

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2021/0001

BETWEEN:

- [1] **SHEIKHA AMENA AHMED H.A. AL-THANI**
(also Known as Amena Ahmed Al-Thani)
[2] **SARA SAOUD M.A. AL-THANI**

Appellants

and

- [1] **SHEIKHA AISHA MOHAMMED ALI ABDULLAH AL THANI**
(also known as Ayesha Mohamed Ali Alabdullah Al Thani)
[2] **SHEIKHA AL-ANOUD ABDULRAHMAN ALI AL ABDULLAH
AL THANI** (also known as Al Anoud Abdul Rahman
Mohammed Al Thani)
[3] **SA'AD AL-DEHAIMI**
(also known as Saad Abdullah Obaid Shurtab Al Dhaimi)

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Moverley Smith, Q.C. with him Mr. Dave Marshall for the Appellants
Mr. Bajul Shah and Mr. Nicholas Brookes for the Respondents

2021: October 4;
2022: March 23.

Civil appeal - Probate- Validity and enforceability of foreign will in BVI - Res judicata - Issue estoppel - Cause of action estoppel - Whether appellants are estopped by the judgment of

the Qatari court from contending that the will is not valid and enforceable in the BVI- Disposal of movable property in the BVI - Whether section 245 of the BVI Business Companies Act establishes that registered shares in a Virgin Islands company are movable or immovable property- Whether shares in a company are movable or immovable property

Sheikh Saoud Mohammed A.A. Al Thani (“the Deceased”) died on 9th November 2014 in London. After his death, an entry was discovered in the Sharia Court register having been made and signed by a judge (Will no. 338/1408 AH, Vol 8, pg. 207) and issued by the Registry in Qatar on 11th June 1990. Such an entry is treated as a will in accordance with Qatari law, the state of Qatar being where the Deceased was domiciled. Under the will, the Deceased devised 20% of his movable and immovable estate to the respondents who were his sister, niece and ‘right hand man’. On 25th June 2015, the appellants, who are the Deceased’s widow and daughter, and the Deceased’s first son, Hamad bin Saud Mohammed Ali Abdulla Al Thani, initiated proceedings in the first instance court in Qatar challenging the validity and enforceability of the entry as a “will”. They contended that the will had been revoked by the Deceased’s subsequent conduct and was therefore invalid and unenforceable. On 20th July 2015, the appellants also made an ex-parte application in the High Court of The Territory of the Virgin Islands for a grant of letters of administration of the Deceased’s estate in the BVI. The application did not disclose the existence of the will or that there were proceedings in Qatar challenging its validity. On 7th October 2015, the High Court in the BVI granted letters of administration of the Deceased’s estate in the BVI to the appellants, on the basis that the Deceased had died intestate as to his estate in the BVI.

Subsequent to the grant of letters of administration in the BVI, the Qatari lower court rendered judgment in favour of the appellants, holding that the will was not valid and enforceable. However, this decision was overturned by the Qatari Court of Appeal which held that the will had not been revoked and it remained valid and enforceable. The appellants appealed the decision of the Qatari Court of Appeal to the Court of Cassation, which is Qatar’s highest civil appellate court. The Court of Cassation dismissed the appeal.

The respondents then commenced proceedings in the BVI High Court seeking revocation of the grant of letters of administration made on 7th October 2015. They also sought probate of the will in solemn form and appointment of an independent personal representative of the Deceased’s BVI estate. The appellants (who were the defendants in the court below) opposed the respondents’ claim and argued that the Deceased had left no valid will pertaining to his BVI estate and that the Qatari courts did not in fact create an issue estoppel, given that they were not called upon to determine the formal and material validity of the will under BVI law. A preliminary issue therefore arose as to whether the appellants were estopped from contending that the will was not valid and enforceable in the BVI. On 12th January 2021, Ellis J of the BVI High Court made an order which gave effect to a written judgment of the learned judge on the trial of the preliminary issue. The learned judge, in summary, ordered that the judgment of the Qatari court is valid and enforceable and is conclusive as to the validity and enforceability of the will in BVI; that the appellants are estopped by the judgment of the Qatari Court of Appeal from contending that the will is not valid or enforceable in the BVI for the disposal of the Deceased’s movable property in the BVI; and that the Deceased’s movable property in the BVI includes registered shares of a Virgin Islands company.

