CLAIM NO: BVIHPB 2024/0170

THE EASTERN CARIBBEAN SUPREME COURT

THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

IN THE ESTATE OF SSQ (DECEASED, TESTATE)

IN THE MATTER OF SECTION 11 OF THE EASTERN CARIBBEAN SUPREME COURT (VIRGIN ISLANDS) ACT (CAP 80)

AND IN THE MATTER OF SECTION 116 OF THE ENGLAND AND WALES SENIOR COURTS ACT 1981

AND IN THE MATTER OF RULES 45 & 47 OF THE EASTERN CARIBBEAN SUPREME COURT (NON-CONTENTIOUS PROBATE AND ADMINISTRATION OF ESTATES) RULES 2017

AND IN THE MATTER OF AN URGENT APPLICATION OF BNU FOR A GRANT OF AN ORDER TO APPOINT HER AS AN ADMINISTRATOR *AD COLLIGENDA BONA*

AND IN THE MATTER OF AN APPLICATION OF BNU FOR A DISCRETIONARY GRANT OF LETTERS OF ADMINISTRATION IN THE ESTATE OF SSQ (DECEASED, TESTATE)

B E T W E E N:

ATH

Applicant/ Respondent

- and -

BNU

Respondent/ Applicant

AND

CLAIM NO: BVIHC(COM) 2024/0358

THE EASTERN CARIBBEAN SUPREME COURT

THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

IN THE MATTER OF UGX AND THA

IN THE MATTER OF SECTION 184C OF THE BVI BUSINESS COMPANIES ACT 2004

B E T W E E N:

DUK

(in the names and on behalf of)

(1) UGX

(2) THA

Applicant

- and -

(1) UGX

(2) THA

Respondents

(3) WKU

(4) ZPP

(5) AUZ

Additional Respondents

Mr Paul Mitchell KC (instructed by M.K. Solicitors LP) and, with him, Mr Martin Kenney of M.K. Solicitors LP, for BNU / DUK

Mr Dakis Hagen KC (instructed by Ogier) and, with him, Mr Nicholas Burkill, and Ms Holly Challenger, both of Ogier, for ATH / AUZ

Mr Timothy Collingwood KC (instructed by Appleby (BVI) Ltd) and, with him, Mr Daniel Mitchell and Ms Fay O'Halloran, both of Appleby (BVI) Ltd, for UGX AND THA

Mr Richard Millett KC, and with him, Dakis Hagen KC (both instructed by Ogier), Mr Nicholas Burkill, and Ms Holly Challenger, both of Ogier, for WKU, ZPP, and ATH / AUZ, the additional respondents

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2025: 6 to 8 May and 12 and 13 May 2025

10 July 2025

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JUDGMENT

INTRODUCTION, BACKGROUND, AND ISSUES

[1] **MITHANI J [AG]:** The dispute, which forms the subject of these proceedings, is between two sisters, BNU / DUK (referred to only as BNU throughout) and ATH / AUZ (" referred to only as ATH throughout), in respect of the division of the estate of their late father ("SSQ"). BNU and ATH are the only two children of SSQ.

[2] The wider dispute between the parties also involves individuals and entities related to, or connected with, BNU and ATH. In the case of BNU, they include three BVI trusts ("the BVI Trusts") in which BNU is alleged to have an interest, namely the A Trust, the B Trust, and the C Trust. ATH alleges that a substantial amount of the money or other assets of the BVI Trusts emanated from their late father's estate and for which she claims BNU must account fully to the estate. In the case of ATH, they include ATH's husband, WKU ("WKU"); ZPP, the company of which WKU is the Executive Chairman; and the "UGX Trust", a trust settled on discretionary terms for (among others) ATH and her descendants ("the UGX Trust"), which owns 70% of the shareholding in UGX and THA , both registered in the BVI.

[3] For the sake of convenience, any reference I make to BNU shall include a reference to one or more of the three BVI Trusts (or any company or entity controlled by them), as the context may require; any reference I make to ATH shall include the UGX Trust (or any company or entity controlled by either ATH or the UGX Trust), as the context may require; and, any reference I make to WKU or ZPP shall include either or both of them (or any company or entity controlled by them), also as the context may require.

[4] SSQ died in France on 20 November 2021. He was domiciled in Panama at the date of his death.

[5] SSQ executed a holograph will ("the Will") while he was in Greece on 1 September 2021. The Will named SSQ's cousin ("E") as executor. However, E has renounced his right to apply for probate.

[6] SSQ's assets in the BVI ("the BVI Estate") included his shareholding in UGX and THA. The Will bequeathed 30% of SSQ's shares in each of UGX and THA to BNU and the remaining 70% to ATH.

[7] The relevant terms of the Will state as follows:

> "I leave my property as follows:
>
> 1. My maritime interests
>
>   a. In the company THA
>   70% to my daughter ATH and

30% to my daughter BNU

b. In the company UGX

70% to my daughter ATH and

30% to my daughter BNU.

c. In my other maritime interests together with undistributed profits … 100% to my daughter BNU."

[8] On the same day as the Will was executed, SSQ executed a codicil ("the Codicil"), the relevant terms of which stated:

> "MY WISHES
>
> This last will is based on monetary values and current evaluations
>
> I want my property to be shared by 50%-50% to each one.
>
> I also wish my daughters to arrange for their mother N and my partner O to live with the same monetary style. Each one of them must have the same way of life, not to cause any jealousy and injustice."

[9] The validity of the Will and Codicil ("the Testamentary Dispositions") is not in dispute[1]. However, their precise meaning and extent are or are likely to be.

[10] What is also not in dispute (at any rate, for the purpose of the determination of the various matters before me) is that a "truing-up" (or, as I prefer to call it "equalisation") exercise will need to take place as a result of the terms of the Codicil, the effect of which appears to be to ensure that SSQ's worldwide net estate is shared equally between BNU and ATH. However, the consequence of this exercise is said by ATH to be an unknown quantity because it will involve BNU having to bring into account against her share of the estate what she has already received, or will receive, by way of 100% of SSQ's "other maritime interests", which are bequeathed to her under the terms of the Will. ATH says that this could include (at least) US$ 116 million, alleged to be in the BVI Trusts that are alleged by ATH to be in the control of BNU, in which her descendants are the beneficiaries or potential beneficiaries.

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[1] The Will and Codicil were written in Greek. The terms extracted above are based on a certified and apostilled translation of the Will and Codicil.

[11] Shortly before SSQ's death, ATH and BNU, in their capacity as SSQ's attorneys-in-fact, transferred 70% of SSQ's then shareholding in each of UGX and THA, at the request of ATH, to the trustee of the UGX Trust to reflect what SSQ had bequeathed to ATH by the terms of the Will. This was allegedly done in order to mitigate potential US tax liability chargeable to ATH as a result of her inheritance of the 70% shareholding of UGX under the terms of the Will. This transaction was, apparently, based on a plan formulated by a Mr Yof Crowe LLP (New York) ("Crowe"). BNU was allegedly informed by WKU and ZPP, as well as Mr Y, that the purpose of the transfer was to save tax for ATH in line with advice said to be given to WKU and ZPP by Crowe. BNU fully cooperated with ATH and WKU to enable the transfer to take place so ATH could save or mitigate any liability to US tax which might otherwise be payable by her on the inheritance.

[12] UGX holds or held, through its various BVI subsidiaries, several valuable vessels, which BNU claims were sold by it at a gross undervalue to ZPP and on terms which were commercially unattractive or did not make any commercial sense.

[13] In respect of THA, BNU claims that THA advanced capital to make investments in assets owned by a Liechtenstein foundation called “X Foundation”, a trustee of a trust of which WKU’s father was the sole lifetime beneficiary. The investments were made pursuant to a “Master Equity Tracker Fee Agreement” (“Master ETFA”). In 2020, the obligations under the Master ETFA were novated to ZPP. According to my understanding of BNU’s case, it was subsequently agreed that all rights and obligations of ZPP and THA in respect of the investments would be replaced by a single obligation: ZPP would pay THA US$72 million. BNU states that THA’s directors have breached (and remain in breach of) their duties to that company by failing to take steps to recover the sum due and owing to THA by ZPP.

[14] ATH and BNU cooperated to obtain a European certificate of succession for the European assets of SSQ outside the BVI. They had reached compromises in relation to those assets to enable that to be done. However, the administration of the BVI Estate remains outstanding.

[15] On 16 July 2024, BNU applied, *ex parte*, to the Probate Court in this territory (“the Probate Court”) for the appointment of herself as administrator *ad colligenda bona* (“AACB”) of the BVI Estate.

[16] By para. 2 of the application ("the Common-form Application")[2] for the making of the order appointing her as AACB, BNU sought the following powers:

> "i. To be registered as the legal holder of all the shareholdings held by SSQ, in THA and UGX, and to exercise all rights as a shareholder;
>
> ii. To apply for leave to bring a derivative action under **s. 184C(1) of the BVI Business Companies Act 2004** (the **"BCA 2024"**) (including the right to seek interim relief under **s.184C(5) of the BCA 2004**); and to pursue or defend such derivative action should leave be granted – as well as any related proceedings within or without the Territory of the Virgin Islands; and
>
> iii To complete all tasks which BNU in her capacity as administrator *ad colligenda bona* deems necessary to preserve SSQ's BVI estate's assets."

[17] The grounds upon which the application for the appointment of BNU as AACB were made are summarised by BNU in her notice of application in the following terms:

> "5. The Applicant is one of the daughters of the deceased, and the sole beneficiary of the BVI portion of the deceased's estate.
>
> 6. The named Executor in the Will, E renounced his Executorship on 28 November 2022.
>
> 7. The deceased's surviving spouse has failed to take any steps to administer the estate and has waived her rights to a share of the estate under forced heirship laws of Greece.
>
> 8. The BVI portion of the deceased's estate is yet to be administered.
>
> 9. There is a real risk that the value of the estate's assets will be significantly diminished if the Orders sought are not granted …"

[18] The application came before Young J on 16 July 2024. She made the order appointing BNU as AACB under **r. 45 and/or r. 47** of the **ECSC (Non-Contentious Probate and Administration of Estates) Rules 2017** ("the **BVI NCPR 2017**") on the same day, i.e., 16 July 2024 ("Young J's

[2] The Common-Form Application was amended on 15 October 2024. For the purpose of my determination of the various applications which are before me, the amendments do not appear to me to be of any material significance.

Order"). She adjourned BNU's application for an order for a full grant of letters of administration with will annexed to a date to be fixed.

[19] The relevant terms of Young J's Order were:

> "1. The part of the Application of BNU (the "Applicant") seeking permission to apply for a Grant of Letters of Administration with Will annexed pursuant to the discretionary powers of the Court under **Rule 45 of the Eastern Caribbean Supreme Court (Non-Contentious Probate and Administration of Estates) Rules 2017**, is hereby adjourned until the first available date after the date of the first inter partes hearing associated with the contemplated application of the Applicant before the Commercial Court for interim relief under **s.184C(5) of the BVI Companies Act 2004**.
>
> 2. The Applicant is appointed the administrator *ad colligenda bona* of the estate of her late father ("SSQ"), located in the Territory of the Virgin Islands, and is permitted to engage in the following to preserve and safeguard the assets of the estate: -
>
> a. To be registered as the legal holder of all the Shareholdings held by SSQ in THA and UGX;
>
> b. To apply for leave to bring a derivative action in the names of and on behalf of UGX and THA under **s. 184C(1) of the BVI Business Companies Act (2024)**; (the "BCA 2004") (including the right to seek interim relief under **s. 184C(5) of the BCA 2004**); and to pursue or defend such derivative action should leave be granted – as well as any related proceedings within or without the Territory of the Virgin Islands; and
>
> c. To complete all tasks which BNU in her capacity as Administrator *ad colligenda bona* deems necessary to preserve SSQ's estate's BVI assets."

[20] BNU's primary reason for seeking the order for her appointment as AACB was to enable her to have what she considered was her beneficial entitlement to 30% of the shares in UGX and THA ("the 30% Shareholding"), which was bequeathed to her by the terms of the Will, transferred to her. The purpose for doing so was to make it possible for her to bring a derivative claim ("the Derivative Claim") on behalf of UGX and THA against: (a) the *de jure* directors of those companies, Y LLP ("Y") and Mr I ; (b) WKU, an alleged *de facto* director of each of UGX and THA; and (c) ZPP, the company of which WKU is Executive Chairman[3]. The Derivative Claim

[3] UGX and THA are also included in the Derivative Claim as defendants but only in a notional capacity.

was based on the alleged wrongful conduct of Y, Mr I , WKU and ZPP (collectively referred to as "the Derivative Claim Defendants") in relation to UGX and THA, as summarised above[4].

[21] On 22 July 2024, BNU applied for permission ("the Permission Application") to bring the Derivative Claim against the Derivative Claim Defendants. By an order of the ECSC Court of Appeal, made by consent on 10 October 2024, WKU, ZPP and ATH were joined as respondents to the Permission Application.

[22] Following obtaining the order from Young J, allowing her to obtain a grant of administration *ad colligenda bona*, BNU applied for, and obtained, *ex parte* freezing and proprietary injunctions against WKU and ZPP ("the Injunctions"). Those injunctions were granted to her on 31 July 2024 by Webster J.

[23] On 13 August 2024, ATH filed a caveat prohibiting the sealing of any grant of representation in respect of the BVI Estate. The caveat was renewed on 3 February 2025. There has been no application by BNU to remove it before it expires in August 2025.

[24] On 16 August 2024, WKU and ZPP applied to have the Injunctions discharged. The application ("the Discharge Application") was heard initially by Webster J on 22 August 2024. Webster J adjourned the Discharge Application and, in the meantime, continued the Injunctions with some variations until further order.

[25] On 19 August 2024, ATH applied to set aside Young J's Order. The basis of the application ("the Set Aside Application") is summarised in the following paragraphs of ATH's notice of application:

> "4 There has been no grant of probate of the Will in BVI.
>
> 5 The Deceased's BVI estate remains unadministered and continues to include the shareholdings described above in UGX and THA.
>
> …
>
> 9 The 16 July 2024 Order provided for the Respondent to be appointed as the administrator ad colligenda bona of the BVI estate of the Deceased but

[4] A more detailed summary of the Derivative Claim Defendants' alleged misconduct is set out in BNU's affidavit sworn on 1 July 2024.

adjourned the Respondent's application for an order for a full grant of letters of administration with will annexed.

10 It appears that the Respondent failed to take the necessary steps pursuant to the NCP Rules to obtain an actual grant of letters of administration ad colligenda bona…

11 Without (i) the Respondent having obtained the necessary grant of letters of administration … the Respondent then proceeded to hold herself out as the Deceased's "personal representative" and proceeded on that basis to commence proceedings in the Commercial Division of the High Court pursuant to section **184C of the BVI Business Companies Act 2004** seeking among other things leave to commence derivative proceedings for and on behalf of UGX and THA (the Derivative Proceedings) and interim injunctive relief against certain other parties, including the husband of the Applicant,

12 The Derivative Proceedings are being contested and an application has been made to discharge the interim injunction relief obtained by the Respondent. One of the issues in the Derivative Proceedings, including in respect of the interim injunction, is whether the Respondent is a personal representative of the BVI estate of the Deceased.

…

14 Further, in the event that it is determined that, notwithstanding the matters referred to in paragraphs 6, 7 and 10 above the Respondent currently has a grant of letters of administration, the Applicant seeks the revocation of that grant.

15 For the avoidance of doubt, the Applicant accepts that a person should be appointed to act as administrator ad colligenda bona and/or administrator with will annexed in respect of the Deceased's estate; however, it is contended that this person should be impartial and independent."

[26] On 22 August 2024, various documents were filed with the Probate Court by BNU to allow her to obtain a formal grant of administration *ad colligenda bona* pursuant to Young J's Order. It appears that because the Registrar became aware that an application to set aside Young J's Order had been made by ATH, she decided to take no action on the documents that were filed with the Probate Court by BNU.

[27] On 12 or 13 May 2025, BNU filed or refiled various documents that were necessary for her to obtain the grant of administration *ad colligenda bona* that she had applied for previously. This followed a note submitted on behalf of ATH to the Court on 12 May 2025 in which she set out a list of alleged defects in the filing of the documents in BNU's initial application for a grant. The

email sent to this court ("this Court" or "the Court") by BNU's lawyers on 13 May 2025 said the following in response to that note:

> "On the morning on Monday, [sic] 12 May 2024, we were served in court by Ogier [who act, inter alios, for ATH] with a copy of a 'Table Showing Defects Under Rule 48(4) and Rule 13 NCPR (on behalf of ATH)' dated 5 May 2025.
>
> Without accepting that there were indeed any deficiencies in our original filing of 22 August 2024 with the Registrar, to put an end to any suggestion that (a) certain documents have not been filed, (b) certain filing fees were not paid, or (c) that some of the papers that were filed contained certain alleged deficiencies, please find attached the following documents filed this evening:
>
> Amended Application for Emergency Grant of Letters of Administration (Form P1);
>
> Supplemental Oath (Form P5);
>
> Revised Draft Order;
>
> Revised Draft Grant;
>
> Supplemental Declaration and Account of Estate (Form P6A);
>
> Certified copy of the Death Certificate filed separately;
>
> Certified Copies of our client's birth and marriage certificate filed separately;
>
> Consent of Applicant to apply for an Emergency Grant; and
>
> Order of Young J filed separately."

[28] Not surprisingly, no action has been taken by the Registrar to process these documents, although that may be because they were only filed a few days ago in the course of the hearing of the various applications that were before me for determination during the 5-day hearing commencing on 6 May 2025.

