, Mr Cox named the three defendants in this action as executors and trustees of his estate. The First Defendant is the widow of Mr Cox and is one of the three executors named in the Will. The Second Defendant is a daughter of Mr Cox and is one of the executors. The Plaintiff is named as a beneficiary and is referred to as "David" in the Will.

7. The Will provided, inter alia, in clause 5 (a) that the First Defendant, should have the right to occupy the former matrimonial home (**Mayflower**) rent free for a period not exceeding two years from the date of his death. Provisions were made for the retention and distribution of the contents of Mayflower by clauses 5(b) and (c):

> "*b) **UPON ROSANNA's** departure from the Mayflower property at the end of the Rent-Free License Period, ROSANNA shall be entitled to retain all contents of the Mayflower Property (including for the avoidance of doubt artwork) acquired after my marriage to ROSANNA in her sole discretion, and such items of contents shall constitute matrimonial property **("Matrimonial Property")**.*
>
> *c) **UPON ROSANNA's** departure from the Mayflower Property at the end of the Rent-Free License Period, **I DIRECT MY TRUSTEES** to give any contents of the Mayflower Property inherited or acquired by me prior to my marriage to Rosanna (and/or any Matrimonial Property not retained by Rosanna) unto my son, **DAVID** absolutely.*" [Emphasis added]

8. In anticipation of the First Defendant's departure from Mayflower, the executors and trustees had meetings and discussions at Mayflower to identify and agree upon those items of household furniture and furnishings which were to remain in the Mayflower for the benefit of the Plaintiff and those items which the First Defendant was entitled to remove in accordance with the Will. This resulted in a final inventory agreed upon by the executors and trustees on 3 May 2022 (**the Agreed Inventory**).

9. In the Agreed Inventory under the heading "Mayflower inventory - Rosanna Cox – As of May 3, 2022" and subheading of "dining room" at item number two is the reference to "mahogany chest on chest" which is the Tall-Boy. The First Defendant says she purchased the Tall-Boy and as such is her property. There is no mention of the Mantel Clock in the Agreed Inventory. It is the First Defendant's position that this was given to her by Mr Cox during his lifetime and therefore would be retained by her. Shortly after the Agreed Inventory was completed, the First Defendant vacated Mayflower.

10. As it relates to the probate of Mr Cox's estate, competing applications have been filed with the Court. No grants have been issued in respect of these applications.

The Plaintiff's Position

11. The Plaintiff's position can be summarized as follows:

    a. The fact that no grant of probate has been made in Mr Cox's estate is irrelevant;

    b. Standing is not dependent on the Plaintiff being able to show that at the time of the trial he has a proprietary interest in the Chattels;

    c. It is sufficient to satisfy the court that the Plaintiff:

        (i) has an interest in the estate by reason of his entitlement under the Will to the Chattels; and

        (ii) that the Claim is brought on behalf of the estate; i.e. a derivative action.

12. It is not disputed that upon the death of Mr Cox, the entire ownership of all real and personal property belonging to the estate is vested in the executors named in the Will in accordance with Section 22 of the Administration of Estates Act 1974 (**the Act**).

13. Mr Kessaram submitted that nevertheless, the Plaintiff has an inchoate property in the Chattels and that such an interest is legally recognized and is capable of transmission on death. Mr Kessaram relied on Halsbury Laws of England, Volume 102 (2021), paragraph 1142 which states as follows:

> "*The bequest of a legacy, whether general or specific, transfers only an incoherent property to the legatee: the executor's assent is necessary to render it complete and perfect. The right is one which devolves on the legatee's personal representatives should he die before the assent is given.*"

14. Butterworths on Wills, Probate and Administrative Service was also relied on, paragraph 2.75 states:

> "*Whilst the estate is still being administered, the entire ownership and the deceased unadministered assets lies in the personal representatives for the purposes of administration, without any distinction between legal and equitable interest. No beneficiary in the meantime, whether under the deceased will or intestacy, has any proprietary interest in any particular asset comprised in the unadministered estate. The beneficiary's entitlement during this. Is to a chosen action, namely the right to require the deceased estate to be duly administered (by an administration action, action for an account etc). The chosen action is transmissible intravenous or on death, so that if, for example, a beneficiary dies whilst the administration is still incomplete, his personal representatives will have the right to enforce it for the benefit of those entitled under his will or intestacy.*"

15. Therefore, Mr Kessaram submitted that the Plaintiff has an interest and upon the due of administration of the estate being a beneficiary to whom the Chattels were bequeathed in the Will. Such an interest would give the Plaintiff standing to bring an administrative action.