The appellants, being dissatisfied with the judge's decision, appealed. On this appeal, the main issues for the Court's determination are: (i) whether the appellants are estopped from contending that the Will is not valid and enforceable in the BVI, which issue was not raised before the Court of Appeal in Qatar; and (ii) whether section 245 of the BVI Business Companies Act, 2004 establishes that registered shares in a Virgin Islands company are immovable property.

Held: dismissing the appeal; affirming the orders made by the judge in the court below on 12th January 2021; and awarding costs to the respondent to be assessed if not agreed by the parties within 21 days of the date of this judgment, which costs must not exceed two-thirds of the costs awarded in the court below, that:

1. As a general rule, a party is not allowed to re-open litigation in later proceedings on matters that have already been adjudicated upon by a court of competent jurisdiction in earlier proceedings between the same parties or their privies. This is the principle upon which the doctrine of *res judicata* is founded. The doctrine also encompasses the defence of issue estoppel which prevents a party from re-litigating an issue which was integral to the cause of action in the earlier proceedings but was not raised by the party who now seeks to rely on it in subsequent proceedings between the same parties. The principle may arise from a judgment of a foreign court of competent jurisdiction. It is clear that the common denominator between the Qatar and BVI proceedings was the issue of the validity and enforceability of the same will. Thus, the issues in the Qatar proceedings and in the BVI proceedings which are materially identical, ought not to be re-litigated. There may be an exception to issue estoppel in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. This exception, however, does not apply in the instant case. The appellants were aware of the existence of the shares in the BVI which formed part of the Deceased's estate at the time litigation was taking place in Qatar. Accordingly, the parties are estopped by issue estoppel from contending that the will was not valid and enforceable under the BVI law after there was a judgment of the Qatari highest civil appellate court affirming the will to be valid and enforceable.

Arnold and others v National Westminster Bank plc [1991] 3 All ER applied; **Jhaveri Darsan Jitendra v Lakshmi Anil Salgaocar et al** Claim no. BVIHC (COM) 83 of 2017 (delivered 28th February 2019, Re-issued 1st April 2019, unreported) considered; **Henderson v Henderson** [1843-60] All ER Rep 378 at 381-382 applied; **Halsbury's Laws of England** 15th Edition Vol. 12A (2020), paragraph 1568 considered; **The Sennar [No 2]** [1985] 1 WLR 490 applied; **Net International Property Limited v ADV. Eitan Erez** BVIHCMAP2020/0010 (delivered 22nd February 2021, unreported) considered.

2. BVI law is silent as to the validity and enforceability of foreign wills in the BVI, thus the Court must look to the common law principles for guidance. On the application

of these principles, it follows that where a foreign domiciled person dies owning assets in the BVI, BVI law will determine the succession and administration of immovable property located in the BVI and the law of the foreign domicile will determine the succession and administration of movable property located in the BVI.

Dicey, Morris & Collins on the Conflict of Laws 15th Edition, Vol. 2, page 120 at paragraph 27R-023 considered; the **New Law Journal** Volume 152, page 1374 considered; **Liao Chen Toh v Liao Hwang Hsiang** BVIHPB 93 of 2011 (10th and 20th November 2011, unreported) considered; **Dennis Donovan v Irene Donovan** BVIHCV2009/0058 (delivered 31st March 2010, unreported) considered; **Re Hoyles, Row v Jagg** [1911 1Ch. 179] considered; Section 11 of **West Indies Associated States Supreme Court (Virgin Islands) Act**, Cap 80 of the Laws of the Virgin Islands applied.

3. Registered shares in a BVI company are movable property and their distribution on succession must be done in accordance with the law of the deceased testator's domicile. Contrary to the appellants' submissions, section 245 of the BVI Business Companies Act, 2004, does not transform the nature of shares in a BVI company to immovable property. Pursuant to section 245, the situs of the ownership of shares is in the BVI for the purposes of determining matters relating to title and jurisdiction; it does not extend to other matters such as succession. The finding that shares in the BVI are movable property is also consistent with section 33 of the BVI Business Companies Act which provides that a share in a company is personal property. Consequently, the disposition of the shares in the BVI company which form part of the Deceased's estate are subject to the laws of the Deceased's domicile, which is Qatar. The learned judge's finding that section 245 did not constitute the registered shares in the BVI as immovable property cannot therefore be faulted.