[29] It is not necessary for me to say much more about the background facts and circumstances, other than to mention three matters: first, a slightly more detailed chronology of the relevant events, albeit largely procedural, is included at page 309 of Volume 3 of the Hearing Bundle; second, the Common-Form Application made to the Probate Court was transferred to this Court by an order dated 8 October 2024, made by Persad J, and approved by this Court on 18 November 2024; and third, the Set Aside Application, the Discharge Application, and the

Permission Application (collectively referred to as "the Combined Applications") were heard by me over the course of a 5-day "omnibus hearing" on 6 to 8 May and 12 and 13 May 2025 ("the Omnibus Hearing").

[30] Nor is it necessary for the allegations that each party makes against the other to be tested at this stage. It may be necessary for findings to be made about those allegations at the substantive hearing of the dispute between the parties about the effect of the Testamentary Dispositions, the law to be applied in interpreting their provisions (if that is contested), the person to whom a full grant of letters of administration with will annexed should be made, the value of the BVI Estate, and any other dispute between the parties in which oral evidence is given by one or more of the parties in proceedings brought in this Court to determine that dispute.

[31] One further (case-management) point is appropriate for mention at this stage. For reasons which will become obvious, it is unfortunate that the Combined Applications were all directed to be heard at the same time as part of the Omnibus Hearing. While fully appreciating that this was what the parties wished to have, and Persad J's order (not mine as I had erroneously thought in my exchanges with Mr Richard Millett KC, who appeared for WKU, ZPP and ATH) dated 8 October 2024 gave effect to those wishes, on reflection, there would have been a substantial saving of cost if the hearing of the Set Aside Application had taken place first and the Permission Application and Discharge Application were dealt with subsequently after the outcome of the Set Aside Application was known.

YOUNG J'S ORDER AND NEED FOR GRANT OF REPRESENTATION

Introduction and applicable legal principles

[32] The provisions governing the administration and distribution of a deceased's estate in the BVI are largely to be found in the following statutory provisions:

(a) The **Administration of Estates Act 1925 of England and Wales ("AEA 1925")**, which is applied in the BVI by **s. 11 of the Eastern Caribbean Supreme Court (Virgin Islands) Act**. The latter provision states that the "jurisdiction vested in the High Court in civil proceedings, and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Act and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England."

(b) **Section 116 of the Senior Courts Act 1981 ("the SCA 1981")**, which is incorporated into the law of the territory of the BVI by **s. 11 of the West Indies Associated States Supreme Court (Virgin Islands) Act Cap 80**.

(c) So far as non-contentious probate business is concerned, the **BVI NCPR 2017** and the **ECSC CPR** (so far as they are not inconsistent with the **BVI NCPR 2017**): see **r. 3 of the BVI NCPR 2017**.

(d) So far as contentious probate business is concerned, **Part 68 of the ECSC CPR**.

[33] **Section 9(2) of the AEA 1925** sets out what happens where, as here, the executor or executors named in a will renounce their right to prove the will or refuse to apply for a grant of representation to a deceased's estate. It states:

> "Where a testator dies and—
>
> (a) at the time of his death there is no executor with power to obtain probate of the will, or
>
> (b) at any time before probate of the will is granted there ceases to be any executor with power to obtain probate,
>
> the real and personal estate of which he disposes by the will shall vest in the Public Trustee until the grant of representation[5]."

[5] However, **s. 9(3) of the AEA 1925** makes it clear that the "vesting of real or personal estate in the Public Trustee by virtue of this section does not confer on him any beneficial interest in, or impose on him any duty, obligation or liability in respect of, the property."

[34] It is probably correct to say that where **s. 9(2) of the AEA 1925** applies, the estate of the deceased vests in the Probate Judge who is the nearest BVI equivalent of the English Public Trustee, though it is possible that the estate vests in the Registrar of the Probate Court, rather than the Probate Judge. Regardless of the "public official" in whom the estate vests, it is clear law that the vesting of the assets does not make it possible for such a person to deal with any of the assets of the estate. He (or she) holds those assets as receiver or quasi-receiver on behalf of the estate. As **Lord Davey** observed in **Chan Kit San v Ho Fung Hang [1902] A.C. 257 at 261** on the similarly worded provision then included under Hong Kong Law:

> "It was argued that by these Ordinances all the rights of action included in the estate of the deceased were vested in the registrar or official administrator, and he therefore had, by implication, a statutory right to enforce them by action. But their Lordships think that there is nothing in the sections to which they have been referred <u>to overrule the established rule of law</u> that no action can be maintained in respect of the estate of a deceased person except by a duly constituted administrator or executor. <u>The sections referred to seem to place the registrar, pending the grant of letters of administration, in the position of a receiver, and to give him powers incident to such an office, but nothing more</u>."
>
> (Emphasis supplied).

[35] It is also appropriate to set out the relevant provisions of **s. 116 of the SCA 1981** of England and Wales. They say as follows:

> "(1) if by reason of any special circumstances it appears to the High court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
>
> (2) Any grant of administration under this section may be limited in any way the court thinks fit."

<u>Analysis and Discussion</u>

<u>Is BNU the AACB of the BVI Estate?</u>

[36] BNU claims that she needed to apply for an appointment of an administrator to the BVI Estate if she was going to be able to pursue the Derivative Claim. She could have applied for the pronouncement of the Testamentary Dispositions in "solemn form", i.e., in a contentious probate claim[6], which would have meant bringing a fixed date claim form under **Part 68 of the ECSC CPR** and having to include ATH in the claim as defendant.

[37] BNU decided not to do so. She decided, instead, to bring an application to the Probate Court for her appointment as AACB. She may have thought that she was justified in doing so as neither the contents of the Testamentary Dispositions nor her right to be registered as a 30% shareholder of UGX and THA appeared to be disputed by ATH, based on the discussions she had with ATH and WKU and those representing them.

[38] BNU relies on several matters to support her contention that she was entitled to invoke the common form procedure to seek an order appointing her as AACB. In addition to the terms of the Will which gave her 30% of the shares in UGX and THA, i.e., essentially the shareholding of her late father, which fell into his estate on his death and bequeathed to her, she relies, *inter alia*, on the following.

[39] First, BNU's recognition that ATH held 70% of the shareholding in UGX and THA, which she willingly transferred into the UGX Trust, at ATH's request before SSQ's death. By necessary implication, that meant that ATH recognised BNU's entitlement to the rest of that shareholding.

[40] Second, the clear indication given to BNU on behalf of ATH in a letter sent by ATH's representative on 12 November 2021 that the "other 300 THA and 15000 UGX will remain in your <u>father's name for your ultimate benefit.</u>" (Emphasis supplied).

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[6] See **ECSC CPR 68.1(2)** which defines a probate claim made under **Part 68** as "a claim for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being a claim which is non-contentious or common form probate business." **Section 128 of the SCA 1981** defines "Non-contentious or common form probate business" as "the business of obtaining probate and administration where there is no contention as to the right thereto, including
(a) the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated; (b) all businesses of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action; and (c) the business of lodging caveats against the grant of probate or administration."

[41] Third, the statement made in WKU's letter dated 29 November 2021, sent shortly after SSQ died, in which he said:

> "On the 5 x HAPAG vessels … this is a business matter and the L guys (100% sub of ZPP) I guess will have to handle this. if you are happy to continue to act ... then we would be most grateful. These assets are owned (along with others) under UGXs Group ... the UBO there is ATH 70% <u>and BNU 30%, although not sure if the latter has been transferred</u>. Think of L as the manager … L sub of ZPP ... ATH/ BNU as owners…" (Emphasis supplied).

[42] Fourth, the following statement made by WKU, following BNU's letter to him and ATH asking what steps needed to be completed "for 30% share of [sic] UGXs and THA to be put in my name":

> "SORRY I DID NOT EVEN KNOW THEY WERE NOT IN YOUR NAME … OF COURSE WE NEED TO CHANGE THIS … TELL ME WHAT YOU WANT, I WILL MAKE INTRO, STATE WHAT NEEDS TO HAPPEN AND IT WILL BE DONE. OR AT LEAST BE PUT ON A PATH TO BEING DONE."

[43] Fifth, on 15 March 2022, ATH and BNU jointly applied to the Athens Magistrates Court for a Certificate of Succession to be issued under Greek Law. The certified translation of the joint application made by ATH and BNU states:

> "based on the contents of the aforementioned handwritten will, it appears that we have been appointed as testamentary heirs with full ownership, possession and control of the following company shares…
>
> **1) <u>Shipping companies and interests</u>**
>
> - **70% of the inheritance was left to the first of us** (referred to in the will as 'ATH ' as our deceased father used to write my name using my husband's surname,) and **30% to the second of us** (referred to in the will as 'BNU as our deceased father used to write my name using my husband's surname) for the shares and generally for the maritime interests held by our deceased father in the foreign shipping company 'THA ' which is based in the British Virgin Islands (see page 1 of the aforementioned handwritten will where it is referred to as 'THA'.
>
> - **70% to the first of us and 30% to the second of us** for the shares and generally for the maritime interests held by our deceased father in the foreign shipping company 'UGX ' which is based in the British Virgin Islands (see page 1 of the aforementioned handwritten will where it is referred to as ['UGX']."

[44] Sixth, on 28 April 2022, ATH and BNU also jointly applied to the Athens Magistrates Court for a European Certificate of Succession to be granted. In the application, the two sisters stated that

their shared understanding of the Will was that, among other things, BNU was to inherit 30% of SSQ's shareholding in each of UGX and THA. One of the stated purposes of applying for the certificate stated in Annex 4 to the application was:

> "4.4
>
> …
>
> (e) To transfer 70% of the shares and generally the maritime interests of and rights to undistributed profits held by the deceased in the foreign maritime company "<u>THA " in the British Virgin Islands</u> to Petitioner A [i.e., ATH] and 30% to Petitioner B [i.e., BNU]
>
> (f) To transfer 70% of the shares and generally the maritime interests of and rights to undistributed profits held by the deceased in the foreign maritime company "<u>UGX "</u> in the British Virgin Islands to Petitioner A [i.e., ATH] and 30% to Petitioner B [i.e., BNU]."
>
> (Emphasis supplied).

[45] Apart from the above, several other matters are relied upon by BNU in support of her contention that she is entitled to the 30% Shareholding, which now forms part of the BVI Estate. They are summarised at paras. 11 to 24 of Mr Paul Mitchell KC's skeleton argument lodged on behalf of BNU. They do not require any detailed mention.

[46] BNU maintains that by 13 February 2023, when WKU wrote to BNU confirming that they would need to take steps to transfer the 30% Shareholding to BNU, she considered that she was fully entitled to that shareholding; and that the correct construction of SSQ's Will, as a matter of Panamanian law which governed all matters relating to the administration and distribution of SSQ's worldwide assets, was that SSQ had made a combination of specific bequests to her and ATH (in relation to which they were considered legatees) and non-specific bequests (in relation to which they were considered heirs).

[47] ATH rejects BNU's assertions. She also maintains that BNU may ultimately only be entitled to 9% of that shareholding. The truing-up exercise, which will need to be undertaken, and the nature of the claims made by and against BNU (and the effect of the *inter vivos* disposition of the 70% shareholding into the UGX Trust before SSQ's death) will need to be factored into the process of determining the true value of the BVI Estate and each sister's share in their late father's estate.

Like Mr Mitchell, I am not prepared to accept, on the material I have seen, that BNU is not entitled to at least the 30% Shareholding, particularly given that she willingly transferred the 70% interest of the shares in UGX and THA that was bequeathed to ATH by transferring it before SSQ's death to the UGX Trust at the behest of ATH on, at the very least, a clear understanding that she would be entitled to the remaining 30% interest in those shares. However, there are many variables which will have to be taken into account in deciding what each sister is entitled to in the BVI Estate; and if, for example, the truing up exercise results in BNU being entitled to more than the value of the entire BVI Estate, any adjustment in favour of BNU could be dealt with by a payment of cash being made to her or (if the Court has power under the relevant law governing the devolution of the BVI Estate)[7] a transfer to her *in specie*[8] of any asset of an equivalent value or a combination of the two, based on a full accounting exercise being undertaken by the Court.

[48] It has not been suggested on behalf of BNU that she has some contractual or other entitlement to require the 30% Shareholding to be transferred to her before a full grant of representation is issued in respect of the BVI Estate. It must follow from this that the only basis to allow her to claim legal ownership to the 30% Shareholding is to consider the effect of Young J's Order and decide, if the order is not effective to vest the legal ownership in the shareholding to her, whether there is any other basis for vesting it in her either by reason of the purport and intent of Young J's Order or on some other ground.

[49] It is possible that if BNU had taken WKU up on his offer to vest the 30% Shareholding in her name before BNU's relationship with ATH and WKU had broken down completely, by suggesting that she should be entitled to obtain a full grant of letters of administration to the BVI Estate to enable that shareholding to be vested in her, WKU (on behalf of ATH), might have agreed to it.

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[7] Agreed between the parties or, at any rate, thought by them to be Panamanian Law.

[8] Under BVI Law, there appears to be power to make transfers or appropriations of an asset of an estate to a beneficiary. This is on the basis that the **AEA 1925** applies in the BVI, with any necessary modifications. **Section 41 of the AEA 1925** governs the entitlement of a personal representative to transfer assets *in specie*. That provision requires the consent of a beneficiary to any such transfer, though in most well-drafted wills in England and Wales, that restriction will be removed as a measure to avoid the payment of stamp duty: see **Jopling v Commissioners of Inland Revenue [1940] 2 K.B. 282**. However, I am not aware of whether a provision equivalent to **s. 41** is contained under Panamanian Law or any other law that is said to govern the devolution of the BVI Estate.

But at or about the time when BNU applied for her appointment as AACB, and indeed much earlier, the relationship between the sisters had broken down to the point that BNU felt compelled to issue the Permission Application against the Derivative Claim Defendants to bring them to book for the way she considered they had behaved.

[50] On 2 July 2024, BNU applied to the Probate Court for a grant for letters of administration with will annexed. The application was made without notice to ATH.

[51] **Rule 5 of the BVI NCPR 2017** states that an application for a grant of representation under the **BVI NCPR 2017** "shall be made to the registrar of the court and shall be filed at the registry where all caveats, warnings, citations, acknowledgements of service and notices of application under these Rules shall be filed." The application need not be made on notice, and most applications are not. However, if the registrar or judge considers that notice of application should be served on a person, he or she will give directions for that to be done. This largely follows the procedure for obtaining a grant of representation in England and Wales under the **Non-Contentious Probate Rules 1987 of England and Wales ("NCPR 1987")**[9].

[52] While it is not necessary for an application for the appointment of a person as AACB to be made on notice, where there is a dispute between those entitled to share in an estate (or who have an interest in the estate), it is desirable to do so. **Williams, Mortimer and Sunnucks**, at para. **15-48**, contains the following statement of principle (disregarding the footnotes in that paragraph), based on the observations of David Richards J (as he then was) in **Ghafoor v Cliff [2006] EWHC 825 (Ch), [2006] 2 All ER 1079, [2006] 1 WLR 3020, at [60]**:

> "Application for the order for the grant *ad colligenda* is usually made without notice to a district judge or registrar on affidavit or witness statement. However, there is no requirement that that the application still less the grant be made without notice. Indeed, in some cases notice should be given as, for example, where it is clear that the matter is likely to be highly contentious but the giving of notice would not defeat the purpose of making the application — i.e., the need to preserve assets. If the applicant decides that it is proper to apply without notice, he is subject to the usual duty to make full and frank disclosure of all relevant facts. Thus, his evidence should set out the facts as known and

[9] See especially **r. 61 of the NCPR 1987**; **Williams, Mortimer & Sunnucks – Executors, Administrators and Probate, 22nd Edition, 2023, Eds: Alexander Learmonth KC and others "Williams, Mortimer and Sunnucks")**, **para. 12-08 ff**; and **Tristram and Coote's Probate Practice, 32nd Edition, 2020, Eds: (former) Master Teverson and others ("Tristram and Coote"), para. [25.1] ff**.

> where allegations are based on belief and instructions or on information from others, this should be made clear. It should also set out the steps taken to investigate the matter. If the application is made without notice, the court may direct that it proceed by way of summons and specify on whom it should be served."

[53] BNU's *ex parte* application was not, therefore, by itself, objectionable. However, given that her relationship with ATH and WKU had broken down at the time when she applied for the order from Young J to appoint her AACB *ex parte*, it was a high-risk strategy for her to undertake. As **David Richards J** observed in **Ghafoor, at [61]-[62]:**

> "In the majority of cases, applications to the registry, including those for a grant of administration *ad colligenda bona*, are not contentious and are properly and sensibly made without notice. However, I am of the clear view that notice of the application in this case should have been given to the claimants in view of the particular circumstances of this case. Mr Cliff specifically considered whether the application should be made without notice and concluded that it should be because of "the particular circumstances" (his letter dated 18 May 2005 to the registrar). Nevertheless, it would not be right to be over critical of Mr Cliff for making the application without notice. He followed the accepted practice, as stated in the leading works, and the registrar was content that it should proceed on that basis…Where Mr Cliff and Mrs Spencer are undoubtedly open to criticism is their failure after the order of the registrar, and the subsequent grant of letters of administration, to give any notice of the order or grant to the claimants. The absence of any express requirement in the Rules does not provide a good reason. The executors should have been informed as soon as possible, particularly as they might be taking steps in relation to the estate."