16. It is the Plaintiff's position that this action is brought on behalf of the estate and as such is a derivative action. A derivative action may be brought by a beneficiary of an estate (or a trust or a minority shareholder of a company) on behalf of the estate representatives to recover damages or an accounting of money or property to which the estate is entitled. There is standing to bring this action as there are special circumstances by reason of which the action cannot or will not be brought by the person entitled to bring it, i.e., in this case, the executors. If successful, the damages or property recovered in the action will be paid or delivered to the executors or to someone on their behalf. Mr Kessaram submitted that the beneficiary who makes the derivative claim does not benefit directly by being awarded the damages or delivery of the property for his own benefit; but rather, benefits indirectly by the recovery of the property by the estate to be held beneficially for him after administration has been completed.

17. Mr. Kessaram says that this is a derivative action brought by the beneficiary of a trust. He relies on Lewin on Trusts at paragraph 43.05 where it is stated as follows:

> "*However, as an alternative to proceedings brought in the name of trustees, a beneficiary may, sometimes, bring an action his name on behalf of the trust against the third party. the fact that the action is brought in the name of the beneficiary rather than the name of the trustees does not alter its character. The action is a derivative action in which the beneficiary stands in the place of the trustees and sues in right of the trust and does not enforce duties owed to him rather than to the trustees: a beneficiary can be in no better position than trustees carrying out their duties in a proper manner. A beneficiary can bring a derivative action only in circumstances, for example circumstances which tend to disable the trustees from pursuing (as where*

their acts and conduct with reference to the trust fund are impeached), or circumstances rendering it difficult or inconvenient for the trustees to sue, as where there is a conflict between their interest and duty." [Emphasis added]

18. Additionally, Mr Kessaram relied on the case of *Roberts v Gill & Co and another* [2009] 1 WLR 531 in which Erin Arden LGG, stated as follows:

> "*The claimant, in his personal capacity as a beneficiary of his late grandmother's estate, commenced proceedings for damages and negligence against two firms of solicitors who had advised the estate's former personal representatives. After the relevant limitation period had expired, the claimant applied under CPR Rule 17.4 4 and on behalf of the estate as a derivative action. The application was dismissed on the ground that no special circumstances existed which would entitle him to bring a derivative action…*
>
> *"In fact, derivative claims can arise in other circumstances, such as where a beneficiary sues to enforce the cause of action vested in a trust of which he is a beneficiary. A derivative claim can also be brought in a case like the present, where a beneficiary under a will seeks to enforce a cause of action vested in the estate.*"

19. Consequently, Mr Kessaram argues that following these legal principles, the Plaintiff has an interest in the due administration of Mr Cox's estate as he had been bequeathed the Chattels in the Will. Thus, giving the Plaintiff a standing to bring a derivative action as there are "special" and/or "exceptional circumstances" that emerge in this case. Mr Kessaram presented three "special circumstances" which should be considered and are as follows:

    (a) he is fully entitled under the Will to the chattels in question;

    (b) had the executors made a *Beddoe* application under Order 85, Rule 2 of the Rules of the Supreme Court 1985 (RSC) for court's approval to bring the claim themselves, it is unlikely that the court would have approved such an action at the expense of the estate. The Court of Appeal case of *Ingham et al v Wardman et al* [2022] CA (Bda) 7 Civ where the case of *Allsop Wilkinson (a firm) v Neary and others* [1995] 1 All ER 431 was relied on to support the legal principle that it is a duty of an executor to remain neutral in a case where there is a dispute between rival claimants to a beneficial interest; and

    (c) even if it was appropriate for the claim to be brought by the executors there is no likelihood of them agreeing to bring it as the First Defendant who is an executor of the estate is the rival claimant.

20. It was asserted by Mr Kessaram that following *Roberts v Gill & Co and another* the Plaintiff's action is for a declaration that the Chattels belong to the estate of which he is a

beneficiary. To succeed, the Plaintiff needs to satisfy the court that the Chattels belonged to Mr Cox on the date of his death. Should the action proceed to trial and the Plaintiff be successful, it is expected that the First Defendant would deliver up the Chattels to the estate without the necessity of a further order of the court. He further asserted that the Chattels would not be delivered into the beneficial ownership of the Plaintiff. Mr Kessaram submitted that any transfer of ownership would only occur after the Chattels (having been returned to the Estate) are vested by the Executors in the Plaintiff by way of the execution of an assent or vesting deed (or by simple delivery) transferring title to the Plaintiff.