Section 245 of the **BVI Business Companies Act, 2004** (No. 16 of 2004) applied; Section 33 of the **BVI Business Companies Act, 2004** (No. 16 of 2004) applied.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against an order of Ellis J dated 12th January 2021 which gave effect to a written judgment of the learned judge on the trial of a preliminary issue between the parties as to whether the appellants (the defendants in the court below) are estopped from contending that the will of the late Sheikh Saoud Mohammed A.A. Al Thani (hereafter "the Deceased") dated 11th June 1990 is not valid and enforceable.

Background

- [2] The appellants, Sheikha Amena Ahmed H.A. Al-Thani ("Sheikha Amena") and Sara Saoud M.A. Al-Thani ("Sara"), are the widow and daughter respectively of the Deceased. The respondents, Sheikha Aisha Mohammed Ali Abdullah Al Thani ("Sheikha Aisha"), Sheikha Al-Anoud Abdulrahman Ali Al Abdullah Al Thani ("Sheikha Al-Anoud") and Sa'ad Al-Dehaimi ("Sa'ad"), are the sister, niece and 'right-hand man' respectively of the Deceased.
- [3] The Deceased, who was at all material times domiciled in Qatar, made a will in accordance with Qatari law before a judge in the Supreme Personal Status Court in Qatar (hereafter "the Will"). An entry of the court hearing was made and signed by the judge (Will no. 338/1408 AH, Vol 8, pg. 207) and issued by the Registry in Qatar on 11th June 1990 (hereafter "the Entry"). Under the Will, the Deceased devised 20% of his movable and immovable estate to the respondents - 5% to Sheikha Aisha, 5% to Sheikha Al-Anoud and 10% to Sa'ad.
- [4] The Deceased died on 9th November 2014 and on 25th June 2015 the appellants and the Deceased's first son, Hamad bin Saud Mohammed Ali Abdulla Al Thani ("Hamad") initiated proceedings in the first instance court in Qatar challenging the validity and enforceability of the Will ("the Qatari Proceedings"). They contended that the Will had been revoked by the Deceased's subsequent conduct and was therefore invalid and unenforceable. The respondents were defendants in the Qatari proceedings. The Qatari proceedings were heavily contested, with 14 hearings taking place between July 2015 and October 2016.
- [5] On 20th July 2015, the appellants also made an ex-parte application in the High Court of The Territory of the Virgin Islands (hereafter "the BVI") for a grant of letters of administration of the Deceased's estate in the BVI. The application was supported by affidavits from Sara, Hamad and their lawyer, Mr. Al Sulaiti, as an expert on Qatari law. The application did not disclose the existence of the Will or that there were proceedings in Qatar challenging its validity. In fact, in her affidavit, Sara

deposed that she had conducted a diligent search and had not found any will relating to the Deceased's estate in the BVI and that she believed the Deceased died intestate as to his estate in the BVI.

- [6] On 7th October 2015, the High Court in the BVI granted letters of administration of the Deceased's estate in the BVI to the appellants on the basis that the Deceased had died intestate as to his estate in the BVI.
- [7] On 30th November 2016, the Qatari court gave judgment in favour of the appellants, which judgment was appealed by the respondents.
- [8] On 29th January 2018, the Qatari Court of Appeal overturned the lower court and held that the Will had not been revoked and it remained valid and enforceable. The appellants appealed the decision of the Qatari Court of Appeal to the Court of Cassation, which is Qatar's highest civil appellate court, and which court dismissed the appeal.
- [9] On 21st August 2019, the respondents commenced proceedings in the High Court of the BVI seeking revocation of the grant of letters of administration made on 7th October 2015. They also sought probate of the Will in solemn form and appointment of an independent personal representative of the Deceased's BVI estate.
- [10] In the High Court, the respondents argued that the appellants were estopped from challenging the validity and enforceability of the Will, since the Qatari Court of Appeal had determined that the Will was valid and enforceable, and its decision was affirmed by the Qatari Court of Cassation, and so the BVI court must recognise it as valid and enforceable. Alternatively, the respondents argued, the Will is in any event valid and enforceable.
- [11] In the High Court, the appellants argued that the Deceased had left no valid will pertaining to his BVI estate and that the Qatari courts did not in fact create an issue

estoppel, given that they were not called upon to determine the formal and material validity of the Will under BVI law. The appellants challenged the validity of the Will in accordance with BVI law and, by extension, the respondents' entitlement to the Deceased's BVI estate. A preliminary issue therefore arose as to whether the appellants were estopped from contending that the Will is not valid and enforceable in the BVI.