[54] It seems to me to be manifestly wrong for an applicant seeking the appointment of a person as administrator or administratrix of an estate on a temporary or emergency basis to do what BNU did, that is: (a) apply *ex parte* to the Probate Court to be appointed in that capacity; (b) have themselves appointed to that office by an order of the Probate Court and, therefore, constitute themselves as the alleged personal representative of the estate; (c) fail to give immediate notice of the appointment to a person (ATH) who could have an interest in the estate (even if they believed that they were beneficially entitled to the whole estate); (d) claim themselves to be legally entitled to an asset of the estate by virtue of that order, i.e., in the present case, BNU's claim to be entitled to the 30% Shareholding; (e) bring proceedings on behalf of the estate on the basis of that alleged entitlement (i.e., the Permission Application leading to the making of the Derivative Claim); and (f) then also apply without notice for a grant to perfect or (as Mr Mitchell would have me accept) prove that entitlement. While not suggesting that such a course of action amounts to an abuse of the process of the Court, it has the potential to do so. ATH should, at the

very least, have been given an opportunity to make representations to the Probate Court about the appropriateness of the order being made that was primarily designed to allow BNU to bring proceedings against ATH or those connected or associated with her.

[55] Young J granted the following substantive relief on BNU's *ex parte* application:

> "1 BNU (the "Applicant") is granted permission to apply for a Grant of Letters of Administration with Will annexed pursuant to the discretionary powers of the Court under Rule 45 of the Eastern Caribbean Supreme Court (Non-Contentious Probate and Administration of Estates) Rules 2017.
>
> 2. Until the said Grant of Letters of Administration with Will annexed mentioned in paragraph 1 has been issued by the Registrar, the Applicant is appointed the administrator ad colligenda bona of the estate of her late father ("SSQ"), located in the Territory of the Virgin Islands, and is permitted to engage in the following to preserve and safeguard the assets of the estate: -
>
> a. To be registered as the legal holder of all the shareholdings held by SSQ, in THA and UGX;
>
> b. To apply for leave to bring a derivative action in the names of and on behalf of UGX and THA under **s. 184C(1) of the BVI Business Companies Act (2024); (the "BCA 2004")** (including the right to seek interim relief under **s. 184C(5) of the BCA 2004**); and to pursue or defend such derivative action should leave be granted – as well as any related proceedings within or without the Territory of the Virgin Islands; and
>
> c. To complete all tasks which BNU in her capacity as Administrator ad colligenda bona deems necessary to preserve SSQ's estate's BVI assets."

[56] On the face of this order, BNU is: (a) appointed the AACB of the BVI Estate, without any further formality; (b) given power, *inter alia*, "to be registered as the legal holder of all the shareholdings held by SSQ, in THA and UGX"; and (c) given power to apply for permission to bring the Derivative Claim on behalf of UGX and THA.

[57] Mr Mitchell contends that this entitles BNU to be registered as the legal owner of the 30% Shareholding. That contention is based on what he states are the clear terms of Young J's Order. That is because Young J's Order does not state that BNU needs to obtain a "formal" grant before she can be registered as the legal owner of the 30% Shareholding.

[58] There is, in my judgment, little to commend this contention.

[59] Based purely on the terms of Young J's Order, it may be possible to argue that BNU became entitled to be registered as a shareholder of the 30% Shareholding once that order was made. However, that contention would be entirely fallacious. **Rule 46** of the **BVI NCPR 2017** states that a "person who seeks a grant of letters of administration under the discretionary powers of the court shall, upon obtaining an order under **rule 45**, file at the registry the usual papers for a grant of letters of administration under **rule 9** or under **rule 13**, as the case may be …". The same position applies where an order to allow an emergency grant under **r. 47 of the BVI NCPR 2017** is made by the court: see **r. 48(4) of the BVI NCPR 2017**. (Emphasis supplied).

[60] The issue for this Court is whether the terms of Young J's Order made it unnecessary for BNU to obtain a formal grant of administration *ad colligenda bona* before she could carry out all the activities referred to in para. 2 of Young J's Order or whether she could only do so once she had obtained a formal grant of administration *ad colligenda bona* in order to enable her to do so.

[61] It seems to me to be clear that in order to make proper sense of Young J's Order, it should be read subject to the terms of **r. 46** and, if appropriate, **r. 48(4)**. In my judgment, therefore, Young J's Order does not allow BNU to bring proceedings on behalf of the BVI Estate, still less be registered as the legal owner of the 30% Shareholding. All it does is to allow BNU to take out a grant for her appointment as AACB, provided she lodges the appropriate documentation in support of that application accompanied by the requisite fee, and the Registrar or Judge of the Probate Court considers that the papers are in order. So far as Young J intended to allow her to represent the BVI Estate without a grant, and I do not consider she did, her order was made in excess of jurisdiction. Further, and in any event, although the order is valid until set aside[10], it should, in my judgment, be set aside for the various other reasons set out in this judgment.

[62] I appreciate the point made by Mr Mitchell that BNU could hardly apply for a formal grant if there was a caveat prohibiting her from doing so[11]. However, BNU could have applied to remove the

[10] See, for example, **Isaacs v Robertson [1985] AC 97, [1984] 3 All ER 140, [1984] 3 WLR 705**.

[11] The position appears to be different in England and Wales: see **r. 44(1) of the NCPR 1987**: "Any person who wishes to show cause against the sealing of a grant may enter a caveat in any registry or sub-registry, and

caveat and have this matter dealt with, as it should have been from the outset, as a solemn form probate claim.

[63] The above conclusion is supported by a wealth of authority.

[64] **Section 9(2) of the AEA 1925** has been considered above. The point at which the vesting of an estate from the "public trustee" equivalent of the BVI vests into a "personal representative" of the estate is when a "grant of representation" is made to him. This is clear from the meaning of the expressions "personal representative" and "grant of representation" in **s. 55(1) of the AEA 1925**.

[65] The expression "personal representative" is defined in **s. 55(1)(xi) of the AEA 1925** as follows:

> "'Personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court …"

[66] The meaning of "representation" is set out in **s. 55(1)(xx) of the AEA 1925** in the following terms:

> "'Representation' means the probate of a will and administration, and the expression 'taking out representation' refers to the obtaining of the probate of a will or <u>of the grant of administration</u>.'
>
> (Emphasis supplied).

[67] The effect of these provisions is clear. A person will only be constituted as an administrator of the estate of a deceased person if a formal grant of representation is issued to him[12]. This is recognised by **r. 2 of the BVI NCPR 2017**, which defines the expressions "administration" and "grant" respectively in the following terms[13]:

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the district judge or registrar shall not allow any grant to be sealed (other than a grant ad colligenda bona or a grant under **section 117 of the [SCA] 1981**) if he has knowledge of an effective caveat …".

[12] *Aliter,* if he is appointed executor of a will.

[13] The omission of a definition for the word "executor" in r. 2 is significant. The authority of an executor stems from his appointment in a will and takes effect from the death of the testator. A grant of probate is not necessary to constitute him an executor. The probate itself is the authentication of his title, and is also a document of title: see, by way of examples, **Comber's Case (1721) 1 P Wms 766; Meyappa Chetty v Supramanian Chetty [1916] 1 AC 603 at 608, PC; Chappell & Co Ltd v Redwood Music Ltd [1980] 2 All ER 817, HL; Jogie v Sealy (Trinidad and Tobago) [2022] UKPC 32;** and **Viegas v**

"'administration' means a grant of letters of administration with or without will annexed."

"'grant' means a grant of probate or letters of administration with or without will annexed."

[68] It follows that unless and until a person appointed as administrator of the estate of a deceased obtains a grant of representation to the estate, he will not be able to act as personal representative of that estate.

[69] In the context of the Permission Application, this view is supported by **s. 184C of the Business Companies Act 2004 ("the BCA 2004")**, which states that the Court can only grant permission to bring a derivative claim to a "member" of a company

[70] The expression "member" is defined in **s. 184A of the BCA 2004** in the following terms:

> "In this Part, 'member', in relation to a company, means — (a) a shareholder or a personal representative of a shareholder …". (Emphasis supplied).

[71] The **BCA 2004** does not define or elucidate on the meaning of the expression "personal representative". However, in my judgment, Mr Hagen is correct to say that this expression cannot have a meaning which is different from the meaning of that expression in the **AEA 1925**, i.e., that the person concerned must have a grant of representation (unless he is an executor) before he can fall within the meaning of that expression for the purpose of the **BCA 2004**. It would be odd if a person would need a grant of representation to perfect his title to all the assets of a deceased's estate, but not to the shares of a company for the purpose of bringing an application for permission to issue a derivative claim. This type of differential meaning or treatment of that expression seems to me to be absurd.

[72] In **Millburn-Snell and others v Evans [2011] EWCA Civ 577, at [16], Rimer LJ (with whom Lord Neuberger MR and Hooper LJ** agreed) said:

Cutrale [2024] EWCA Civ 1122. However, in practice, third parties (particularly banks and other financial institutions) will only deal with him if his authority is confirmed by such a grant.

> "I regard it as clear law, at least since **Ingall's** case, that an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity. That principle was recognised and applied by this court in **Hilton v Sutton Steam Laundry [1946] KB 65, 71 (per Lord Greene MR) and Burns v Campbell [1952] 1 K.B. 15 (per Denning LJ at p 17, and Hodson LJ at p 18)**. **In Finnegan v Cementation Co Ltd [1953] 1 Q.B. 688, 700 Jenkins LJ** said:
>
> > 'As to the law, so far as this court is concerned it seems to me to be settled by **Ingall v Moran** and **Hilton v Sutton Steam Laundry** and, I may add, **Burns v Campbell**, that an action commenced by a plaintiff in a representative capacity which the plaintiff does not in fact possess is a nullity, and, further, that it makes no difference that the claim made in such an action is a claim under the Fatal Accidents Acts which the plaintiff could have supported in a personal capacity as being one of the dependants to whom the benefit of the Acts extends.'"

[73] In my exchanges with Mr Mitchell, I indicated to him that perhaps the Court might have power to cure any defects in BNU's title to the 30% Shareholding by making a "representation order" under the BVI equivalent of **CPR Part 19 of England and Wales**. However, it is clear that neither the power the Court has to cure procedural defects (**ECSC CPR 26.9**, the rough equivalent of the **England and Wales CPR 3.10**) nor to grant a party representative status (**ECSC Part 21**, the rough equivalent of **England and Wales CPR Part 19**) can come to the assistance of BNU. Likewise, despite the wide power which the Court has to make orders to further the overriding objective under **Part 1 of the ECSC CPR**, that power cannot be exercised in the present case to allow BNU to bring court proceedings or to take any steps to preserve the assets of the BVI Estate.

[74] In **Kimathi and others v Foreign and Commonwealth Office (No 2) [2016] EWHC 3005 (QB), [2017] 1 W.L.R. 108**, the English High Court refused to follow the decision of **Peter Smith J** in **Meerza v Al Baho [2015] EWHC 3154 (Ch)** in which he had said that the court retained a residual jurisdiction to cure any technical errors and objections, whether procedural or legal, under the "overriding objective" provisions of the **England and Wales CPR Part 3**, provided it was just to do so. **Stewart J** said in **Kimathi**, at **[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 W.L.R. 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 [sic] 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."

[75] There are several BVI authorities to like effect. They include **Liao Chen Toh v Liao Hwang Hsiang BVIHPB 2011/93** and **Re Scherbakov BVIHC (Com) 2018/134**. In the latter case, **Adderley J** said, at **[50]-[52]**:

> "Upon obtaining the order the person who seeks the grant of letters of administration shall file at the registry the usual papers for grant of letters of administration under Rule13 and the oath shall include the following recitals: the date and effect of the order of the court including the relevant statutory provision and the Act under which the order was made and; the limitations if any, imposed by the court. A copy of the order of the court directing that the grant be made to the applicant pursuant to the discretionary powers of the court shall be filed. The usual papers to be filed under Rule 13 are set out in the schedule to Act."

[76] In **Batista v Batista BVIHCVAP2022/0015 (18 January 2024)**, the **Court of Appeal of the ECSC** stated that a Registrar and Judge of the High Court had concurrent jurisdiction (or, at any rate, the Registrar's jurisdiction was (to use my, rather than **the Court of Appeal's** expression) "derivative", in the sense that it was derived from the jurisdiction of the Judge) to issue orders and make grants of representation. However, neither could exercise that jurisdiction unless all the necessary paperwork specified in the **BVI NCPR 2017** had been lodged before them. At **[120]**, **Henry JA** observed:

> "The referral of that application to the Registrar gave effect to the procedure stipulated by the **NCPR**. This was necessary not because the judge could not dispose of the application but evidently because the relevant forms were not before him."

[77] This precise situation applies in the present case. The documents necessary for a grant of representation to be issued were not before Young J. She, therefore, had no power to issue the grant to follow on from the order she made appointing BNU as AACB and did not, therefore, do so. As Mr Hagen correctly states, this practice (of taking out a grant of representation) must be followed once a court appoints a person as administrator and is recognised by most well-known

practitioner works on the subject: see **Tristam and Coote**, at **para. 11.387 ff**; and **Williams, Mortimer & Sunnucks**, at **para. 15-49 ff**.

[78] If, as Mr Mitchell contends, it is sufficient simply for BNU to be constituted the personal representative of the BVI Estate by virtue of her appointment as AACB by Young J's Order, I question why BNU felt the need to apply for a grant in August 2024 after she obtained the order and then reapply for the grant on 12 or 13 May 2025. After all, the sole (or, at any rate primary) purpose of obtaining an order for her appointment as AACB was to allow her to bring the Permission Application. On Mr Mitchell's analysis of BNU's position, it was not likely to be required for any other purpose.

[79] On the basis that the documents leading to the obtaining of the grant of administration *ad colligenda bona* were lodged by BNU first in August 2024 and then relodged on 12 or 13 May 2025, Mr Mitchell says that it is possible for me to issue a grant of representation now. I reject his contention for several reasons.

[80] First, even accepting that I do have the jurisdiction to issue grants, the **BVI NCPR 2017** make it clear that the decision to issue such a grant is primarily for the Registrar of the Probate Court to make. If a judge of the High Court has concurrent jurisdiction with the Registrar to issue grants, it should usually be a Judge of the Probate Court who should do so, not a Judge of the Commercial Court[14]. Commercial Court Judges do not have the expertise to know what specific matters they should look for in deciding whether to issue the grant. But in any event, it is a fallacy for BNU to think that this Court (or even the Registrar or Judge of the Probate Court) would be willing to issue such a grant as a matter of course. In addition to the papers having to be checked, the Court would have to take into account that ATH had, at or about the time that BNU applied for the grant, sought to impugn Young J's Order. Until that issue was finally determined, it would not have been appropriate for a grant to be issued in BNU's favour. The Registrar of the Probate Court was right not to do so in this case until the dispute between the parties was finally determined. I, too, would have refused to allow the grant to be issued.

[14] This is despite **r. 2 of the ECSC NCPR 2017** defining a "judge" as any "judge of the Eastern Caribbean Supreme Court."

[81] Second, it is up to the Registrar or Judge in the Probate Court to decide whether the papers lodged with that court should be transferred to a judge (including a judge of the Commercial Court) to determine whether the grant should be issued. No such transfer has been made by the Registrar to me or any other High Court Judge. It would, in my judgment, be an abuse of process for BNU to invite me to issue a grant on a fresh application made to me to do so when there is an application for such a grant pending before the Registrar or a Judge of the Probate Court.

[82] Third, I do not think that issuing a grant now would assist BNU in perfecting her title to the 30% Shareholding for all the reasons referred to in this Judgment.

[83] Finally, and by way of reiteration of what I have said, the issue of a grant should not follow the making of an order for the appointment of BNU as AACB as a matter of course. As noted above, given that Young J's Order has been impugned by ATH, it is difficult for me to see how I could issue the grant on the basis that I might subsequently decide to set aside that order or, as I have now found, I should set aside the order.

[84] Mr Mitchell seeks to counter these arguments in various other ways and suggests that the Court should not give in to them if, by doing so, it avoids justice being done to a party, in this case, BNU. He relies on the decision of **Wallbank J** in **Fong v Incredible Power Limited, BVIHC(COM) 2015/0047**, in which **Wallbank J** expressed "gross distaste" for the strategy pursued by the defendants of "fleeing for refuge into legalistic technicalities." Mr Mitchell claims that such distaste might "justifiably be expressed in the instant case: here, it has long been common ground between the parties that BNU is the heir to 30% of SSQ's shares in UGX and THA. If only those shares had been transferred to her long ago – as they should have been – the application for the grant *ad colligenda bona* would not have been necessary; and the plethora of meretricious technical points that have been taken in response to BNU's successful application do ATH and WKU no credit. On the contrary, the fact that defences of this nature have been taken only reinforces the impression that WKU is fighting desperately to avoid the light finally being shone on what he has done."

[85] I do not agree with him. I do not consider that these points are merely technical. They go to the root of how grants of representation should be applied for and obtained in this jurisdiction. Compliance with the requirements of the **BVI NCPR 2017** is not an empty formality. The

documents needed to be lodged are necessary to determine, *inter alia*, whether there is any tax to be paid on the death of a deceased (even though there is none payable in this jurisdiction), and also what fees may be due arising from such death. In England and Wales, for example, no grant of representation will be issued without an "Inheritance Tax Account" form (referred to as an "IHT400 – CTO form") being submitted by the person seeking to obtain the grant of representation (whether full or limited) accompanied by the requisite amount of any tax payable by him, and the appropriate amount of probate (court) fees. This is so even if the person does not have sufficient information about the value of the estate to include final figures in the form. He would need to include provisional or estimated amounts in the form and pay any revised tax and fee when the final amounts are known, together with any interest on the tax if there is a shortfall between the tax originally paid and the final amount of tax found to be due. The Probate Registry in England and Wales has no power to waive this requirement, though where it is satisfied that there is difficulty in aggregating the estate, HM Revenue and Customs will often waive the requirement to produce an account. In such a case, a confirmatory letter will need to be obtained from HM Revenue and Customs and will need to be lodged with the application for the grant[15].