21. It was averred that given the status of the probate applications, the vesting of assets of the Estate will likely be "*a long way off*" as the disagreements and purported conflicts of interest which have been alleged must be resolved in order that probate has been granted to the proving executor. Until then, there can be no vesting of assets.

22. Therefore, it was submitted that the Plaintiff does have standing to bring this action and that the Court has the jurisdiction to hear this matter. As such, the First Defendant's position should be rejected, and this matter should proceed to trial for final determination.

The First Defendant's Position

23. In summary, Mr Pachai for the First Defendant argued that the general rule set out in the authorities (as confirmed by Section 22 of the Act) should be applied such that the property to which the Plaintiff lays claims which is vested in the Defendants should, in the normal course, be distributed by the Defendants (as executors). Consequently, the Plaintiff has no standing to bring this action and the court has no jurisdiction to hear it.

24. Mr Pachai, for the First Defendant, argued that Mr Kessaram's interpretation of the legal principles are erroneous and that their application to the facts of this case have been done so incorrectly. Mr Pachai's first point relates to the composition of the Writ and the Claim. Particularly, he says that it is crucial that it is not plead that the Plaintiff is bringing this action in a representative to capacity on behalf of the estate. The action is simply commenced in the Plaintiff's personal name. In accordance with the principles set by *Roberts v Gill & Co*, it was noted that in accordance with Order 6, Rule 3 of the Rules of the Supreme Court 1985 (**the RSC**), there is a mandatory requirement to make a statement that it is a derivative action:

> "*3. Before a Writ is issued it must be endorsed –*
> *(a) where the Plaintiff sues in a representative capacity, with a statement of the capacity in which he sues;*"

25. In response, Mr Kessaram submitted that the Writ can simply be amended to have the Plaintiff referred to bringing the action in a representative capacity which will resolve this

statutory requirement. Mr Kessaram further argued that it is apparent on the face of the Writ that it is a representative action because if it were a personal claim the First Defendant would have been named in her personal capacity rather than as an executor.

26. Mr Pachai submitted that the purpose of the RSC is to direct how claims must be formulated. There would be no point in having the RSC if parties were not held to comply with them. Moreover, he argued that the exercise of amending the Writ as Mr Kessaram has suggested is not enough and does not remedy the position as the court must look at the actual claim and the relief being sought.

27. Mr Pachai argued that the only standing that the chose in action gives to the Plaintiff (as a beneficiary) is the right to sue for the estate to be duly administered. In this instance the Plaintiff is seeking to lay claim to the Chattels. Thus, the Claim can be interpreted as nothing other than a personal proprietary claim.

28. The reliance on Lewin on Trusts and *Roberts v Gill & Co*, Mr Pachai says is misguided for the following reasons:

(i) Mr Pachai emphasized that the relief sought in the Writ cannot be construed as anything other than a personal proprietary claim to the Chattels as the Plaintiff is seeking, "*a declaration that he is entitled to…*" the Chattels. The legal definition of "*entitled*" is "*a legal right to*" which means that he is seeking relief for his own personal benefit.

Mr Pachai highlighted that the text of Butterworths on Wills, Probate and Administrative Service includes important wording which has been overlooked:

"*…no beneficiary in the meantime, whether the deceased's own or intestacy, has any proprietary interest in any particular asset comprised in the unadministered estate. The beneficiary's entitlement during this period a chose in action, namely the right to require the deceased's estate to be duly administered, by an administration action, action for an account etc.*" [Emphasis added]

(ii) The executors in carrying out their duties in a proper manner, have made a distribution of the Chattels in accordance with the Will. Reference was made to Parker's Will Precedents, 9th Edition, where it states as follows:

"*8 .5 While generally speaking the same people are appointed as Executors and Trustees, the roles are different and there is no obligation to appoint the same people to both roles. The role of an Executor is, broadly speaking, to collect in the Testator's estate, to clear the debts and liabilities and to distribute the estate in accordance with the will*." [Emphasis added]

Mr Pachai says that the executors (Defendants) demonstrated that they went to great lengths to identify and agree upon the distribution of all chattels devised in the Will prior to the First Defendant's departure from Mayflower. Each executor was involved in the process and had independent attorneys representing each of them. Consequently, there would be no reason for the Executors to apply to the Court for any approval to bring the claim themselves or any likelihood of them agreeing to bring a claim.