[12] By order dated 12th January 2021, Ellis J ordered as follows:

- (a) the judgment of the Qatari Court of Appeal dated 29th January 2018 decreeing the Will of the Deceased dated 11th June 1990 as valid and enforceable is also conclusive as to the validity and enforceability of the Will in the BVI for the disposal of the Deceased's moveable property located in the BVI;
- (b) the appellants are estopped by the judgment of the Qatari Court of Appeal dated 29th January 2018 from contending that the Will is not valid or enforceable in the BVI for the disposal of the Deceased's moveable property located in the BVI; and
- (c) the Deceased's moveable property located in the BVI includes the registered shares of a Virgin Islands company.

The appeal

[13] The appellants, being dissatisfied with the decision of Ellis J, appealed to this Court. The notice of appeal lists four grounds of appeal, namely:

- “(1) the Court erred in concluding that the issue that arises in the present proceedings, namely, whether the Deceased executed a will (pleaded at 2(a) of the Statement of Claim) is identical to the issue that arose and was determined by the Qatari Judgment, namely, that an entry in the records of the Sharia Court in Qatar, treated as a will of the Deceased under Qatari law, had been revoked, such that [the appellants] were estopped from contending that, under Virgin Islands law, the Entry is not a valid will of the Deceased in so far as it disposes of moveable property in the Virgin Islands;

- (2) further or alternatively, the court, having correctly concluded that the Virgin Islands probate court, in deciding whether to grant probate, is required to construe the formal validity of any testamentary instrument and determine whether it has been executed by the Deceased, erred in concluding that the Entry was a testamentary instrument and was executed by the Deceased, in circumstances where the Entry simply constituted the limited record of a court appearance signed by a judge of the Sharia court;
- (3) further or alternatively, the court erred in concluding that the Qatari Court of Appeal had by the Qatari Judgment determined that the Entry constituted a testamentary instrument executed by the Deceased, such that the Appellants were estopped from contending that, under Virgin Islands law, the Entry is not a valid will of the Deceased in so far as it disposes of moveable property in the Virgin Islands;
- (4) the court erred in concluding that s. 245 of the BVI Business Companies Act 2004 did not constitute registered shares in Virgin Islands companies as immovable property.”

Appellants’ submissions

- [14] The appellants noted that the preliminary issue which the court below was called upon to determine raised a very narrow issue of whether issue estoppel arose. They contended that the requirement that in order for estoppel to arise the issues raised must be identical was not met, in that the issue raised in the Qatari proceedings was not identical to the issue raised in the BVI court. They argued that the Qatari Court of Appeal had to determine whether the Will had been revoked by the Deceased’s subsequent conduct, whilst the BVI court was being called upon to determine the extent to which it should be guided by the decision of the Qatari Court of Appeal in determining how the BVI estate of the Deceased should be administered. The issue then to be determined in this case, according to the appellants, is whether a decision as to how the Qatari estate of the Deceased should be administered in Qatar is to be treated as also determining how the BVI estate of the Deceased, comprising company shares in the BVI, should be administered.
- [15] Further, in oral submissions, counsel for the appellants argued that the learned judge was entirely correct in saying that the mode of execution is determined by the

law of the testator's domicile. She expressed it as follows: "Conversely, in relation to movables, the formalities of execution of a valid will are governed by the law of the domicile of the testator". Counsel however argued that, by recognising this, the judge is also recognising that the Will needed to have been executed by the testator. He argued further that, in the present case, there is no testamentary instrument made or executed by the Deceased, and all there is is the Entry, which is made by the court and signed by a judge.