[86] Mr Mitchell contends that this Court can save BNU from what appear to be the consequences of the matters to which I have referred above in several ways.

[87] As I have already indicated, he says that BNU applied for a grant of administration *ad colligenda bona* on 21 August 2024 but was unable to obtain it because ATH had objected to the grant being issued. He contends that there is no reason why the grant should not be issued now because the documents specified in the **BVI NCPR 2017** have been lodged with the Registrar. He claims that if the grant of administration *ad colligenda bona* is issued in favour of BNU now, the assertion by ATH that BNU did not have standing to apply for permission to bring the Derivative Claim cannot be sustained.

[88] I do not agree. There seem to me to be two obstacles to such an argument succeeding in the present case. First, the authorities to which I have referred above make it clear that the failure to perfect the title of a person nominated to act as AACB renders any step taken by that person a

[15] See **Williams, Mortimer and Sunnucks**, at **para. 15-50**.

complete nullity. It is difficult to see how the standing (or lack of it) of BNU in the Permission Application can be cured by a grant being issued to her now.

[89] But the second, and perhaps more important, point is that I do not see how obtaining the grant now can cure the deficiency in her standing to bring the Permission Application, even if I refuse to set aside Young J's Order. That is because the grant would only take effect from the date it was issued. It cannot apply retrospectively for all the reasons analysed above. It follows that BNU's title to the 30% Shareholding *qua* AABC cannot be perfected by the grant. This point is made clear by the editors of the **White Book (2025)** by reference to CPR 19.12 of the CPR of England and Wales:

"Rule 19.12 has no role to play where proceedings are a nullity at the time of issue

19.12.2 In **Millburn-Snell v Evans [2011] EWCA Civ 577; [2012] 1 W.L.R. 41** the Court of Appeal rejected the notion that **r.19.12(1)** has any role to play in proceedings which were a nullity at the time of issue. The court held that proceedings commenced purportedly on behalf of an intestate's estate but without a grant of administration were an incurable nullity. **Rule 19.12(1) i**s concerned exclusively with giving directions for the forward prosecution towards trial of validly instituted proceedings when a relevant death requires their giving. The court held that **r.19.12(1)** cannot give life to proceedings which were born dead and are incapable of being revived (citing with approval **Ingall v Moran [1944] K.B. 160 CA** and doubting, obiter, the views stated by **Arden LJ and Pill LJ, obiter**, in **Haq v Singh [2001] 1 W.L.R. 1594**). **Millburn-Snell** was followed by a differently constituted Court of Appeal in **Hussain v Bank of Scotland Plc [2012] EWCA Civ 264** …

In **Meerza v Al Baho [2015] EWHC 3154 (Ch)**, **Millburn-Snell** was distinguished by **Peter Smith J** on the basis that the Court of Appeal there had considered only the court's powers under **r.19.12** and had not been referred to the wide powers of amendment as explained in **Maridive and Oil Services SAE v CNA Insurance Co (Europe) Ltd [2002] EWCA Civ 369** in which an earlier Court of Appeal had held that there is no absolute rule of law or practice which precludes an amendment to rely on a cause of action which has arisen after the commencement of the proceedings in circumstances where (but for the amendment) the claim would fail.

In **Kimathi v Foreign & Commonwealth Office (No.2) [2016] EWHC 3005 (QB); [2017] 1 W.L.R. 1081** the decision in **Meerza** (see above) was distinguished on the grounds that, in this case, the claim had been made in the name of the deceased, not in the name of a living claimant such as a personal representative and, in any event, had been commenced before any Grant of Administration had been made. **Stewart J** also expressed serious doubts as to whether **CPR Pt 3** gives the court a general discretion to cure defects in claims, however fundamental. The learned judge stated that, if **Meerza** had not been distinguishable he would have felt constrained to depart from the reasoning and judgment of **Peter Smith J**. In **Jogie v Sealy [2022] UKPC 32** (at **[55]**), **Lord Burrows** (with whom **Lady Rose agreed**) agreed with Stewart J's analysis. In **Jennison v Jennison [2022] EWCA Civ 1682; [2023] Ch. 225** (at **[52]–[60]**) **Lord Justice Newey** (with whose judgment **Lord Justice Coulson** and **Lady Justice King** agreed) held that **CPR 3.10** is not applicable where the proceedings that have purportedly been brought are to be regarded as a nullity. **CPR Pt 3** cannot be used to validate a nullity.

In **Haastrup v Okorie [2016] EWHC 12 (Ch)** it was stated to be part of the ratio of the Court of Appeal in **Millburn-Snell** that the words '[Where] a person who had an interest in a claim has died' in **r.19.12(1)** apply only to the case where the claim in question had already commenced, and then the claimant or some other person having an interest in it, died. This summary of the ratio is over-concise. It was recognised by **Rimer LJ** in his judgment in **Milburn-Snell** at **[28]–[30]** that the phrase doesn't refer exclusively to a deceased person who was a party to the claim and that **r.19.12(1)** enables the joinder during the currency of the proceedings of someone to represent the interests of a deceased person who had an interest in the claim, but who may not have been a party to it. That does not assist a claimant without title to sue when the claim is issued.

The principle that a person has no standing to institute proceedings as an administrator in advance of the issue of letters of administration and that proceedings brought earlier are a nullity was applied both in **Viegas v Cutrale [2023] EWHC 1896 (Comm)** and in **Ali Abdullah Alesayi Will Establishment v Hashim Ali Alesayi [2023] EWHC 3150 (Ch)** to claims relating to assets abroad. The claims in both cases were characterised as being claims relating to administration of foreign estates and not as personal claims and were, absent a grant of letters of administration in England and Wales, held to be a nullity. In **Viegas v Cutrale [2024] EWCA Civ 1122**, the Court of Appeal upheld the judge's decision to strike out a claim brought by heirs in the absence of a grant of representation rather than giving the heirs a further opportunity to apply for letters of administration and to make applications under **CPR r.17.4(4)**.

[90] Mr Mitchell also contends that the "role of the Letters of Administration is simply to prove the title to third parties. Where a court, using its powers under **s. 116**, has appointed someone as [AACB], the title required to give effect to the order is vested on the spot. The letters are merely proof of title, not part of the machinery by which title is actually conveyed. In this case, the actual asset to be dealt with is shares, not real property; title to shares is usually conveyed by entries into the register; but post death, a form of title to shares can either be vested into personal representatives by operation of law (executors) or, it is submitted, by court order giving powers to deal with those shares."

[91] I respectfully disagree.

[92] It is clear from the cases analysed above that the authority of an administrator, as opposed to an executor, takes effect from the date of the grant. Up until that point, the estate of a deceased is vested in the equivalent of the public trustee in this jurisdiction. The revesting in the administrator only takes place when the grant is issued. A grant that is issued now cannot, therefore, allow BNU to perfect her title to the shares *qua* AACB and give her standing to bring the Permission Application. Put simply, the issue of the grant AACB does not have retrospective effect and cannot, *ex post facto*, validate BNU's title to bring the Permission Application.

[93] Nor would it be appropriate for me to consider whether the papers in support of obtaining a grant were in order sufficient for me to issue the grant, though this need not, by itself, be an impediment. I can always direct the Registrar to do so.

[94] But the issue with what Mr Mitchell proposes is that it does not seem to be viable in any event. Even if I (or the Registrar) did issue a grant now, and BNU issued a new permission application, as Mr Mitchell suggests she could do, I would still have to strike out or dismiss the first Permission Application for want of standing on the part of BNU to bring it. The position is no different even if I accepted his view that Young J's order permitted BNU to bring the Permission Application unless, of course, I dismissed ATH's application to set aside her order. That is because even if one proceeds on the premise that Young J's order allowed BNU to bring the Permission Application and that the order is valid until set aside (see **Isaacs v Robertson [1985] AC 97, [1984] 3 All ER 140, [1984] 3 WLR 705**), if I decided to set aside the order, I do not see that I could make any order on the Permission Application other than strike out or dismiss that application.

[95] Mr Mitchell relies on the decision of the Privy Council in **Jogie v Sealy (Trinidad and Tobago) [2022] UKPC 32** to support some of the points he makes.

[96] In that case, a notice to renew a statutory tenancy given by the administrator of an estate before the grant of letters of administration, and proceedings seeking possession of the land which had been commenced prior to the grant of letters of administration, were held to be both a nullity and unable to be retrospectively validated by the doctrine of "relation back".

[97] I am not sure how this authority assists BNU. Mr Mitchell relies on the following *obiter* comments of **Lord Burrows** in that case, at **[70]** and **[72]**, to support the premise that this Court can save the validity of the Permission Application that BNU issued:

> "70 While I have some sympathy for Angela Sealy, it should be noted that the facts of this case are significantly different from those in **Ingall** and the other cases on limitation following it that have been explored in paras 44-45 above. In those cases, there was a 'blot upon the administration of the law' because the relevant limitation period had expired prior to the grant of administration (or shortly afterwards) so that the administrator had no (or little) time to commence an action. In contrast in this case, the four-year limitation period for even the first alleged trespass (in January 2011) would not have expired until January 2015 and that was over two years after the grant of administration. It is also very important to bear in mind, in considering the overall position, that, had Angela Sealy succeeded on the renewal of the lease issue, she would even today have been able, as administrator, to start proceedings afresh albeit in relation to a different claim. This is because, as Mr Beharrylal made clear at the hearing before us, the limitation period has not expired for a claim for the recovery of land given that the limitation period for such a claim is 16 years under **section 3 of the Real Property Limitation Act**. Indeed, so as to avoid wasting costs, if Angela Sealy as administrator had issued fresh proceedings for the recovery of land I might have deemed the existing steps in the present action to have been taken in the new action (somewhat analogously to what was done in **Millburn-Snell** : see para 49(iii) above). But given my (and the Board's) decision on the renewal of the lease, she cannot succeed on a claim for the recovery of land.
>
> 72. Since writing a draft of this judgment, I have read the judgment of **Lord Leggatt**. It would appear that the only significant difference between us concerns the renewal of the lease. As I have made clear in paras 24-26 above, I am content to accept that what I have there termed the 'wider view' of the relation back doctrine is correct whereas Lord Leggatt's reasoning is that that wider view is wrong (so that the reasoning in **Mills v Anderson** is wrong) and that what I have termed the 'narrower view' is correct. But we both accept (for **Lord Leggatt** this is an alternative reason for his decision on the renewal of the lease) that the renewal of the lease could not be validated by relation back because this would undermine the landlord's vested proprietary rights."

[98] The important point to note about **Jogie** is that the Privy Council unanimously held that the "relation back" doctrine did not validate a person's title to bring a claim, *ex post facto*, to the date when the order permitting that person to apply for it was made. **Lord Burrows** made this clear at **para. [3]** of his judgment:

> "It is well-established that, in contrast to the position of an executor of a will, an administrator … only acquires the right to act on behalf of an estate once the grant of administration has been made …".

[99] **Jogie** was considered by the **Court of Appeal of England and Wales** in **Viegas v Cutrale [2024] EWCA Civ 1122.** It is only necessary to set out the following remarks made about **Jogie by Newey LJ** (with whom **Nugee and Lewis LJJ** agreed), at **[85]**:

> " … an administrator acquires title only when granted letters of administration and, until then, legal title to the estate of a person who has died intestate vests in the Public Trustee under **section 9 of the Administration of Estates Act 1925**. An administrator therefore has no right to bring a claim before letters of administration are issued. Once a grant has been obtained, 'the title of the administrator to the property of the deceased relates back to the death', 'enabl[ing] the administrator to sue on a cause of action which arose between the date of the death and the date of the grant, as well as on a cause of action which arose before the death, provided the cause of action survives': see **Jogie v Sealy [2022] UKPC 32, at para 162**, per **Lord Leggatt JSC**. At common law, however, relation back will not serve to save proceedings commenced in advance of the grant: as **Lord Burrows JSC** said in **Jogie v Sealy, at para 68(i)**, 'the subsequent grant of administration does not retrospectively validate the proceedings'."

[100] Of course, there are exceptions to this general rule. However, they are of an extremely limited nature. **Williams, Mortimer and Sunnucks** summarise, at paras. **5-18** and **5-19**, what they are (disregarding the footnotes in those paragraphs):

> "5-18 Cases may, however, be found, where the letters of administration have been held to relate back to the death of the intestate, so as to give [sic] a validity to acts done before the letters were obtained. Thus, if a person takes the goods of the intestate as executor de son tort, and sells them, and afterwards obtains letters of administration, it seems the sale is good by relation and the wrong is purged. An administrator can recover in trespass or for wrongful interference with goods against a wrongdoer who has seized or converted goods before the grant. The reason for this is that otherwise there would be no remedy for this wrongdoing. Further, it has been held that where the administrator might sue in respect of a conversion that occurred between the death of the intestate and the grant of administration, the administrator might waive the tort and recover as on contract. Thus, in one example where money belonging to the intestate at the time of his death, or due to him and paid in after his death, or proceeding from the sale of his effects after his death, had, before the grant of administration, been applied by a stranger to the payment of the intestate's debts and funeral expenses, it was held that the administrator could recover it from such stranger as money had and received to his use as administrator.
>
> 5-19 It would also seem that whenever anyone acting on behalf of the intestate's estate and for its benefit, and not on their own account,

makes a contract with another before any grant of administration, the administration will have relation back, so that the benefit of the contract is not lost and the administrator may sue upon it. Similarly, if during the time when there is no personal representative, services have been rendered which not only were for the benefit of the estate, but also were rendered under a contract with someone who subsequently, by becoming administrator, became authorised to bind the estate, and who ratified the contract, the estate of the deceased is liable for such services. It seems also that the grant of administration vests leasehold property in the administrator by relation, so as to enable the administrator to bring actions for all matters affecting that property after the death of the intestate, and so to render the administrator liable to account for the rents and profits of it from the death of the intestate … Such relation back exists only in those cases where the act done is for the benefit of the estate. Accordingly, where the widow of an intestate had remained in possession of her husband's property for some time after his decease, and the intestate's son had not interfered in any way with the property, which was seized under a writ of fi. fa. issued against the widow, and the son afterwards took out administration, it was held that there was no evidence from which the administrator's consent to the widow's taking the property could be implied, and by Parke B. that even if there had been, the estate was not bound by it, as the act to which the consent was given did not benefit the estate."

[101] The substance of these passages was approved in **Jogie.** The exceptions have no application to the facts that apply in the present case. There is simply no basis to depart from the general rule that there is, and would be, no relation back of the grant to the date of Young J's Order.

[102] To the extent that there is any tension between the approaches taken by the **Court of Appeal** in **Millburn-Snell** and some of the other cases cited by Mr Mitchell, I consider the approach in **Millburn-Snell** to be correct. This was also the view taken by **Master Marsh** in his *obiter* comments in the following paragraphs of his judgment in **Haastrup v Haastrup [2016] EWHC 3311 (Ch)**:

"39 Simply put, the question is this. If a person commences a legal action claiming as an administrator or otherwise on behalf of a deceased's estate (but not as executor of the deceased's will), but does not allege a grant of letters of administration before the issue of the claim, can the action be struck out if the person subsequently obtains or at least seeks a grant of administration?

40. The decision of the **Court of Appeal** in **Ingall v Moran [1944] KB 160**, that a claim begun by a person on behalf on an estate who at that date did not have a grant was an 'incurable nullity' (see at **p 165**, per **Scott LJ**), was applied

recently by the **Court of Appeal** in **Milburn-Snell v Evans** [**2012] 1 WLR 41**…

41. But in the present case it was argued that I should follow the recent decision of **Peter Smith J in Meerza v Al Baho [2015] EWHC 3154 (Ch) (not cited in Haastrup v Okorie [2016] EWHC 12 (Ch)**). There the judge appears to have held that the court had power to order the grant of letters of administration after the commencement of a claim and then treat that grant as conferring title to sue retrospectively. A deceased died in 2003 domiciled in Kuwait. One of the Claimants in that case was the daughter of the deceased. She brought a claim in respect of immovable property, and claims related thereto, situate in England ('the English Estate'), apparently on behalf of the estate of the deceased. It was alleged that the deceased was the beneficial, though not the legal, owner of such property.

42. At the date of the issue of the Claim Form, the daughter had no grant in respect of any part of the estate of the deceased. She was just a beneficiary, or potential beneficiary, of his estate. But *subsequently* [emphasis supplied by the learned **Master**] she was granted letters of administration of the English Estate for the use and benefit of her mother, a widow of the deceased. She accepted that without such grant she would have no title to sue. In fact the Defendants acquiesced 'for a substantial period' in her title to sue despite the lack of letters of administration, and the action proceeded. However, later, the First Defendant and the Third Defendant applied to strike out the claim by her on the basis of her lack of title.

43. The judge was referred to **Millburn-Snell v Evans**, and to another case which followed it, **Hussain v Bank of Scotland plc [2012] EWCA Civ 264**. He specifically considered the **Court of Appeal's** decision in **Haq v Singh [2001] 1 WLR 1594**, which preceded it, but on which the **Court of Appeal** in **Millburn-Snell** made some adverse comments. However, the judge also considered another line of authority, seemingly based on **Hendry v Chartsearch Ltd [1998] CLC 1, 382, CA**. This suggested that there was no rule of 'incurable nullity' as suggested in **Ingall v Moran**, but instead a discretion vested in the court to permit amendments even adding new causes of action accrued since the claim was issued, if the justice of the case so required it. **Hendry** was followed by the Court of Appeal in **Maridive & Oil Services (SAE) v CNA Insurance Company (Europe) Ltd [2002] EWCA Civ 369,** and by the judge himself in **Midtown Ltd v City of London Real Property Co Ltd [2005] EWHC 33 (Ch)**.