In any event, Mr Pachai highlighted that Lewin on Trusts confirms that "*...a beneficiary can be in no better position than trustees carrying out their duties in a proper manner*". He highlighted the fact that the Plaintiff is asking for the Chattels to be delivered to him "*to be held by and for the Plaintiff pending the administration of the Deceased's Estate*". Granting this relief would be put the Plaintiff in a better position than the executors.

(iii) There are no exceptional and/or special circumstances to justify a beneficiary bringing a derivative action on behalf of the estate. The onus is on the party who is bringing the derivative action, i.e. the Plaintiff, to prove there are exceptional and/or special circumstances.

Mr Pachai submitted that the cases of *Ingham* and *Allsop* concerned the issue of pre-emptive costs and are not relevant in determining the question of whether the Plaintiff is entitled to bring a derivative action on behalf of the estate in respect of which, in the context of this case, the Plaintiff has shown no exceptional or special reasons to bring a derivative action.

29. Ultimately, Mr Pachai argued that the Claim does not even get off the ground as the Plaintiff must get over the first hurdle of showing that the Claim is a derivative action which he says has not been done. It is only after the court finds that it is truly a derivative action that it the court must consider if there are special and/or exceptional circumstances to bring the claim.

Findings

30. I am reminded that the purpose of this hearing is not to consider whether the Tall-Boy was purchased prior to the marriage between Mr Cox and the First Defendant, nor whether the Mantel Clock was gifted by Mr Cox to the First Defendant during the marriage. Likewise, as to the issue of whether the Agreed Inventory amounted to a distribution to the First Defendant.

31. Having heard Counsel and considering the legal principles, I find that the relief being sought by the Plaintiff in the Claim is a personal propriety claim and that there is no basis for which the Plaintiff can bring the Claim as a derivative action.

32. My reasons are as follows:

(a) I accept Mr Pachai's argument that if the Plaintiff were to amend the Writ to include the wording that confirms the action is being taken in his representative capacity on behalf of the estate, this would not cure the issue of standing.

(b) Furthermore, Mr Kessaram's suggestion that the that First Defendant would have been named in her personal capacity had this truly been a personal proprietary claim by the Plaintiff, falls flat. The First Defendant is in fact named "*...in her personal capacity and as an Executor and Trustee...*". Conversely, the Second and Third Defendants reference state "*...in her capacity as Executor...*" and "*...in his capacity as Executor...*" respectively. Undoubtedly, this distinction between the Defendants only further supports the notion that the Claim is made in the Platintiff's personal proprietary capacity.

(c) The relief being sought speaks for itself. The Plaintiff is asking for the Court to declare that he is the owner of the Chattels and is asking for the Chattels to be delivered to him and be "*held by and for*" him pending the administration of the estate. Plainly, this cannot be considered a representative claim on behalf of the estate.

(d) Furthermore, as the estate has yet to be administered, the Plaintiff has no proprietary interest in the Chattels (see Butterworths on Wills, Probate and Administrative Service). Until Mr Cox's estate has been administered, the only chose in action the Plaintiff has the right to bring an action for the estate to be duly administered. Therefore, the Court has no jurisdiction to hear this action.

(e) I accept Mr Pachai's submissions that in the first instance, the court must determine whether it is a derivative action, and only after then can the Court consider if special and/or circumstances arise in accordance with *Roberts v Gill & Co*.

Even if I were to get over the first hurdle of accepting that this is a derivative action made by the Plaintiff (which I do not), in my view, there are not any special and/or exceptional circumstances to bring the claim based on the facts of this case..

Conclusion

33. Following the findings above, I will dismiss the Plaintiff's Claim on the basis that he has no standing to bring this action and neither does this Court have the jurisdiction to hear this action. As to costs, I see no reason why costs should not follow the event. As such, the First Defendant shall have her costs in this matter on a standard basis which shall be taxed if not agreed.

DATED: 28 May 2024

ALEXANDRA WHEATLEY

ACTING PUISNE JUDGE OF THE SUPREME COURT