Respondents' submissions

- [16] In the court below, the respondents argued that the appellants are estopped from contending that the Will is invalid or unenforceable by virtue of the Qatari judgment which determined and upheld the validity of the Will, such that this Court must recognise it as valid and enforceable. The respondents argued further that the appellants had made a bare assertion that the Deceased left no valid will, without pleading any particular challenges to the validity of the Will. They argued that the appellants are simply seeking to re-litigate the very matters which were fully litigated in Qatar over three years ago.
- [17] In oral arguments before this Court, counsel for the respondents averred that the Deceased left a valid will pursuant to which the respondents are collectively entitled to 20% of the Deceased's worldwide estate. He argued that the validity of the Will has been upheld in proceedings before the highest civil court in Qatar to which the appellants were parties. Counsel maintains that in the court below, the respondents commenced proceedings on the basis that the Will was made in accordance with Qatari law and that the court should comply with the laws of the Deceased's domicile as to the validity of the Will, and on the basis too that there is already a judgment from the courts of Qatar decreeing the Will to be valid and enforceable, and this gives rise to an estoppel against the appellants. Counsel therefore submits that this Court should uphold the decision of the learned judge.

Issues

[18] The two main issues which arise for consideration and determination by this Court are:

- (1) Whether the appellants are estopped from contending that the Will is not valid and enforceable in the BVI, which issue was not raised before the Court of Appeal in Qatar.
- (2) Whether section 245 of the **BVI Business Companies Act, 2004** establishes that registered shares in a Virgin Islands company are immovable property.

Issue 1- Estoppel

[19] As a general rule, a party should not be allowed to re-litigate issues which have already been decided by a court of competent jurisdiction. The doctrine of res judicata is founded upon the principle that there should be an end to litigation and justice demands that the same party should not be vexed twice for the same cause.¹

[20] In the case of **Arnold and others v National Westminster Bank Plc**,² Lord Keith of Kinkel, in giving judgment in the House of Lords, said that:

“Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened.”

He said too that:

“Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negating the existence of a cause of action.”

¹ In *Carl Zeiss Stiftung v Raynor and Keeler Ltd.* [No. 2].

² [1991] 3 All ER 41 at paragraph 46.

[21] As to issue estoppel, Lord Keith said:

“Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.”³

[22] Lord Keith also said that:

“Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier.”⁴

[23] As to whether there were any exceptions with regard to the application of the doctrine of issue estoppel, Lord Keith opined as follows:

“In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings.”⁵

[24] Lord Keith concluded that:

“One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result”⁶

[25] Issue estoppel may arise from a judgment of a foreign court of competent jurisdiction.⁷

In **Jhaveri Darsan Jitendra v Lakshmi Anil Salgaocar et al**⁸ this Court held that, in order to create an estoppel, the foreign judgment must satisfy 5 criteria: (1) it must be from a court of competent jurisdiction; (2) it must be final and conclusive, in that it can only be reversed on appeal; (3) it must be on the merits; (4) the parties must be the same; and (5) the issues must be the same.

³ Ibid at 47.

⁴ Ibid.

⁵ Ibid at 50.

⁶ Ibid.

⁷ The Sennar [No 2] [1985] 1 WLR 490.

⁸ Claim No. BVIHC (COM) 83 of 2017 (delivered 28th February 2019, Re-issued 1st April 2019, unreported).

[26] The learned authors of **Halsbury's Laws of England**⁹ state:

"The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue."

[27] In **Henderson v Henderson**,¹⁰ Sir James Wigram V.-C. had this to say:

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, ... not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

[28] In the case of **Net International Property Limited v ADV. Eitan Erez**,¹¹ this Court stated that:

"The doctrine of res judicata comprising cause of action estoppel and issue estoppel provides that a decision of a court of competent jurisdiction cannot be reopened and relitigated in subsequent proceedings between the same parties or their privies. It is also an established principle that the court will prevent a party from raising, in extant proceedings, an issue that was essential to the existence or non-existence of the cause of action in an

⁹ 5th Edition Vol. 12A (2020), paragraph 1568.

¹⁰ [1843-60] All ER Rep. 378 at 381-382.

¹¹ BVIHCMAP2020/0010 (delivered 22nd February 2021, unreported).

earlier case between the same parties, but which was not raised by the party who now seeks to rely on the issue.”

[29] On the authorities, it is clear that a court will not permit a party to reopen and relitigate in extant proceedings a decision of a court of competent jurisdiction in earlier proceedings between the same parties or their privies, or an issue which was integral to the cause of action in the earlier proceedings but was not raised by the party who now seeks to rely on it.