44. **Peter Smith J said (at [46]**): 'It seems to me that based on those authorities (which were not cited in [**Millburn-Snell v Evans and Hussain v Bank of Scotland**]) I have a discretion under **CPR 3** to apply the overriding objective to enable cases to be dealt with justly. In particular based on **Chadwick LJ**'s observations above [in **Maridive** at **[54]**] it seems to me clear that that power can be used to ensure that any technical objections whether procedurally or a matter of law can be overcome provided it is just so to do. In the present case

it is clearly just to accede to an application to amend to perfect the claim by reason of the grant of the letters of administration if that were necessary.'

45. With all due respect to **Peter Smith J**, I have to say that I find this a difficult passage to follow. **CPR Part 3** is concerned with case management powers. These powers are set out in **CPR rule 3.1(2)** beginning with the words, "Except where these Rules provide otherwise…" None of the powers there set out deals with power to amend claims or add or substitute parties. Those matters are instead dealt with by **CPR Part 17** (amendment generally) and **CPR Part 19** (change of parties). It is difficult enough to see how the "overriding objective" can allow the court to ignore the provisions of specific rules concerned with amendment. But in any event, the judge's decision in Midtown is based on **Hendry** and **Maridive**, and **Maridive** is stated to follow **Hendry.** Yet **Hendry** is a case under the **RSC 1965**, not the **CPR.** There was no 'overriding objective' and no equivalent of **Part 3 under the RSC 1965**. So whatever **Hendry** is based upon, it is not the overriding objective or **Part 3 of the CPR**.

46. There is also the difficult question of which of the two streams of (Court of Appeal) authority the court should now follow. In other circumstances I might have had to go into that. There are for example, dicta in **Roberts v Gill [2011] 1 AC 640** (not cited in either **Millburn-Snell** or **Meerza**) which might have to be taken into account. Since the hearing I have also come across two further relevant decisions. They are that of **Asplin J** in **Courtwood Holdings SA v Woodley Properties Ltd [2016] EWHC 1168 (Ch)** (following **Hendry** in preference to **Millburn-Snell**), and that of **Stewart J** in **Kimathi v Foreign and Commonwealth Office [2016] EWHC 3005 (QB)** (following **Millburn-Snell** in preference to **Hendry**)."

[103] Of course, **Jogie** was decided before **Haastrup**. But, as I have pointed out above, there is little or nothing in **Jogie** that can provide any comfort to Mr Mitchell. The most that can be said is that their lordships used different reasoning to conclude that the "relation-back" doctrine did not apply to administrators. The position is summarised in the following lengthy passage from **Williams, Mortimer and Sunnucks**, at **para. 5-14** (disregarding the footnotes in those paragraphs), with which I am in full agreement:

"By reason of the general rule referred to above, a person has no right even to commence proceedings as an administrator before letters of administration have issued for, until such time, there is no right of action. Under existing case law, the subsequent issue of letters of administration will not assist, for the grant does not for this purpose relate back and an administrator with the will annexed has no more right in this respect than any other administrator. On the basis of these authorities, it has been held that proceedings brought by a person supposedly as administrator, but before obtaining a grant, are a nullity which cannot be validated by a later grant of administration. It had been suggested that **CPR r.17.4(4)** may have altered this position, namely in **Haq v Singh [2001] EWCA Civ 957** where **Arden LJ commented** (obiter) at **[22]** that the effect of r. 17.4(4) was 'to remove the effect of **Ingall v Moran [1944] K.B. 160**. There were considerable difficulties with this argument. First, the earlier authorities establishing that a person could not commence proceedings as administrator before a grant dealt with substantive rather than procedural law. In **Millburn-Snell v Evans**, the **Court of Appeal** questioned the correctness of the comments in **Haq** and in so holding, found that such proceedings cannot be validated by a direction under **CPR r.19.8(1)** and it doubted that **r. 17.4(4)** could perform a similar function; thereby finding that proceedings commenced purportedly on behalf of an intestate's estate but without a grant of administration are an incurable nullity. Further, **CPR r.17.4** applies only where a period of limitation has expired (see **r.17.4(1)(b)**), being founded on the **Limitation Act 1980, s. 35**. It would seem as a matter of principle to be an extraordinary result if proceedings could be saved by amendment only where a limitation period had expired. However, this is what, in the **Privy Council** case of **Jogie v Sealy** … **Lord Burro**ws says is 'indisputably' the effect of CPR r.17.4, and it seems that three of the five members of the Privy Council agreed with that conclusion …

The law applying in this area was comprehensively considered by the **Privy Council** in the case of **Jogie v Sealy** … The net result of the decision was to confirm that a claim brought on behalf of an estate prior to the grant of letters of administration is a nullity; however, the members of the **Privy Council** used differing reasoning to reach that result, and made various obiter comments as to the scope of this general rule and the exceptions thereto. In particular, and in respect of the operation of **CPR r.17.4(4)**, the Privy Council had differing views as to its operation:

Lady Arden appeared to repeat her earlier obiter comments in **Haq v Singh**, concerning the potential for **CPR r.17.4(4)** to 'save' such litigation.

Lord Burrows, with whom **Lady Rose** agreed, stated that **CPR r.17.4(4)** takes effect such that proceedings can be saved by amendment where a limitation period had expired but not where it was still live, noting that this cut across the most 'drastic' consequences of **Ingall;**

Lord Leggatt, with whom **Lord Shepherd** agreed, noted that **CPR r.17.4(4)** did not apply on the facts of the case, as there was no similar provision in the law of Trinidad & Tobago [from which appeal to the Privy Council emanated] but noted that, applying **Ingall**, an act done without authority at the time of its execution could not later be saved.

These comments were however strictly obiter, as this procedural rule did not apply on the facts or applicable law of this case.

It has been suggested that an exception to the above principle may exist where it is necessary for the person who is entitled to the grant of letters of administration to take possession of the deceased's personal property to safeguard the estate; there is an immediate right to possession enforceable by action, but this has been considered and disapproved (and found to be obiter), albeit in a decision of a Chancery Master. In certain cases, however, for example to claim an account from an executor de son tort or by derivative action, it may be possible for a person interested in the estate to issue a claim before grant seeking to safeguard the estate, in the capacity of a beneficiary."

[104] Mr Mitchell correctly points out that in England and Wales, it is now accepted practice to allow a claim which has arisen after the issue of proceedings to be added or substituted by amendment where there is no time bar and it is just to do so: see **Maridive and Oil Services v CAN Insurance Co (Europe) Ltd [2002] EWCA Civ 369**. He states that, on that basis, the position should be the same where a party's title to bring a claim is defective at the time when the claim is issued, but the defect is cured subsequently by an order of a court or, in this case, the making of a grant.

[105] I have already touched upon this above. But it is worth summarising the principles which apply where that may be appropriate.

[106] The editors of the **White Book (2025 Edition)** set out a summary of the relevant principles that apply in the context of validating a claim arising on death where the claimant had no standing to bring it:

> "In a claim commenced on behalf of a deceased person's estate, an amendment to plead a grant of representation obtained after the claim form was issued
>
> 17.3.3.3 The main group of cases to which this sub-paragraph applies are cases in which the claimant is described as the personal representative of a deceased person's estate but is not in fact an executor of the deceased's will and, at the time of commencement, had not already obtained a grant of representation (for example, letters of administration, or letters of administration with will annexed, or a grant under **s.116 Senior Courts Act 1981**, (Power of court to pass over prior claims to grant). Whilst an executor can sue in the capacity of executor before obtaining a grant of probate (because he derives his title to sue from the will itself) an administrator has no title to sue until he has obtained a grant of administration (**Chetty v Chetty [1916] 1 A.C. 603, at 608, 609, per Lord Parker of Waddington**).
>
> The leading case here is **Milburn-Snell v Evans [2011] EWCA Civ 577; [2012] 1 W.L.R. 41**, as to which … In that case the Court of Appeal held, following **Ingall v Moran [1944] K.B. 160**, that the commencement of proceedings as a personal representative without first obtaining a grant of representation is an incurable nullity; such a claim is born dead and so is incapable of being revived (unless, fortuitously, the case falls within the Limitation Act s.35 … The Court doubted, *obiter*, the views stated by the Court in **Haq v Singh [2001] EWCA Civ 957; [2001] 1 W.L.R. 1594** … However, about a year before the **Milburn-Snell decision**, views similar to those expressed in **Haq** were also expressed in the **Supreme Court in Roberts v Gill &**

Co [2010] UKSC 22; [2011] 1 A.C. 240 (see the judgment of **Lord Collins at [2], [34] and [38]**; and the judgment of **Lord Walker at [97] and [98]** …"

Milburn-Snell was followed in a differently constituted Court of Appeal in **Hussain v Bank of Scotland Plc** [2012] EWCA Civ 264 (noted in para.19.12.3, below) and by **Stewart J** in **Kimathi v Foreign & Commonwealth Office [2016] EWHC 3005(QB); [2017] 1 W.L.R. 1081** … and in **Qunintana v Surrey & Sussex Healthcare NHS Trust, 28 March 2017, unrep. (QB)**.

<u>Later cases in which Milburn-Snell was distinguished</u>

17.3.3.4 In **Meerza v Al Baho [2015] EWHC 3154 (Ch)**, proceedings were commenced in 2011 on behalf of a deceased's estate by a claimant who did not obtain letters of administration in England until March 2012. On an application to strike out the proceedings citing **Milburn-Snell** (see above) **Peter Smith J** distinguished that case on the basis that the Court of Appeal there had considered only the court's powers under r.19.12 and had not been referred to the wide powers of amendment as explained in **Maridive and Oil Services SAE v CNA Insurance Co (Europe) Ltd [2002] EWCA Civ 369** …

In **Haastrup v Haastrup [2016] EWHC 3311 (Ch)** (**Master Matthews**) the claim concerned a deceased person's estate but, on the facts, the claimant was entitled to sue in her capacity as a beneficiary and therefore the decisions in both **Milburn-Snell and Meerza** were distinguished. Nevertheless the learned Master explained how, had that not been the case, he would have decided which of these two conflicting cases to follow. On the facts, **Meerza** differs from both Milburn-Snell and Haastrup in that, only in **Meerza**, had the claimant obtained a grant of representation before her title to sue was challenged.

In **Football Association Premier League Ltd v O'Donovan [2017] EWHC 152 (Ch); [2017] F.S.R. 31** (**Master Marsh**) the claimant commenced proceedings in May 2016 claiming remedies for infringement of copyright. Later, the claimant sought permission to amend in respect of, amongst other things, allegations of infringement of copyrights created after May 2016. Whilst acknowledging the two strands of Court of Appeal authority (**Milburn-Snell** and **Maridive**) the learned Master adopted and applied the guidance given by **Morrison J** in **British Credit Trust Holdings v UK Insurance Ltd [2003] EWHC 2404 (Comm); [2004] 1 All E.R. (Comm) 444** … and stated that '[19] … the issue of "incurable nullity" in relation to the estate of a deceased person is some considerable distance from the issue I am considering.' Permission to amend was given, the amendments to take effect, not from the date of issue of proceedings or from the date of amendment, but from 13 August 2016, that being the opening date of the 2016/17 football season."

[107] The observations of **Master Marsh** in **Football Association Premier League Ltd v O'Donovan** referred to in the **White Book** are particularly apposite to describe the cases to which Mr Mitchell is referring. There may well be causes of action that accrue after a claim is issued. A claimant can either issue a new claim and have the old and new claims consolidated or heard at the same time or – as is suggested in the last paragraph of the above commentary cited from the **White Book** – simply allow an amendment to be made to the original claim to include the fresh claim. This is far removed from the circumstances that apply in the present case.

[108] There is, therefore, no analogy to be derived from the principles set out in **Maridive** and related cases, summarised above by the authors of the **White Book**, to the facts of the present case. The present case is not dissimilar to **Haastrup**, in which **Master Marsh** observed:

> "47. But, fortunately for me, there is a real and important distinction between **Meerza** and the present case. That is that, in **Meerza**, the Claimant had obtained a grant of administration after issue of the claim but before the Defendant applied to strike out the claim. In the present case the Claimants have never had a grant of administration, and, although they have now applied for a limited grant, I have said that if it were necessary to decide the point I would have refused it. So on this view of the facts the title to the claim would not be perfected, Meerza could have no application, and I should have simply struck out the claim under **Ingall v Moran** and **Millburn-Snell v Evans**. The discretion to permit amendment to the claim to plead a subsequent grant would never have arisen."
>
> 48. However, I do not wish it to be understood that I necessarily agree with the decision in **Meerza**. There is a very real question as to which stream of authority is right, or whether they both are, albeit applicable to different situations. None of the cases in the 'discretion' stream before **Meerza** deals with letters of administration, whereas the cases in the 'non-discretion' stream do. I record that I have not had to consider these questions, which must be left for another occasion."

[109] The most that the authorities relied upon by Mr Mitchell do is to establish that if a claim is brought by the correct party to a claim, that party can include a cause of action that he did not include in his originally formulated claim if doing so does not have any adverse effect upon the other party, such as allowing him to make a claim that is time barred. They go no further.

[110] The authorities also make it clear that a different claimant may be included in a claim either by way of addition or substitution of an existing claimant where the new claimant has standing to do

so and his standing is perfected at the time of the claim. But the circumstances here are different. BNU did not have standing to bring the Permission Application when the Permission Application was issued, and does not have standing to do so now. Even if Young J's Order gives her standing, as Mr Mitchell contends, she loses that standing if, as I have decided in this judgment, Young J's Order must be set aside.

[111] In **Kimathi**, **Stewart J** said:

> "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 T**etlow 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'."

[112] Following the conclusion of what was an exhaustive 5-day hearing in which the parties raised every conceivable point to advance the case on which they were relying, Mr Mitchell sent me to two further authorities purportedly supporting what he was saying.

[113] The first was **ACL Netherlands BV v Lynch [2025] EWHC 1171 (Ch)**. In that case, **Hildyard J** said:

> "[25] In my judgment,
>
> "(1) My jurisdiction under section 116 has been properly invoked, without the necessity of a separate action joining the executors appointed under the Will, provided that some mechanism is provided for any order made being binding on the relevant executors.
>
> …
>
> (3) There is no doubt that the circumstances I have described are "special" and that it is 'necessary or expedient' to 'appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant…' within the meaning of the quoted provisions of **section 116(1)**.
>
> …

(5) The terms on which Mr Sandelson is to be appointed, as set out in the attached agreed draft Order, are within the power of the Court to prescribe as conferred by section 116. I consider that those terms and provisions (none having been objected to) are expedient and reasonable. I draw comfort in that regard from the judgment and (comparable) orders made by Sales J (as he then was) in **Inna Gudavaze & Ors v Joseph Kay [2012] EWHC 1683 (Ch)**.

…

(9) The agreed draft Order attached, as requested by CCUK, includes a provision authorising Mr Sandelson to act immediately on the terms of the agreed draft Order, even before a formal grant of representation is issued by the Probate Registry: and see the elaboration of the reasons for this in paragraph 30 below.

…

[30] Lastly, and in further elaboration of my comment at paragraph 26(9) above, it had seemed to me to be implicit **in section 116(2**) that I would have power to make a formal grant of administration ad litem with power reserved to the Executors appointed under the Will who have not renounced to apply for probate in due course. Nevertheless, I consider that I should abide by what I understand to be the consensus between the parties that although the Order when sealed will appoint Mr Sandelson, direct his substitution as a party and authorise him to act, it will not of itself constitute a 'grant' and it will still be necessary for Mr Sandelson to apply to the Probate Registry for a formal limited grant ad litem. The provision referred to in paragraph 26(9), which I agree should be included, is to ensure that the time for processing applications in the Probate Registry (which I understand is typically some 12 weeks from submission of a formal application) does not yet further delay the reactivation of these proceedings and the circulation for correction of my draft judgment on the quantum issue (subject to the usual strict embargo)."

[114] In **ACL Netherlands BV**, **Hildyard J** determined that he had jurisdiction under **s. 116 of the SCA 1981** to appoint an administrator to represent the estate of the deceased defendant, Dr. Michael Richard Lynch, in proceedings that were pending before him. The first defendant, Dr. Michael Richard Lynch, passed away on 19 August 2024 during the ongoing proceedings. His will had appointed four executors, two of whom had renounced their executorship, while the remaining two, K and G, did not renounce but were undecided on taking up their appointment until they knew whether Dr Lynch's estate was solvent. They would not know this until judgment on quantum had been given by **Hildyard J**. Judgment on liability had been given by **Hildyard J** in favour of the claimants during Dr Lynch's lifetime on 17 May 2022 (**[2022] EWHC 1178 (Ch)**) in which certain counterclaims advanced by Dr Lynch during his lifetime were dismissed. Submissions on quantum were heard during Dr Lynch's lifetime but, before judgment on quantum was given, he died. The claimants made an application under **s. 116** of **the SCA 1981** to appoint

S, a solicitor, as the administrator of Dr. Lynch's estate for the limited purpose of representing the estate in those proceedings. S consented to the appointment, and the second defendant and the executors did not object to it. The hearing was to address and resolve the issues arising concerning the constitution of the proceedings following the death of Dr Lynch in August 2024.

[115] **Hildyard J** considered the circumstances to be "special" as required by **s. 116(1)**, given the death of Dr Lynch and the reluctance of the appointed executors to take up their roles until the solvency of the estate was determined. He found the appointment of an administrator to be "necessary or expedient" to represent the estate in the ongoing proceedings. He was also satisfied that S was a suitable appointee, considering his experience and familiarity with the case. In addition, he found the terms of the appointment of S, including the administrator's duties, liability, and the payment of costs and expenses, to be reasonable and within his powers under **s. 116**. **Hildyard J** granted letters of administration to S under **s. 116(1)** for the limited purpose of representing the estate of Dr Lynch in the ongoing proceedings. He, therefore, substituted S as the first defendant in place of Dr. Lynch under **CPR 19.2 of England and Wales**.

[116] In his note dated 19 May 2025 on this case, Mr Mitchell largely seeks to go over old ground and restate BNU's case on whether a formal grant is necessary, based on the authorities cited to me at the Omnibus Hearing. However, so far as he relies on the reasoning in **ACL Netherlands BV,** he advances the following submissions:

> "12. Note that the administrator's powers in the *Lynch* case did not involve paying debts, collecting assets, resolving disputes regarding the meaning and effect of the Will etc. His appointment was for one purpose only: to give Dr Lynch's estate a voice in the proceedings.
>
> 13. **Hildyard J** clearly understood that letters of administration did not have to be used before [S] could act as administrator. Nor did Sales J in *Gudavadze*: he appointed the administrators there effectively immediately, regardless of the fact that they did not yet have letters of administration.
>
> 14. The reason is obvious: letters of administration are not a *necessary* component of giving a person authority to act as administrator when exercising powers pursuant to section 1**16 SCA 1981**."

[117] I am unable to accept what Mr Mitchell says.

[118] The way in which the court was invited to proceed in **ACL Netherlands BV** was largely agreed. **Hildyard J** had decided to deal with the application on paper and did not have the benefit of the skeleton arguments I have read and the oral submissions I have heard. Neither the **NCPR 1987** nor cases such as **Millburn-Snell, Jogie,** and **Viegas** were cited to him. But leaving aside the circumstances of that case, which were rather different from the circumstances that apply here, as I have already indicated, on its proper construction, Young J's Order does not appear to have permitted BNU to act without taking out a grant of representation. Accordingly, even if I were to extend the terms of that order to allow her to do so, it would not operate retrospectively, and the Permission Application would still be a nullity.

[119] Another significant difference between BNU's claim and the position that applied in **ACL Netherlands** was that, as initially made, the claim in **ACL Netherlands** was validly constituted. In BNU's case, the Permission Application was simply not valid on account of the lack of authority on the part of BNU to bring it.

[120] Mr Mitchell asked by email dated 14 May 2025, sent to the Court, if it would help to hear further submissions in the matter. For the reasons referred to in this judgment, I do not believe that it would.

[121] This Court also received submissions on this point from Mr Hagen KC who appeared on behalf of ATH.

[122] Mr Hagen makes the following points about **ACL Netherlands BV**.

[123] First, he says that there is a difference between a situation where a defendant dies during the course of proceedings, having no personal representative to represent his estate, and one where a defendant who has made a valid counterclaim in those proceedings, dies intestate or dies testate without appointing any executor or, as here, where the executor or executors have either renounced probate or are not willing to prove the will. In the former case, the court may appoint a person to represent the deceased under **ECSC CPR 21.7,** without the issue of a grant. In the latter case, the person wishing to continue the counterclaim will need to obtain a formal grant because until he does so, the estate will remain vested in the Probate Judge (or Registrar).

[124] In my judgment, this analysis must be correct. In **ACL Netherlands BV**, **Hildyard J** observed, at **[29]**:

> "I have considered whether it is also within the power conferred by section 116 and expedient for me to include within the Order provision <u>for the immediate substitution of [S] as a party</u> in his capacity as Administrator pursuant to **CPR 19.2**; and I am satisfied that it is, again with the comfort of **Sales J's** approach in **Inna Gudavaze & Ors v Joseph Kay** [supra]. In that case, that order was made pending "the formal grant of Letters of Administration by the Probate Office (see **paragraph [48]** of **Sales J's** judgment)." (Emphasis supplied).

[125] The difference between the two situations is that in the former case (where the deceased is a defendant but there is no claim), the court has to appoint a person to represent his estate and that appointment may be made of a person who may not even be an executor appointed under the deceased's will, such as where, for example, the executor is a minor and cannot, therefore, prove the deceased's will. In the latter case, there has to be a person who can legitimately claim to be entitled to the legal title in the assets of the estate, which would, of course, include any claim that the deceased had against a person in respect of which the deceased had counterclaimed. This can only be achieved by the obtaining of a grant by him.

[126] In **ACL Netherlands BV**, **Hildyard J** was referred to his power to make an order under **CPR 19.12 of the CPR of England and Wales**. He decided that he did not have jurisdiction to do so under that provision, but made an order substituting S in place of Dr Lynch under **CPR 19.2 of the CPR of England and Wales**[16], the relevant provisions of which, subject to exceptions which do not apply here, state:

> "(1) This rule applies where a party is to be added or substituted …
>
> (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.

[16] I will refer to the **English and Welsh CPR** instead of the analogous **ECSC CPR** provisions purely for the sake of convenience as the cases referred to by Mr Mitchell that he claims support BNU's contentions refer to English and Welsh cases.

(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."

[127] Several points are appropriate for mention about **CPR 19.2**:

(a) **CPR 19.2** does little more than allow a person to be added or substituted as a party in the circumstances there set out if the requirements of that provision are satisfied. The purpose of the provision is primarily to allow the estate of a deceased party to be represented in extant proceedings. That much is clear from the fact that the court can add or substitute a person who has no interest in the estate as a party, as happened in **ACL Netherlands BV**, where the person appointed (S) was a solicitor. Significantly, also, there is no reference in that provision to the person proposed to be substituted having to be entitled to obtain a grant of representation to the estate of the deceased.

(b) The person appointed does not have to be an executor of a will or a person entitled to a grant of representation to the deceased's estate, as was the case in **ACL Netherlands BV**. In other words, the court does not have to replace the person it has appointed as a party to the proceedings with a person who has obtained a grant of representation to the estate; and

(c) **CPR 19.2** is a purely procedural provision designed to allow an estate to be represented and the assets of the estate to be protected in proceedings that are pending when the deceased dies. This is clear from the fact that it only allows the addition or substitution of a person to an existing claim. It does not extend to enable such a person to bring a claim against another person, still less allow a person to obtain title to the assets of an estate by purportedly seeking to constitute himself as a person entitled to the assets of the estate in probate proceedings (whether in common or solemn form) which he decides to bring against another person, such as ATH, who may have some entitlement (however little) to the estate.

[128] In **ACL Netherlands BV, Hildyard J** relied on the observations of Sales J in **Gudavadze v Kay [2012] EWHC 1683 (Ch) at [45]-[46]** to support the terms of the order that he proposed to make, and subsequently made, on the basis that the case he was dealing with was broadly similar to that case.

[129] The observations of **Sales J**, at **[45]-[46]**, largely deal with the scope of the provisions of **s. 116** and **rr. 22 and 30 of the NCPR 1987**. In that case, the deceased had died domiciled in Georgia. Since his death, litigation had taken place in many jurisdictions in relation to the devolution and administration of his estate. The deceased's half-cousin and occasional business assistant, the claimant, sought to prove the existence of a letter of wishes, a deed appointing him executor of the estate, and an unsigned document purporting to be a confidential addendum. The claimant did not produce any originals in the court proceedings nor file any supporting evidence. The defendant's family stated that the documents did not constitute a genuine will or testamentary document and that they were forgeries. They brought proceedings against the claimant, asking the court to pronounce against the documents, and applied for summary judgment. Further, they applied for an order for three of them to be appointed as administrators and also that they be appointed receivers of the estate until the issue of a grant of letters of administration and that they be vested with the right to represent the deceased's estate in any claims.

[130] The court appointed those family members as receivers until they were able to obtain a full grant of letters of administration and, in the interim, pursuant to s**. 51 of the Trustee Act 1925 of England and Wales**, they were vested with the right to represent the deceased's estate, to sue or be sued in their own names as representatives, and to sue on causes of action existing for the benefit of the estate.

[131] Mr Hagen rightly points out that a key distinguishing feature between **Kay** and this case was that, in **Kay**, the deceased's estate also had various causes of action that it wished to continue, including a counterclaim, which until the new administrators had a grant of letters of

administration, they could not (without more) continue, given the effect of **s. 9 of the AEA 1925**[17]. This was why the court made a vesting order prior to the outgoing administrators leaving office in favour of the new administrators under **s. 51 of the Trustee Act 1925** to enable them to pursue the estate's claims during the hiatus before their grant. **Sales J** said, at **[48]**:

> "So far as vesting the new administrators with causes of action and the ability to be substituted immediately for the interim administrators in the existing Chancery actions and proceedings (in the period before formal grant of Letters of Administration to them by the Probate Office), I am satisfied that I have that power as well. In particular, I am satisfied that on the basis of **section 51 of the Trustee Act 1925** I have power while the interim administrators continue in post (as they do up to the time when I make the relevant order at the conclusion of this hearing) to order that causes of action vested in them may vest in other persons (for these purposes, the new administrators) so that the new administrators can continue to sue upon those causes of action for the benefit of the estate, but now in their own names, as previously the interim administrators were able to do. **Section 51 of the Trustee Act 1925** is applicable because the interim administrators are to be regarded as trustees of the estate for the purposes of that provision. I am satisfied for the reasons already given that it is right to exercise that power in this case to avoid any hiatus which might arguably arise and any uncertainty arising out of the legal regime that would apply if this court did not exercise its powers to make these orders and put the position beyond doubt."

[132] There can be no possible comparison between **Kay** and the present case.

[133] The present case is not one where someone was suing SSQ as a defendant or even where BNU had sought substitution as claimant in place of SSQ in an existing claim. If she had, she would no doubt have made an application to do so in the existing claim. She attempted to rely upon an order obtained by her in common form proceedings for her to be appointed as AACB in order to make a fresh claim. She may have thought that she was entitled to the whole of the BVI Estate but, at the very least, she should have made her application for a grant on notice to ATH or informed ATH immediately when she obtained the order from Young J that she was entitled to obtain a grant of administration *ad colligenda bona* by virtue of that order. The course of action she took offends against what any court would regard as the usual principles of fairness, justice, openness, and transparency that any party to proceedings should properly be entitled to expect.

[17] See, at **[38]**, per Sales J: "It has been submitted that unless orders along these lines are made, a hiatus in terms of the ownership of the relevant causes of action existing for the benefit of the estate and the ability of the estate to be represented in the other actions to which I have referred would arise involving a degree of uncertainty about the legal position arising out of the operation of the **Administration of Estates Act 1925** (in particular, by reference to the effect of **section 9** of that Act)."

What BNU did was to “cock a snook” at the processes of this Court by failing to give ATH a chance to have a say on her application and now effectively seeks “ratification” of that course of action.

[134] The other case relied upon by Mr Mitchell, which was referred to in **ACL Netherlands BV**, but not analysed in any detail in that case, was **ZS v NJ [2024] EWHC 306 (Fam).**

[135] In that case, an application had been made by **ZS**, pursuant to **s. 55A of the Family Law Act 1986** of England and Wales (“**FLA 1986**”), for a declaration that the late NJ was the father of the applicant ZS. NJ had died intestate and letters of administration of his respondent estate were granted to JK, as attorney for NJ's sister EM. ZS sought a direction, pursuant to the inherent jurisdiction of the High Court, that blood samples of NJ held by an NHS Trust should have been released for DNA testing. That direction was given, and DNA testing took place in which it was concluded that there was a “99.9% probability of paternity”, based on a comparison of the DNA profiles of NJ and ZS. By that time EM had died, and JK had taken the view that, in such circumstances, he could no longer act under the letters of administration on behalf of NJ's estate.

[136] The issue in that case was whether a final declaration of parentage should have been made. On the facts, that issue was adjourned generally with liberty to restore. A question arose as to who should represent the estate in the proceedings. It was unclear whether anyone was entitled to a grant of administration under **r. 22(1) of the NCPR 1987**. NJ had appeared to have left no family (save perhaps for ZS). The original letters of administration had recorded the gross value of the estate of NJ in the UK as £3,500, and the net value as £0. JK's understanding had been that NJ had had no significant worldwide assets, although he had had intellectual property rights which had been sold to satisfy the liabilities of the estate. In those circumstances and given the limited purpose for which the estate had to be represented in those proceedings, it would have been disproportionate to have required any advertisements, or any further investigations to be conducted, to establish who, if anyone, might have been entitled to a grant. Rather, in circumstances where EM had previously appointed JK as her attorney for the purpose of administering NJ's estate, the special circumstances of the present proceedings had made it expedient to have JK appointed as administrator, for the limited purpose of representing NJ's estate in those proceedings.

[137] **Mr Simon Colton KC**, sitting as a deputy Judge of the **High Court of England and Wales**, observed:

"18. As for NJ, where the putative father is deceased, a representative of their estate should be made respondent to the application. As described in paragraph 7 above, that is indeed what occurred. However, JK was correct to think that, following the death of EM, he could no longer represent the estate: the grant of letters of administration to JK was qualified by the words "The lawful attorney of [EM] for their use and benefit limited until further representation be granted", and an attorney in such circumstances is debarred from acting further under his grant once he knows of the death of the donor – see **Tristram and Coote's Probate Practice (32nd ed, 2021) at ¶11.102**; **Williams, Mortimore & Sunnucks – Executors, Administrators and Probate (22nd ed, 2023) at ¶15-15**.

19. In such circumstances, I could order the application to continue, with NJ's estate still named as a respondent, but with no person representing that estate. By way of analogy, although not directly applicable to the present application, I note that such possibility is specifically provided for in civil claims by **CPR 19.12(1)(a)**. Alternatively, I could simply waive the requirement that NJ's estate remain as a respondent at all: compare **Aylward-Davies v Chesterman at [18]-[19]**. I am concerned, however, that there may yet be aspects to the substantive application under section **55A of the 1986 Act** where submissions on behalf of NJ's estate, or access to documents held by NJ's estate, will be of benefit to the court, and so I am reluctant to allow a situation where NJ's estate is either not a respondent, or a respondent in name only.

20. In this regard, I note section **116 of the Senior Courts Act 1981**, which provides

'Power of court to pass over prior claims to a grant

(1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.

(2) Any grant of administration under this section may be limited in any way the court thinks fit.'

21. Decided cases on the meaning and application of **section 116** were summarised by **HHJ Paul Matthews** (sitting as a Judge of the High Court) **in Otitoju v Onwordi [2023] EWHC 2665 (Ch) at [20]-[22]**. The position, in sum, appears to be that no gloss should be put on the language of the statute: the power under **section 116** may be exercised where, by reason of any special circumstances, it appears to be necessary or expedient to appoint an administrator other than the person who would otherwise be entitled. The power is an entirely general one and may be used to appoint any person, including someone who would otherwise have no entitlement at all to appointment: **Gudavadze v Kay [2012] EWHC 1683 (Ch) at [45]-[46] (Sales J)**.

22. In the present case, it is unclear whether there is anyone entitled to the grant of administration under **rule 22(1) of the Non-Contentious Probate Rules**. NJ appears to have left no spouse or civil partner; no child (save perhaps, which is the very question in this application, ZS); no parent; no siblings (except for his sister, who has now died); no nephews or nieces. I have no information as to whether NJ had, or has, any first cousins. JK did not know who (if anyone) was acting for the estate of EM (NJ's sister), which might be a matter of Swiss law, since that is where she was understood to be resident at the time of her death.

23. The original letters of administration recorded that the gross value of the estate of NJ in England and Wales amounted to £3,500, and the net value amounted to £0. JK's understanding was that NJ had no significant worldwide assets: he had had intellectual property rights which had been sold to satisfy liabilities of the estate, but that was all. In these circumstances, and given the limited purpose for which the estate is to be represented in these proceedings, I consider it disproportionate to require any advertisements, or any further investigations to be conducted, to establish who, if anyone, may be entitled to a grant. Rather, in circumstances where EM previously appointed JK as her attorney for the purpose of administering NJ's estate, I consider that the special circumstances of this case make it expedient to re-appoint JK as administrator, for the limited purpose of representing NJ's estate in these proceedings. JK has consented to such appointment. Since there has been a prior grant of administration, this will be of the de bonis non type (see, e.g., **Williams, Mortimore & Sunnuks (sic) at ¶16-06**; and **Perotti v Watson [2004] EWCA Civ 269 at [5]**). This grant will be limited, as I have indicated, to representing the estate in these proceedings."

[138] In addition to the above analysis, which applies equally to this case, there are other reasons why no analogy may be drawn between the present case and **ACL Netherlands** (and **ZS v NJ**). They include the following.

[139] First, none of **Millburn-Snell, Jogie,** or **Viegas** were cited in **ACL Netherlands** and **ZS v NJ**.

[140] Second, this was an existing claim or application that had been properly brought but which, following the date of the deceased's death, could not be continued without some representation order being made.

[141] But, in my judgment, even if **Kay**, **ACL Netherlands**, and **ZS v NJ** support the position advanced by BNU, they are inconsistent with **Millburn-Snell, Jogie,** and **Viegas**, and I decline to follow them.