[30] In the present case, the appellants sought to argue that the requirement that the issues raised must be identical has not been satisfied. They contend that the issue in the Qatari proceedings concerned the validity and enforceability of a will in Qatar, but the court in the BVI proceedings must determine the validity and enforceability of the Will in accordance with BVI law. It is clear, however, that the common denominator between the Qatar and BVI proceedings was the issue of the validity and enforceability of the same will. The issues in the Qatar proceedings and in the BVI proceedings are materially identical and ought not to be re-litigated. It follows then that the appellants cannot now argue that the Will is not valid in the BVI, since they would have had an opportunity to make that argument in the Qatari proceedings, given that they had known of the existence of the shares in the BVI at the time that the litigation was taking place in Qatar. It is apparent, therefore, that the learned judge correctly held (at paragraph 93 of her judgment) that:

“... the suit as framed did not directly address sic [to] the formal or material validity of the Will under Virgin Islands law. However, in pronouncing on its formal validity under the laws of Qatar, the Qatari Court of Appeal effectively determined the validity under Virgin Islands law through [of] sic. the application of common law principles of private international law.”

[31] The learned judge was accordingly correct in her analysis and application of the law and this Court ought not, therefore, to disturb her findings. The appeal on this issue therefore fails.**Issue 2- Are company shares in the BVI movable or immovable property**

- [32] The conflict of law principles on succession are largely settled. Where a person dies with assets in different jurisdictions, different laws of succession could apply to different assets forming part of his estate. It is established that common law principles of private international law ought to be applied where there is a dispute as to the validity of a foreign will in the BVI. Accordingly, where a foreign domiciled person dies owning assets in the BVI, BVI law will determine the succession and administration of immovable property located in the BVI and the law of the foreign domicile will determine the succession and administration of movable property.
- [33] The learned authors of **Dicey, Morris & Collins on the Conflict of Laws**¹² state that: “[t]he law of the testator’s domicile at the time of making his will determines whether or not he has personal capacity to make a will of movables.” They further state that: “[t]he general principle which governs testamentary no less than intestate succession is that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and the succession to his movables, and therefore decides what constitutes his last will, and whether and how far it is valid.”
- [34] In volume 152 of the **New Law Journal**, it is stated (at page 1374) that:
- “Where a deceased is domiciled in one State, habitually resident in another State, a national of yet a third State and with immoveable property in a fourth State, four different laws of succession could in theory apply to the assets in his estate. Each jurisdiction is autonomous, and in most cases not designed to inter-weave sensibly with others. The entanglement of various jurisdictions increases the complexity of administration of the estate, and often the different advisers in each jurisdiction find it difficult to understand the rights, duties and interests of the different parties (be they executors/administrators or beneficiaries) provided for by the laws in the other jurisdictions.”
- [35] It is not in dispute that the Deceased died domiciled in Qatar. It is also not in dispute that the Deceased left a valid Will, which the Qatari courts have determined is valid and enforceable. It is in dispute between the parties to this appeal, however, as to

¹² 15th Edition, Vol. 2, page 120 at paragraph 27R-023.

whether the BVI situated shares owned by the Deceased can be treated as immovables and therefore governed by BVI law or are movables governed by Qatari law.

[36] The appellants contend that shares in a BVI company are to be treated as immovable property pursuant to section 245 of the **BVI Business Companies Act** ("**BCA**"). Section 245 of the **BCA** provides that: "For purposes of determining matters relating to title and jurisdiction but not for purposes of taxation, the situs of the ownership of shares, debt obligations or other securities of a company is in the Virgin Islands." The appellants argue that given that section 245 mandates that the situs of ownership of shares is in the BVI 'for purposes of determining matters relating to title and jurisdiction', this transforms the nature of shares in the BVI into immovable property and the shares cannot, therefore, be moved from the place where the asset is located, in this case the BVI, and so BVI law would apply.

[37] Section 33 of the **BCA** provides that: "a share in a company is personal property". In the BVI High Court case of **Liao Chen Toh v Liao Hwang Hsiang**,¹³ Olivetti J said:

"Once a full grant is made the administrator must distribute the estate according to law. The person who eventually obtains the full grant has to distribute the estate according to the law of [domicile] as in the Territory, shares in a company constitute personal property – the BVI Business Companies Act 2004 section 33 - and the distribution of personalty ... is governed by the law of the place of domicile of the deceased at the date of death."