[142] I have carefully considered whether there is some basis for validating BNU's title to bring the Permission Application which may be derived from the cases on the "administration" provisions (not presently in force in the BVI) under **Schedule B1 to the Insolvency Act 1986**, as they apply to England and Wales, and other insolvency cases in England and Wales. These cases include **Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants VOF [1999] 2 Lloyd's Rep 443**; **Darrell v Miller [2003] EWHC 2811 (Ch), [2004] BPIR 470**, in which **Lewison J** held that the court had no jurisdiction to backdate the effect of a block transfer order of appointments of administrator, liquidator and trustee in bankruptcy; **Re G-Tech Construction Ltd [2007] BPIR 1275**: in that case, **Hart J** ruled that the wording of para **13(2)(a) of Schedule B1 to the IA 1986** ('An appointment of an administrator by administration order takes effect (a) at a time appointed by the order') was wide enough to grant the court jurisdiction to make a retrospective appointment of an administrator notwithstanding **CPR 40.7 of England and Wales**; **Re MTB Motors Ltd (In Administration) [2010] EWHC 3751 (Ch), [2012] BCC 601**; **Adjei v Law for All [2011] EWHC 2672 (Ch), [2011] BCC 963, [2012] 2 BCLC 317, [2011] BPIR 1563**; **Re Derfshaw Ltd [2011] EWHC 1565 (Ch), [2012] 1 BCLC 814, [2011] BCC 631**; **Re Frontsouth (Witham) Ltd [2011] EWHC 1668 (Ch), [2012] 1 BCLC 818, [2011] BCC 635**; **Re Care Matters Partnership Ltd [2011] EWHC 2543 (Ch), [2012] 2 BCLC 311, [2011] BCC 957**; **Re Synergi Partners Ltd, Mond v Synergi Partners Ltd [2015] EWHC 964 (Ch), [2015] 2 BCLC 229, [2015] BCC 333**; **Pettit v Bradford Bulls (Northern) Ltd (In Administration) [2016] EWHC 3557 (Ch), [2017] BCC 50, [2017] 2 BCLC 519**; and **Re Biomethane (Castle Eaton) Ltd [2019] EWHC 3298 (Ch), [2020] BCC 111.**

[143] These, and other cases, such as **F Hoffmann-La Roche & Co AG v Inter-Continental Pharmaceuticals Ltd [1965] Ch 795**, **Kuwait Airways Corpn v Iraqi Airways Co & Anor (No 2) [1994] 1 WLR 985, [1995] 1 All ER 790** and **Re Brian Sheridan Cars Ltd [1996] 1 BCLC 327**, do little more than confirm that the courts have power to backdate an order, in an appropriate case, if it would be just to do so. They do not apply in a case such as this, where the Court is being invited to cure a defect in the title of the applicant, i.e., BNU, or, as is now suggested by Mr Mitchell, to effectively backdate the date on which a grant of representation (if one is issued) has effect.

[144] It follows that, even if I accept that the course of action suggested by Mr Mitchell will not cause any prejudice to ATH, which I am prepared to do for the purpose of the Set Aside Application, I

am unable to cure the defect in BNU's title about which ATH, UGX, THA, WKU and ZPP complain.

[145] I can see why Mr Mitchell states that setting aside Young J's Order and the Permission Application will have no practical benefit for the parties. He says – and I agree – that at some point, the Permission Application may need to be revisited by this Court, and I can also say – as I have said throughout my exchanges with counsel – that I would not consider any comments I make on the substance of that application to create any issue estoppel. However, absent receiving ATH's consent that she takes no issue about BNU's standing to act as AACB – which, of course, she will not agree to – and having the specific consent of the Derivative Claim Defendants that they too will not dispute her standing to bring the Derivative Claim – which they too will not do – I cannot see how this Court can come to BNU's assistance.

[146] For the above reasons, I agree with ATH that BNU is not – and never was – the properly constituted AACB of the BVI Estate, based on the fact that she did not have the benefit of a grant of representation to the BVI Estate.

Consequence of BNU's lack of standing

[147] BNU, therefore, had no standing to bring the Permission Application or apply for and obtain the Injunctions.

[148] The Permission Application and the application for the Injunctions ("the Injunction Application") made by BNU are a complete nullity. I accordingly strike out the Permission Application, set aside the Injunctions, and strike out the Injunction Application.

Should Young J's Order be set aside?

[149] The fundamental point to make here is that even if I accept Mr Mitchell's submissions in their entirety about the construction and effect of the terms of Young J's Order, I would be bound to strike out or dismiss the Permission Application and the Injunction Application if I came to the conclusion that Young J's Order should be set aside.

[150] The circumstances in which it would usually be appropriate to seek an appointment as AACB are summarised in the following statement in **Williams, Mortimer and Sunnucks** in the following paragraphs (disregarding the footnotes in those paragraphs):

> "15-47 The court has a general power to make a limited grant of administration in order to preserve assets of the deceased within the jurisdiction without waiting until those entitled to a grant have applied. Such grants are grants ad colligenda bona defuncti, usually known as ad colligenda grants. They are often confused with grants pendente lite, which serve a distinct purpose and are available in more limited circumstances… Such a grant is often useful where the person entitled to a full grant is abroad or temporarily incapacitated <u>and where some urgent step needs to be taken (e.g. the removal of valuables from an empty house or more commonly the sale of a house which is in danger of deteriorating or being vandalised and so losing value or stocks and shares)</u>. <u>Application may be made for a limited grant to allow the deceased's business to be run or for any urgent purpose. It is also common practice to allow such grants where there is a need for urgent administration but where the full facts or details to allow a full grant to issue cannot be immediately ascertained. However, ad colligenda grants should not be viewed as simply an expedient means of achieving a quick sale of property. Their purpose is to preserve the estate</u>."

> "15-51 The object of such a grant is to ensure that the estate of the deceased is managed and preserved for the benefit of those found to be entitled thereto. Applications for the appointment of an administrator pending determination of a probate claim are most commonly made in connection <u>with the sale, lease or repair of a house, but there are many other matters, e.g. dealings with stocks and shares or the running and management of a business, which necessitate such an application</u>."

> "15-49 Grants have been made to a creditor limited <u>to collecting the estate in order to pay his debts and to renewing his lease, to a creditor where no next-of-kin could be found and to the Official Solicitor where the executors were attempting to move the proceeds of sale of estate assets outside the jurisdiction</u>. Grants have been made for the benefit of absent or unknown next-of-kin with extended powers to pay debts, deal with real estate and to sell the property of the deceased."

(Emphasis supplied).

[151] A court should not make an appointment of a person as AACB unless – to quote the words of **s. 116 of the SCA 1981** – "by reason of any <u>special circumstance</u>s, it appears to the High Court to

be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient." (Emphasis supplied).

[152] The Court must, therefore, apply a two-fold test. It has to be satisfied that there are "special circumstances" which would justify passing over a person who may be entitled to obtain a full grant of representation, and, also, that it is necessary or expedient by reason of those special circumstances that that person be passed over: see, for example, the unusual facts of **Buchanan v Milton [1999] 2 F.L.R. 844**, in which Hale J (as she then was) refused to appoint an AACB. As **Cranston J** pointed out in **Burrows v HM Coroner for Preston [2008] EWHC 1387 (Admin), at [17]:**

> "In the light of **Buchanan v Milton**, the domestic law is clear. If there are no personal representatives, then it must be asked: who has the best claim to be appointed as administrator of a deceased person's estate. Rule 22 lays down the order of priority. If there is a dispute, then section 116 may come into play if no compromise is possible. That requires an answer to two questions. First, are there special circumstances which may displace the order of priority set out in Rule 22 ; secondly, is it necessary or expedient by reason of those special circumstances to displace the normal order of priority. As demonstrated by the result in **Buchanan**, the situations where the order of priority will be varied will be rare indeed."
>
> (Emphasis supplied).

[153] In **Haastrup v Haastrup [2016] EWHC 3311 (Ch)**, the facts of which have certain similarities with the present case, **Master Matthews**, said, *obiter*, that he would not have made an order for the appointment of an AACB, on the facts in that case, because he could not be satisfied that the position of the estate and the heirs of the estate could be improved by making the order. This theme is found in many other cases on the subject. A court will only make an order of administration *ad colligenda bona* if the two-fold test is satisfied. It will, or should, not be granted as a matter of course, as appears to be commonplace when the application is made without notice.

[154] The power of a court to appoint an AACB under **s. 116** is discretionary. The discretion is wide and unfettered, subject only to the limitation that it should be exercised judicially, taking into

account all the circumstances of a particular case and having regard to the purpose for which the discretion exists.

[155] In the exercise of that discretion in the present case, the Court can take one of three courses of action:

(a) it can refuse to set aside Young J's Order. It can take this course of action even if it decides that the order should otherwise be set aside because it was obtained in a procedurally unfair way or if, for example, there was a failure to disclose material facts to Young J. The Court could do this if it concluded, notwithstanding the procedural unfairness, that the application of the two-fold test warranted the appointment of an AACB and that BNU was the most suitable candidate to be appointed.

(b) It can allow Young J's Order to stand but substitute a so-called "independent" person as AACB in place of BNU.

(c) It can decide to set aside Young J's Order without appointing an AACB.

[156] I can discard option (b) above straight away. I do so for several reasons: first, I do not see how it is open to ATH to suggest who should represent the BVI Estate in order to bring a claim against the Derivative Claim Defendants (which include her husband and his company) in relation to the 30% Shareholding. The position she advances before the Court is absurd. It is tantamount to her suggesting that there may be a claim against the Derivative Claim Defendants on account of their wrongdoing and that she wishes to have someone independent to investigate that claim. However, the likely reason for suggesting an independent administrator to consider whether the claim is viable seems to me to be designed to obtain some sort of validation from the independent administrator either that there is no viable claim against the Derivative Claim Defendants or that the claim would not be worth pursuing; second, and as a corollary to the first reason, it has never been suggested by ATH that the 30% Shareholding or any other assets of the BVI Estate (whatever they are and wherever they happen to be) are in need of protection from dissipation or the like, such that an AACB should be appointed to take steps to avoid that; third, it seems to me to be highly unlikely that, in a complex case such as this, where the claim effectively involves

bringing proceedings against the family and associates of another potential beneficiary of the BVI Estate, the independent administrator would be able to form a view about the merits and appropriateness of making such a claim without knowing what the BVI Estate is worth and what shares BNU and ATH are entitled to in the estate. That would not usually be why an AACB should be appointed; fourth, it is difficult to see how any independent administrator would even be prepared to consider bringing a claim without knowing whether there were sufficient assets to pay his costs for undertaking all the preliminary work in deciding whether the claim was meritorious and appropriate and also the costs of any respondent or defendant to the claim (or any application for permission to bring it) if the court decided to make an adverse order for costs against him; and fifth, if the independent administrator decided to seek the views of the beneficiaries or potential beneficiaries of the BVI Estate about the appropriateness of bringing the claim, I question what ATH will say. She is hardly likely to support the claim if the independent administrator concludes that the claim should be pursued, even though, bizarrely, the independent administrator was appointed at her behest.

[157] The suggestion by ATH that an independent AACB should be appointed is to completely disregard the potential for conflict that it gives rise to in the context of the case that she is advancing before this Court.

[158] But perhaps the most important reason for not acceding to her request is that the appointment of an independent administrator will achieve nothing[18], in other words, neither of the two limbs of the two-fold test specified in **s. 116** is made out. I am told that there are no limitation issues in relation to the bringing of a derivative claim against the Derivative Claim Defendants. On that basis, it is difficult to see why the Derivative Claim should not be put on hold until the issues between BNU and ATH are determined in a solemn form probate claim. If the Court took any other course of action, it would be acting “in vain”, which it must not do: see, by way of examples, **Cruz City 1 Mauritius Holdings v Unitech Ltd [2014] EWHC 3131 (Comm)**; **JSC VTB Bank v Skurikhin [2015] EWHC 2131 (Comm)**; and **Pitt and another v Holt and another, Futter and another v Futter and others [2013] UKSC 26, [2013] 2 AC 108**.

[18] If the independent administrator sought directions from the Court about the issue or sought a **Beddoe** order (i.e., **Re Beddoe, Downes v Cottam [1893] 1 Ch 547, CA of England and Wales**), that is almost certainly the answer he would get, certainly if I were the judge dealing with it.

[159] Leaving aside the procedure that BNU initiated to apply for her appointment as AACB, which, as I have indicated, was wholly inappropriate, I do not consider that there was any need to appoint an AACB.

[160] In my judgment, regardless of whether the procedure for seeking the appointment was appropriate or whether there was or was not a full disclosure of the material facts to Young J, BNU should not have applied for the appointment of an AACB. This statement is in no way intended to be critical of Young J and is entirely separate from the "full and frank disclosure" point, which I deal with below.

[161] I can understand why Young J felt it appropriate to appoint an AACB, and I might have done so as well if this matter had been included in what is always an excessively busy "general list" in this Court, in which "without notice" matters are included, or even in specific lists in which such matters are heard, as was the case before Young J where the application was heard over 30 minutes.

[162] Of course, I say this having been taken exhaustively through the many documents in several bundles which were lodged with me and having had the benefit of detailed written and oral submissions (made over 2+ days) by four exceptionally able silks, assisted by several eminent juniors who appeared with them.

[163] On behalf of BNU, it is said that the obtaining of an order of administration *ad colligenda bona was* a necessary prerequisite for her to apply for the Injunctions against the Derivative Claim Defendants. The Injunctions could only be applied for once BNU had standing to bring the Permission Application. But that seems to me to be looking at matters from the wrong end of the telescope. BNU could have issued a claim for the pronouncement of the Testamentary Dispositions in solemn form and sought her appointment (or the appointment of another person) as the representative of the BVI Estate for the limited purpose of enabling her to issue the Permission Application and obtaining injunctions within that application against the Derivative Claim Defendants under **s. 184C(5) of the BCA 2004**[19]. Though I have not looked into the matter

[19] The Court would likely also have imposed a stay of the Permission Application pending the grant being pronounced in solemn form and all the issues between the parties about the construction of the Testamentary Dispositions being determined, particularly given that there is said to be no limitation issue involved in bringing the Derivative Claim is permission is granted.

in any detail, the Court is unlikely to have required a personal representative to be appointed for this purpose: see **ECSC CPR 21.2**; alternatively, if it did, it is more likely to have been willing to appoint BNU (or some other person) for this limited purpose; and, although a grant would have been required for the appointment of BNU or any other person as such an administrator – most likely a grant *pendente lite* – it would have been willing to pave the way for BNU to obtain this speedily. But what is clear is that whether or not this was all possible, the application for the appointment of an AACB should never have been made, regardless of whether BNU thought that there was a risk of the dissipation of assets by WKU and ZPP.

[164] For these reasons, I would not have made the order for the appointment of BNU as AACB on the material she relied upon before Young J, or if I had made it, I would have set it aside at any *inter partes* hearing.

[165] The only option the Court should take, therefore is Option (c), above. Young J's Order must be set aside.

[166] In these circumstances, I do not have to consider the other matters upon which ATH relies to set aside the order, i.e., the assertion that BNU: (a) is not independent; (b) is not a suitable candidate to be appointed as AACB; (c) has been guilty of improper dealings with regard to the BVI Estate; and (d) failed to provide a full and frank disclosure to Young J leading up to the making of her order. However, I do so, not just because of the possibility that there may be an appeal against this judgment but also in deference to the skilful manner in which BNU's case has been advanced by Mr Mitchell before this Court. In the circumstances, I only intend to deal with these matters briefly.

<u>BNU not independent or suitable candidate for appointment</u>

[167] I have dealt with this briefly above. However, I only add these points to what I have said above.

[168] The authors of **Halsbury's Laws of England** state[20] that "in a case where there appears to be serious divisions between the executors/beneficiaries and one is accusing the other of dishonesty and misappropriation, the need for an independent appointment for a grant *ad colligenda bona is clear*: **Ghafoor v Cliff [2006] EWHC 825 (Ch), [2006] 2 All ER 1079, [2006] 1 WLR 3020**."

[169] In **Ghafoor, David Richards J, at [63]**, said:

> "Mr Cliff's conduct in this respect is a central part of the claimants' fourth ground for the revocation of the grant, namely the lack of independence displayed by him and by Mrs Spencer and the claimants' lack of confidence in them. The first point made by the claimants is that, as Mrs Farooqi's solicitors, Mr Cliff and Mrs Spencer in any case lacked the independence appropriate for this grant. I agree with this view. In an uncontroversial case, the appointment of an interested person or his solicitor may well be very sensible. In a highly contentious case such as the present, where there appear to be serious divisions between the executors/beneficiaries and one is accusing the others of dishonesty and misappropriation, the need for an independent appointment on this application is in my view clear. Those interested in the estate are entitled to have confidence in the impartiality of the person appointed to represent the estate. The solicitor for one of the parties involved would not reasonably be viewed as independent or impartial."
>
> (Emphasis supplied).

[170] I can understand the wisdom of those remarks. However, the appointment of an independent administrator would not be appropriate in every such case. In at least one case in this jurisdiction, the Court refused to follow **Ghafoor** and appoint an independent administrator: see **Liao Hwang Hsiang v Liao Chen Toh & Anor**[21], in which **Ellis J** refused, on the facts of that case, to appoint an "independent" administrator despite the deep divisions between the beneficiaries in that case.

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[20] See **Halsbury's Laws of England, 5th Edition, Reissue, Wills and Intestacy, Volume 103, 2016, para. 815**. This statement does not appear in the reissued volume 103, current at the date of the writing of this judgment, which was published in 2021.

[21] The only information I have about this case is from an article entitled "Trusts litigation update — **British Virgin Islands Trusts & Trustees (2015) 21 (4): 423**. The case is not the same as the **Olivetti** case referred to below, in which the parties appeared to have been the same. A citation is given for that case in footnote 2 to the article, but on my laptop, it takes me to a judgment by **Ellis J** in the same proceedings, though that case appears to be different and does not deal with this aspect (i.e., the appointment of the AACB) of the case.

[171] As I have also said, in the present case, there is, and always has been, a much better alternative course available to BNU. She could have issued a probate claim under **ECSC CPR Part 68** ("the Proposed Probate Claim") and have had all (or, at any rate, most) of the issues between her and ATH determined in that claim. Once the claim was determined, the Court would be better able to assess who would, or would be likely to, inherit the BVI Estate. If it became clear during the course of the Probate Claim, or after it was determined, but before the net BVI Estate was distributed, that BNU would likely inherit the whole or substantially the whole of the BVI Estate, I would have been prepared to appoint BNU (if it became necessary to appoint someone).

Full and Frank disclosure by BNU?

[172] The importance of an applicant making a "full and frank" disclosure where he seeks an *ex parte* order can never be over-emphasised. In the context of probate proceedings, **Williams, Mortimer and Sunnucks** state, at **para. 23-03** (disregarding any footnotes in that paragraph):

> "23-03 A large number of matters are determined by a registrar without notice (ex parte) … There is a special duty owed to the court to be frank and fair in making any without notice application. Accordingly, the evidence in support of such an application should provide the fullest possible information and must disclose any fact known to the applicant that might affect the court's decision on the application. The evidence should set out the facts as known and where allegations are based on belief and instructions or on information from others, this should be made clear. The evidence should also set out the steps taken to investigate the matter. A failure to comply with this may lead to the court's order being set aside and an adverse costs order."

[173] The grounds upon which ATH suggests that there had been a failure to make a full and frank disclosure on the part of BNU include the following:

(a) Failure to cite and draw attention to **Ghafoor**, which states that in a disputed case, such as this, the person who should be appointed AACB must be independent.

(b) Alleged misrepresentation that the 30% Shareholding represented the entirety of the BVI Estate.

(c) Alleged failure to disclose the existence of actual and potential creditor claims against the BVI Estate.

(d) Alleged failure to disclose the existence of actual or potential claims against BNU herself, namely a claim in respect of the distribution BNU received from the B Trust and the B P Claim.

(e) Alleged failure to disclose and/or failure fairly to present the possibility that BNU is not solely entitled *qua* legatee (even subject to creditors) to the 30% Shareholding, by reference to the matters referred to in the schedule to ATH's affidavit made on 15 November 2024.

[174] It would require a counsel of perfection for an applicant to draw every conceivable area of dispute to the attention of a court where a "without notice" application is made to the court. In my judgment, the substance of what was in issue between the parties was sufficiently drawn to the attention of Young J by a combination of: (a) the contents of the without notice application made by BNU for her appointment as AACB; (b) the contents of BNU's affidavit in support of that application; (c) the contents of the skeleton argument that was filed on her behalf; and (d) the matters referred to by counsel at the oral hearing before the Judge. Add to all of that the fact that BNU believed that she was entitled to the entirety of the 30% Shareholding, it becomes difficult for me to understand how she can be criticised for failing in her duty to make full and frank disclosure.

[175] The Codicil should, of course, have been disclosed by BNU to the Judge. But the failure to do so would have had no significant bearing on Young J's willingness to grant the order appointing BNU as AACB. <u>Purely on the face of the Codicil</u>, it purports to give a larger share of the assets of SSQ's estate to BNU than the Will (though whether that is or will, in fact, be the case is a different matter), so it is unlikely to have resulted in the Judge refusing to make the order in her favour.

[176] The position could not have been expressed more eruditely than by **Olivetti J** in **Liao Chen Toh v Liao Hwang Hsiang (29 November 2011) BVIHPB 93 of 2011**:

> "[41] **Ghafoor** also held that, "If the applicant decides that it is proper to apply without notice, he is subject to the usual duty to make full and frank disclosure. This is the usual duty imposed by the court on a litigant who moves the court without notice to his or her opponent. It means that such a litigant has a duty to make full and fair disclosure of all material facts. The material facts are those which it is material for the judge to know in dealing with the application as made. Materiality is to be decided by the Court and not by the applicant or his or her legal adviser. The duty also requires the applicant to draw to the Court's attention any possible defences by opposing parties who have not been given notice of the hearing ...
>
> [42] I do not find that the duty to make full disclosure was breached in any material way. Further, in my view, in a probate matter, albeit one of great value, one does not expect the full panoply of the law on disclosure to apply as it does to commercial matters for the obvious reasons."

[177] The failure to draw **Ghafoor** to the attention of **Young J** is likewise of little significance. The observations of **David Richards J** about the necessity of an AACB being independent are nothing new. They are based on impeccable logic and are a feature of the appointment of any person as an administrator on a temporary or limited basis (i.e., "essentially to hold the ring" and take only those steps that were urgently required to be taken in order to protect the assets of an estate) until the court can appoint one permanently under a will or on intestacy. It is difficult to understand how an extremely able and experienced judge, like **Young J**, would not know when it would be appropriate to appoint an "independent" administrator and when not to. I reject any suggestion that she would not have known, without being referred to **Ghafoor**, that the usual rule was that in a heavily contested dispute, a court should appoint an independent administrator.

[178] There is no substance in the allegations that BNU should have disclosed: (a) the alleged transfers to the three trusts referred to by ATH of which BNU is alleged to be an actual or potential beneficiary; (b) the existence of any actual and potential creditor claims against the BVI Estate; or (c) the nature of the alleged claims of the BVI Estate against BNU. I am not sure that BNU had sufficient information about any of these claims to warrant their disclosure. Even if she did, I do not see how their disclosure could have led Young J to conclude that the appointment of BNU as AACB should not be made or made on the terms in which it was. Regardless of what appears to be the wide scope of the order appointing BNU as AACB, the primary purpose of appointing

her in that capacity was to allow the BVI Estate that held the 30% shareholding to bring the Permission Application and the Injunction Application. So far as this aspect of BNU's application was concerned, she made a full disclosure of all material facts. In any event, one would not usually expect an applicant for an order for his or her appointment as AACB to be expected to make disclosures of that type to the Court. It would mean having to disclose every conceivable point to the Court, no matter how trivial, rather than disclose material matters that should or could have a bearing on the decision of the court to determine whether the order should be made.

[179] Most of the other matters relied upon in support of the allegation of failure to disclose seem to me to be so far-fetched or trivial that they do not warrant any or any detailed consideration[22]. For example, how it could conceivably be the case that BNU might have thought that ATH would be entitled to more than a 70% shareholding in UGX and THA at the time when she applied for the order seems to me, based on what I have said above, to be bordering on the fanciful. Likewise, the suggestions that Young J should have been told that the Will speaks from death, and that this might affect BNU's entitlement to claim the full 30% Shareholding, or that **Young J** should have been informed which Law should be applied to determine the shares of the parties in the BVI Estate, is frankly an insult to her intelligence. I entirely reject that suggestion.

[180] But what is significant about this aspect of ATH's case is what Young J herself said about the application: see Court Transcript, page 5, lines 16-21, where at the outset of the application, she said:

> "THE COURT: I am not opposed to giving you the grant, which you have asked me for, which is the ad colligenda bona, but I will not make the order for the full grant, that you could apply for the full grant. I think you need to -- have you heard me?"

[181] She then went on to say this: *ibid*, page 5, lines 24-25; and page 6, lines 1-

> "THE COURT: I would not make the order that you are given permission to apply for the full grant of letters of administration with the will annexed. For that I would need to see that the Applicant's mother, that she knows of the

[22] That is not to say that ATH's allegations or contentions are incorrect or unsustainable. I have reached no findings or conclusions on these allegations or contentions. I simply point out that it is difficult to see why they would need to be disclosed at the point when the application for the order was made to **Young J**.

> application and that she consents or that she renounces and then I'd be able to see whether or not.
>
> What you need, as far as I can see, is that quick grant right now so that you could do certain things by way of preservation. I'm not opposed to giving you that.
>
> The other one, the other part of your application, you will have to go, take that to the mother, have the mother do what she needs to do and then you can come back and we can do what we need to do …"

[182] Young J had decided at an early stage of the hearing that there was enough material produced to her to make it appropriate for her to appoint BNU as AACB. An extremely able and well-experienced judge like her would know exactly what she was looking for.

[183] Young J went on to say this, which makes it clear that she had read the papers and knew what the issues were: see Transcript, page 11, lines 7-21

> "THE COURT: I really saw all of that, Mr. Kenney [counsel for BNU]. The issue for me really, because I did go through your papers, trust me, I did. But the issue for me really is why it is that I must: (1) not bother to hear whether the Applicant's mother would renounce here and you have told me your view on it; and (2) why should there be some secrecy about the full grant?
>
> I could understand the secrecy about the ad colligenda bona, I could understand that but I do not understand why there should be some secrecy about the full grant when if they would wait until after certain things are done, there would be absolutely no need to circumvent that in making the application for the full grant."

[184] What I deduce from this thorough exchange and others is not that Young J was misled into making the order appointing BNU as AACB, but that she had a full and thorough appreciation of all the relevant facts. When Mr Kenney took her through the disclosures he intended to make, the Judge "took over and identified" those concerns she had and dealt specifically with them with Mr Kenney's assistance.

[185] It follows that I cannot see that there has been any failure to disclose matters to Young J to warrant the setting aside of her order on that ground. The real criticism of BNU is not that she failed to be full and frank with the court, but that the order for her appointment as AACB should

not have been made without notice. But even if that was somehow excusable, she should have informed ATH immediately when it was made.

[186] However, for the other reasons mentioned above, Young J's Order must be set aside.

Conclusion on Set Aside Application.

[187] On the basis that Young J's Order is set aside, it must follow that even if, contrary to the conclusion I have reached, BNU did have standing, pursuant to the terms of Young J's Order, to make the Permission Application and the Injunction Application at the time they were made, those applications must now be dismissed. However, the reality is that as BNU never had proper standing to bring the Permission Application, that application and the proceedings taken in the course of it (including the Injunction Application) are a nullity and must be struck out.

Permission Application and Injunction Application

[188] As I have already indicated, for the reasons stated above, the Permission Application must be struck out on the basis that BNU had no standing without a grant of representation to bring that application. Alternatively, if Young J's Order provided standing to BNU to issue the Permission Application, and the Permission Application was valid when it was issued, it must be dismissed on the basis that I have found that Young J's Order should be set aside.

[189] The Injunction Application, which was brought in the course of the Permission Application, falls away for the above reasons and must also be struck out, alternatively, dismissed.

"OBITER" OBSERVATIONS ON PERMISSION APPLICATION AND INJUNCTION APPLICATION

[190] In the course of my exchanges with counsel, I indicated that if I found against BNU, I would provide the parties with my observations on the substantive merits of the Permission Application and the Injunction Application in case BNU wished to bring a fresh application for permission, accompanied by an application for an injunction.

[191] I do not consider that it is appropriate for me to give a provisional view or provide any observations on the Permission Application or the Injunction Application ("the Applications") for several reasons. They include the following.

[192] If these Applications are, as I have found, invalid, and must be struck out, then it is difficult to see how, as a matter of principle, I can then go on to provide my observations about how I would have dealt with the Applications if they had been validly brought. My observations could not be classed even as *obiter*. Once proceedings are struck out on the basis that they were invalidly constituted, there is nothing left in the proceedings for any judgment or observations to be made. They have no legal significance whatsoever. The remarks I make would have no force, not even the force of *obiter* observations made by a judge. It follows that if BNU decided to bring a fresh permission and/or injunction application, it would have to be considered *de novo*. On the basis that I had made remarks which would not even have persuasive force, BNU and ATH could disregard them completely. But the point here is that if the Applications had to be made afresh, and I had given my observations on the Permission Application, I would not feel able to deal with the fresh applications myself, having expressed views about them. The applications would, therefore, have to be transferred to another judge who had no prior involvement with, or prior knowledge of, those observations.

[193] In addition, if BNU's title to the 30% Shareholding (or any part of it) is perfected in the Proposed Probate Claim, whether as a result of this Court appointing her administrator (either by issuing a full grant of administration with will annexed or on a limited basis to her) or in some other way (such as if it finds that she is beneficially entitled to the whole or part of the 30% Shareholding and that the shareholding should be distributed to her *in specie*), then the basis or grounds of the Applications may change. This would be especially so if the issues (or some of them) in the Proposed Probate Claim were determined before the Applications were made, which would be perfectly possible, given that there are no limitation difficulties that arise if the bringing of the Derivative Claim (subject to the grant of permission) is delayed to allow the issues between BNU and ATH to be finally determined.

[194] The different permutations that might apply if the Applications are made are many and varied. The determination of a probate claim under **Part 68** will finally determine several of the matters which are in issue between the parties, and the Court would be better equipped to deal with the

Applications once those matters were finally determined. The position becomes even more complicated if BNU appeals this Judgment and the Court of Appeal[23] allows her appeal in whole or in part. If, for example, the Court of Appeal decided to accede to ATH's application to appoint an "independent" AACB (assuming that ATH decided to bring a cross-appeal against my decision refusing to appoint an independent AACB), the whole character and basis of any permission application (if one were applied for by such an administrator) might change.

[195] I would have reached the same view even if I had decided that BNU had standing to bring the Permission Application without a formal grant, i.e., that the Application had to be dismissed because I had set aside Young J's Order.

[196] While largely moot because I have decided to strike out the Applications, the importance of an application or even a trial starting afresh with "a clean sheet" in such a case has been emphasised in many cases. For example, in the decision of the **Court of Appeal** in **Harb v Aziz [2017] EWCA Civ 2215** in which it found that the appellant had not received a fair trial (and, therefore, there had to be a fresh trial), **David Richards LJ** (as he then was) said, at **[41]-[42]**:

> "Put positively, the point that appeared to be made was that, for the purposes of securing the right of Mrs Harb and, it must follow, of the Prince under **article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms**, the original trial before **Peter Smith J** followed by this court's order for a retrial satisfied the requirement for 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' to determine their civil rights and obligations
>
> <u>The trial before Peter Smith J and his judgment were historical facts but, following the order of this court, they had no legal significance.</u> <u>As a matter of law, the parties had not had a hearing to determine their civil rights and obligations … It will be solely for the judge at the retrial to make findings on the evidence then presented to the court</u>.''
>
> (Emphasis supplied).

[197] **David Richards LJ** went on to say, at **[53]**:

> " … while this court made trenchant observations about aspects of Mrs Harb's evidence — and there would otherwise have been no grounds to interfere with the judgment — it did not reach any conclusion about her evidence or the merits of her case but remitted

[23] I make it clear that BNU must not assume by my giving this example that I will be willing to grant permission to appeal to her, though, if she decides to make one, I will carefully consider her application.

it for retrial. It will be solely for the judge at the retrial to make findings on the evidence then presented to the court."

[198] I make it clear that these are my provisional views on whether, having decided to strike out the Applications, I should nonetheless deal with the substantive merits of the Applications. Of course, I will hear what counsel have to say and will be willing to be persuaded that I should provide my observations on the substance of those applications on a provisional basis to afford the parties some element of certainty about how I am likely to decide those applications if they were brought afresh.

[199] I can assure the parties that I have not considered their cases on the Applications in any detail following the conclusion of the hearing on 13 May 2025, still less come to any conclusion, even provisional, on the Applications. I would hope that if these applications are made afresh, the parties will agree to their written and oral submissions standing as their submissions in those applications (assuming that the parties remain the same), and that I can determine the applications by having short oral and written updating submissions from the parties.

OVERALL CONCLUSION

[200] Young J's Order is set aside.

[201] In addition, the Applications are struck out. For the avoidance of doubt, as there has been no determination of the Applications on the merits, it would not be an abuse of process for fresh applications to be brought in the future by BNU if she wishes to.

MATTERS OUTSTANDING AND ARISING

[202] There are several matters that the Court will need to be dealt with arising from my judgment, such as costs[24]. However, the following matters seem to me to require immediate attention.

[24] This will need to include the costs of some of the interlocutory matters that were held over to be determined at the trial, such as the application by ATH for specific disclosure and related matters.

[203] First, any representations that the parties wish to make on the approach to the Applications that I have decided to take. I make it clear that this does not mean that BNU should be entitled to revisit my rulings on any other matter. Those rulings are final.

[204] Second, the bringing of a probate claim under **ECSC CPR Part 68**. Either ATH or BNU can bring the claim, though it seems to me to be appropriate for BNU to do so.

[205] Third, if and so far as the proper construction and effects of the Testamentary Dispositions are not agreed, the Proposed Probate Claim should seek a determination of these, or, if the equivalent of a construction summons is required to determine, then this should be issued.

[206] As I indicated to counsel, I am perfectly content for the written evidence so far filed in the common form proceedings to stand as the evidence in the Proposed Probate Claim and to give directions as soon as the Proposed Probate Claim is issued to progress it to trial. Having heard brief submissions on the point, I agree with Mr Hagen that I do not think that the Common-Form Application, which led to the making of Young J's Order, can simply be "converted" into a solemn form claim under ECSC Part 68, though if the parties believe this is possible, I will give further consideration to it.

[207] These issues and any other matters arising from this judgment may be dealt with when judgment is handed down. I would hope that, by this time, the Proposed Probate Claim will have been issued. I would suggest that a time estimate of 2 hours should be given for the hearing. While I am perfectly content that the hearing should take place remotely, I consider it would be helpful to have it in person. If matters such as costs and other issues that arise between BNU, and UGX and THA, are agreed, I would be prepared to excuse attendance on behalf of those companies at the "handing down" hearing. I am also content to dispense with attendance by counsel and any other representatives who are based outside the jurisdiction.

[208] I invite counsel to lodge an approved minute of an order to reflect my judgment at least 48 hours before the hearing.

ACKNOWLEDGMENTS

[209] I again express my deep and sincere gratitude to counsel, both for the manner of the presentation of their clients' cases and for their cooperation throughout the Applications. The skeleton arguments were not just extremely thorough but also prepared to the highest possible standard. A mark of the quality of the oral submissions of all counsel was that on the "main" application, i.e., whether Young J's Order should be set aside, my mind changed on more than one occasion in the course of hearing the application. However, that was due entirely to counsel's erudite and detailed submissions on the issue. In the final analysis, I found that decision a straightforward one to make

Abbas Mithani KC

High Court Judge

By the Court

Registrar