[38] In the BVI High Court case of **Dennis Donovan v Irene Donovan**,¹⁴ Harriprashad-Charles J stated that:

"The law is that a will, other than a valid international will, may be regarded as properly executed either as a result of statute or by common law. Since the laws of the BVI pertaining to foreign wills are silent, common law

¹³ BVIHPB 93 of 2011 (10th and 20th November 2011, unreported) at paragraph 46. This judgment was appealed, however, the court only dealt with the issue of whether the learned judge erred in the exercise of her discretion in disposing of the two matters as she did; the issue of the nature of shares did not come up for consideration.

¹⁴ BVIHCV2009/0058 (delivered 31st March 2010, unreported) at paragraph 13.

principles are applicable. At common law, a will of immovables is properly executed if its execution complies with the formal requirements of the *lex situs*.”

Harriprashad-Charles J did not, however, go on to determine what may be classified as immovables, because this was not an issue in dispute between the parties.

[39] In the Canadian case of **Re Hoyles, Row v Jagg**,¹⁵ counsel for the appellant framed the issue this way:

“The question of the validity of this bequest depends primarily on the question whether these Ontario mortgages are movables or immovables. If they are movables, the question of the validity of the gift is governed by the law of the testator’s domicile; if they are immovables, by the law of the situs. The question whether they are movables or immovables must be decided according to the law of Ontario...”

[40] Although not on all fours with this matter, in **Re Hoyles** Cozens-Hardy MR pronounced on the nature of a mortgage as follows:

“The terms "movable" and "immovable" are not technical terms in English law, though they are often used, and conveniently used, in considering questions arising between our law and foreign systems which differ from our law. But where the two systems are identical, as in the present case, I doubt whether the terms are appropriate”

[41] Based on the authorities, it appears that the determination of whether a share is a movable or immovable must be done in accordance with BVI law. However, there appears to be no express pronouncement on this issue by the BVI courts. The Court must therefore turn to English law, in accordance with section 11 of the **West Indies Associated States Supreme Court (Virgin Islands) Act**¹⁶, which reads:

“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 Virgin Islands] 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.”

¹⁵ [1911 1Ch. 179].

¹⁶ Cap 80 of the Laws of the Virgin Islands.

[42] In the present case, the learned judge's decision cannot be impugned because she correctly applied the applicable principles. At paragraph 48 of her judgment, the learned judge stated:

"These common law principles also prescribe that where a testator dies domiciled aboard [sic], in construing the formal validity of any testamentary instrument, the Virgin Islands probate court will apply different laws to movable property from that which it applies to immovable property. To be clear, in so far as immovable estate is concerned, a will is deemed to be valid if it is executed in accordance with the law of the country where the immovable estate is situated (lex situs). On the other hand, a will is valid to pass movable estate if it is executed in accordance with the law of the testator's last domicile (lex domicilli)."

She continued at paragraph 49:

"And in applying the law of the domicile of the testator, the Virgin Islands, following the practice of the English courts will always look first to see whether the foreign court has made any decision about the estate of the deceased testator or the validity of any purported will. If there has been such a decision, the English court will in general follow it, but if not, it will come to its own decision applying the law of the domicile as given in evidence by experts in the foreign law in question."

[43] Pursuant to section 245 of the **BCA**, registered shares in the BVI are situated where they are registered. However, although the situs of the shares is the BVI for title purposes, shares in a company are considered to be movables. It follows therefore that shares in a BVI company are deemed situated in the BVI for title purposes, but are movable property for succession purposes.

[44] Therefore, for succession purposes, the Deceased's movables, including his shares in the BVI, are governed by the law of the jurisdiction where he was domiciled at his death, which is Qatar. Accordingly, the laws of Qatar are to be applied in determining the validity and enforceability of the Will and any dispositions made thereunder.

[45] On this second issue as well, that is, the legal status of company shares in the BVI - whether they are movables or immovables - the learning from the cases and the very persuasive authorities, like **Halsbury's Laws of England** and **Dicey, Morris & Collins on the Conflict of Laws**, leads ineluctably to the conclusion that the

learned judge was correct in her determination that section 245 of the **BVI Business Companies Act** establishes that company shares in the BVI are movable property. The appeal on this issue must also fail.

Conclusion

- [46] The appellant having failed on both issues set by this Court for its determination, the appeal is accordingly dismissed, and the orders made by the learned judge on 12th January 2021 are affirmed.
- [47] Costs to the respondent to be assessed, if not agreed by the parties within 21 days of the date of this judgment. The assessed costs shall not exceed two-thirds of the costs awarded in the court below.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar