Neutral Citation Number: [2025] CA (Bda) 6 Civ

Civil Appeal No. 9 of 2024

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ACTING JUSTICE ALEXANDRA WHEATLEY
CASE NUMBER: 2023: No. 115

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 21/03/2025

Before:

JUSTICE OF APPEAL THE HON IAN KAWALEY
JUSTICE OF APPEAL THE HON NARINDER HARGUN
and
JUSTICE OF APPEAL RT HON SIR GARY HICKINBOTTOM

Between:

DAVID WILLIAM COX

Appellant

- and -

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

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

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

Respondents

Appearances:
Mr David Kessaram of Cox Hallett and Wilkinson for the Appellant
Mr Jai Pachai of Wakefield Quin Limited for the Respondent

Date of Hearing: 14 March 2025
Date of Judgment: 21 March 2025

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Derivative action by a beneficiary under a will - pleading representative capacity under RSC O.6 r. 3 - special circumstances justifying derivative action

JUDGMENT

HARGUN JA:

1. This is an appeal from the Judgment of Alexandra Wheatley AJ (**"the Judge"**) on a preliminary issue, namely the standing of David William Cox (**"the Appellant"**) to bring his action in the Supreme Court and the jurisdiction of the Supreme Court to grant the relief he is seeking. By Judgment dated 28 May 2024, the Judge dismissed the Appellant's claim against Rosanna Cox ("**the First Respondent**"), in her personal capacity and as an executor and trustee of the last Will of William Milner Cox dated 19 July 2020 (**"Mr Cox"** or **"the Deceased"** and **"the Will"**) on the grounds that (i) the claim pleaded by the Appellant in the Statement of Claim was a personal proprietary claim (as opposed to a derivative claim) which could not be pursued by him as he had no proprietary interest in the relevant property; and (ii) in any event the Appellant could not pursue a derivative action in his capacity as a beneficiary under the Will as there were no special circumstances which could justify the Appellant commencing a derivative action on behalf of the estate. The Judge further held that the Supreme Court did not have jurisdiction to hear this action.

Factual Background

2. As the Judge noted at paragraphs 6 to 10 of the Judgment, the relevant facts are not in dispute. The Appellant filed a Specially Endorsed Writ of Summons on 31 March 2023 (**"the Writ"**). In the Statement of Claim, the Appellant sought from the First Respondent the return of two items of furniture and furnishings, namely a mahogany tall-boy (**"the Tall-boy"**) and a gilt French mantel clock (**"the Mantel Clock"**) (collectively referred to as "**the Chattels**"). On 30 July 2020, Mr Cox passed away and in his Will named the three Respondents in this action as executors and trustees of his estate. The First Respondent was

the third wife of the Deceased, and the Second Respondent and the Appellant are children from his first marriage. The Appellant is named as a beneficiary under clause 5 (c) of the Will.

3. The Will provided, *inter-alia*, in clause 5 (a) that the First Respondent should have the right to occupy the former matrimonial home (Mayflower) rent free for a period not exceeding two years from the date of his death. The Will also made provisions for the retention and distribution of the contents of Mayflower. Clauses 5(b) and (c) provided:

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

4. In anticipation of the First Respondent's departure from Mayflower, the executors and trustees had meetings and discussions at Mayflower to identify and in May 2022 agreed upon those items of household furniture and furnishings which were to remain in the Mayflower for the benefit of the Appellant and those items which the First Respondent was entitled to remove in accordance with the terms of clause 5 (b) of the Will. The First Respondent asserts that in the lists prepared by the executors and trustees they agreed that the First Respondent is entitled to the Tall-boy. There is no mention of the Mantel Clock in those lists.

5. In the pre-action correspondence between the Appellant and the attorneys for the First Respondent, the Appellant asserted that the Chattels had been wrongfully removed by the First Respondent as these two chattels belong to the estate of Mr Cox and should pass to him under clause 5 (c) of the Will. This assertion by the Appellant was disputed by the attorneys for the First Respondent. In a letter dated 7 March 2023 Wakefield Quin, attorneys for the First Respondent, set out the First Respondent's position in relation to the Chattels:

> *"Regarding the "Tallboy",… this was purchased by our client in about 1989/1990 at an estate sale when she was still married to her first husband and was moved into Mayflower when she married your father. It was not in good condition then and it is not in good condition now. We find it unreasonable to expect our client to provide proof of purchase of this item dating back over 30 years and before her marriage to your father.*

> *…*
> *So far as the mantel clock is concerned, your father considered it to be "hideous" and was going to dump it but instead gave it to Rosanna as long as she kept it out of sight. That is why it was in the dining room… She does not know if it is repaired or not and, in any event, as we have noted, your father did not like it and gave it to her."*

The Statement of Claim and the Amended Defence

6. The parties were unable to resolve their differences and as a consequence on 31 March 2023 the Appellant filed the Writ claiming from the First Respondent the return of the Chattels. The Writ names the First Respondent in her personal capacity as well as in her capacity as an executor and trustee of the Will. The Second and Third Respondents are added as parties in their capacity as executors and trustees of the Will. In paragraph 8 and 9 of the Statement of Claim the Appellant seeks from the First Respondent delivery up of the Chattels:

> *"8… The First Defendant removed (or caused to be removed) the Tall-boy from the Deceased's said residence and retains possession or control of the said piece of furniture and refuses to deliver it up* ***to be held for the Plaintiff pending the administration of the Deceased's Estate.***
>
> *9… The First Defendant removed (or caused to be removed) the gilt French mantel clock from the Deceased's said residence and retains possession or control of it and refuses to deliver it up* ***to be held for the Plaintiff pending the administration of the Deceased's Estate"*** (emphasis added)

7. In the Statement of Claim the Appellant seeks the following relief:

> *"1. A declaration that the Plaintiff is entitled to the mahogany Tall-boy and gilt French mantel clock pursuant to clause 5 (c) of the Deceased's Will* ***pending the administration of the Deceased's Estate.***
>
> *2. An Order that the First Defendant deliver up possession of the mahogany Tall-boy and gilt to the Plaintiff at Mayflower… forthwith* ***to be held by and for the Plaintiff pending the administration of the Deceased's Estate****."* (emphasis added)

8. In the Defence filed by the First Respondent dated 27 April 2023, the First Respondent asserted that the Chattels claimed by the Appellant in these proceedings in fact are the property of the First Respondent. At paragraphs 5 and 7 Defence the First Respondent states that:

> *"5. The Tall-boy was purchased by the 1st Defendant in about 1989/1990 at an estate sale when she was still married to her first husband and was moved into the*

matrimonial home when she married the deceased, Mr Cox. Therefore, it was not "inherited" or "acquired" by the deceased prior to his marriage to the First Defendant and belongs to the First Defendant."

…

7. Regarding the mantel clock, the deceased considered it to be"hideous"and intended to dump it, but instead gave it to the First Defendant, as long as she kept it out of sight, which is the reason why it was located in the dining room."

9. On 25 September 2023, the First Respondent filed an Amended Defence challenging the Appellant's standing to pursue these proceedings. Paragraph 1 (a) of the Amended Defence states:

"…the 1st Defendant denies that the Plaintiff has any standing to bring this action or that the Supreme Court of Bermuda has any jurisdiction or power to make the order sought by the Plaintiff for the reason that, as admitted in the Plaintiff's Statement of Claim, no probate has yet been made to the Defendants as Executors of the Deceased's Will, such that all property of the Deceased, including any right of action, vests in the Defendants as Executors of the Deceased's Will and they are responsible to collect in the Deceased's estate , to clear it of debts and liabilities and to distribute the estate in accordance with his Will as and when the probate is granted."

Parties' submissions before the Judge

10. It was agreed by the parties that the issue raised by paragraph 1 (a) of the Amended Defence be determined as a preliminary issue. At the trial of the preliminary issue, Mr Pachai for the First Respondent submitted that:

(i) Mr Cox's personal property, including all rights of action, vests in the Respondents as executors upon his death.

(ii) Only the executors can institute an action in relation to Mr Cox's personal property before the Will is proved.

(iii) Even so, they cannot obtain a judgment before probate, not because their title depends on probate, but because production of the probate is the only way they are allowed to prove their title.

(iv) In this case, competing probate applications have been filed with the Court in respect of which a further and separate application will be made by the First Respondent. In the meantime, and for present purposes the Court has no jurisdiction to entertain the Appellant's claims in this action as a beneficiary of Mr Cox's estate since his property has vested in the hands of the Respondents for the purposes of executing his wishes. It is for the Respondents to make decisions concerning the distribution of the estate assets and not for the Court.

11. Mr Kessaram for the Appellant submitted that:

    (i) It is irrelevant to the question of the Appellant's standing that no grant of probate has been made in respect of the Mr Cox's estate.

    (ii) The Appellant's standing to bring this action is not dependent on him being able to show that at the time of the trial the Appellant has a proprietary interest in the Chattels which are the subject of this action.

    (iii) It is sufficient to satisfy the Court on the issue of standing that the Appellant (i) has an "interest" in the estate as that term is understood by law by reason of his entitlement under the Mr Cox's Will to the Chattels; and (ii) that the claim is brought on behalf of the estate.

    (iv) This action is brought on behalf of the estate. It is a derivative action. A derivative action may be brought by a beneficiary of an estate on behalf of the estate representatives to recover damages of money or property to which the estate is entitled. Such an action is permitted to be brought because there are special circumstances by reason of which the action cannot or will not be brought by the person entitled to bring it, i.e., in this case the executors.

    (v) The Appellant's action is for a declaration that the Chattels belong to the estate. To succeed he needs to satisfy the Court that the Chattels belonged to Mr Cox on the date of his death. If the Appellant succeeds in this action, the Chattels would not be delivered into the beneficial ownership of the Appellant. That would only happen after the Chattels (having been returned to the estate) are vested by the executors in the Appellant by the execution of an assent or vesting deed (or by simple delivery) transferring title to the Appellant.

12. In reply, Mr Pachai submitted that the Appellant's Statement of Claim does not plead that he brings this action in a representative capacity on behalf of the estate. He submitted that on a proper reading of the Statement of Claim this was a personal action by the Appellant to enforce his personal proprietary rights and interests. Furthermore, Mr Pachai submitted that a beneficiary can only bring a derivative action in special or exceptional circumstances and in this case, there was an absence of any such circumstances. In response, as noted by the Judge at paragraph 25 of the Judgment, Mr Kessaram submitted that the Writ can simply be amended to comply with the requirement of RSC O. 6, r. 3 requiring that where the plaintiff sues in a representative capacity the writ must be endorsed with the statement of the capacity in which he sues.

The Judgment

13. The Judge held that on a fair reading of the Statement of Claim the claim pursued by the Appellant was in the nature of a personal proprietary claim for his personal benefit and not a derivative claim for the benefit of the estate. In this respect the Judge relied upon the fact that the wording of the Writ does not state that the Appellant is taking these proceedings in his representative capacity on behalf of the estate. The Judge also relied upon the fact that in the Writ the Appellant is asking for the Court to declare that he is the owner of the Chattels and is asking for the Chattels to be delivered to him and the "*held by and for*" him. The Judge held that plainly this cannot be considered representative claim on behalf of the estate.

14. The Judge further held that as the estate has yet to be administered, the Appellant has no proprietary interest in the Chattels and until Mr Cox's estate has been administered, the only chose in action the Appellant has is the right to bring an action for the estate to be duly administered. Therefore, the Judge held that the Court has no jurisdiction to hear this action commenced by the Appellant.

15. Finally, the Judge held that even if the Court accepted that this is a derivative action pursued by the Appellant (contrary to the Court's finding) there were no special and/or exceptional circumstances in this case which would entitle the Appellant to pursue a derivative action. Accordingly, the Judge accepted Mr Pachai's submission that even if the Appellant was allowed to amend the Writ to include the wording that confirms the action is being taken in his representative capacity on behalf of the estate, this would not cure the issue of his standing to pursue a derivative action on behalf of the estate.

The Grounds of Appeal

16. The Appellant pursues this appeal on two principal grounds:

    (i) First, in finding that the Appellant's action was a personal proprietary claim the Judge failed to consider the meaning and intent of the words "*pending the administration of the deceased's estate*" pleaded in the first and second prayers for the relief in the Statement of Claim. The Appellant contends that the said words qualified the Appellant's claim for relief and were intended to (and did) make it clear that the claims were subject to the Chattels being required for payment of the debts and other testamentary expenses of the Mr Cox's estate and were not claims of an existing proprietary interest. Furthermore, the Judge failed to address the submission that the fact that all three executors were added as defendants in their capacity as executors was a clear indicator that this was a derivative action brought on behalf of the estate of Mr Cox. In addition, the Judge failed to take into consideration the Appellant's express denial in his written submissions of an existing proprietary interest in the Chattels; or if the Judge felt that the framing of the Appellant's claims left the nature of the claim in doubt, the Judge failed to afford an opportunity for amendment of the claims.

(ii) Second, the Judge erred in finding that there were no special circumstances justifying the bringing of a derivative action; and failed to explain why the fact that the First Respondent, one of the three joint executors, who was claiming the Chattels to be her property, was not a special circumstance.

Discussion

17. In support of his submission that the claim pursued in the Writ was a personal proprietary claim and not the derivative claim Mr Pachai relied upon RSC O.6 r.3 which requires that where the plaintiff sues in a representative capacity the writ must be endorsed with a statement of the capacity in which he sues. Mr Pachai correctly points out that the Writ issued on behalf of the Appellant in this action does not contain a statement that the Appellant is suing "*on behalf of the estate of William Milner Cox deceased.*" He argues that if the Appellant was pursuing a derivative claim the Writ would and should have been endorsed with such a statement, relying upon *Roberts v Gill & Co* [2009] 1 WLR 531at 531B.

18. In response Mr Kessaram submits that this omission can be rectified by an appropriate amendment to the Writ and such an amendment would not cause any prejudice to the First Respondent. Mr Kessaram further submits that in any event O.6 r.3 does not apply to the derivative claim sought to be pursued in this case. In support of this submission, he relied upon the provision relating to representative proceedings under RSC O.15 r.12 which provides that where numerous persons have the same interest in any proceedings, the proceedings may be begun, and continued, by or against any one or more of them as representing all or as representing all except one or more of them.

19. Mr Kessaram also relied upon a passage in the judgment of Vinelot J. in *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] 1 Ch. 257 at 304F: "*But although a derivative action is in form a representative action it differs from other representative actions in that if the action succeeds property or damages are recovered not by the plaintiff or the class he claims to represent but by the company - and only indirectly by the shareholders through the accretion of the company's assets*…"

20. Mr Kessaram submits that it is highly arguable that a derivative action does not come within the terms of O.15 r.12 dealing with representative actions due to lack of common interest and as a result does not come within the scope of O.6 r.3 dealing with the pleading requirement where the plaintiff sues in a "*representative capacity*".

21. I am unable to accept this submission. O.6 r.3 and O.15 r.12 are dealing with entirely separate subjects. O.6 r.3 is dealing with all cases where the plaintiff is suing in a representative capacity. It applies to any case where the plaintiff is suing other than solely in his personal capacity. O.15 r.12 is dealing with an entirely different subject, namely, the circumstances in which it is permissible to pursue a representative action or a "class-action"

(in American legal parlance). The fact that a derivative action does not come within the scope of O.15 r.12 for lack of common interest is, in my judgment, entirely irrelevant to the operation of O.6 r.3. Accordingly, it is necessary in this case for the Appellant to endorse the Writ with a statement that he is "*suing on behalf of the estate of William Milner Cox deceased.*"

22. However, it is also clear that any failure to endorse the Writ with such a statement does not render the Writ a nullity. Any such failure is an irregularity within the meaning of RSC O.2 r.1. This is made clear by Denning LJ (as he then was) in *Bowler v John Mowlem & Co Ltd* 3 All ER 556 at 558E:

> *"In the circumstances I am of the opinion that this writ was not a nullity from the date of its issue, because the endorsement is completely clear of any suggestion of representative capacity… A misdescription in the title is never fatal; it can be always cured by amendment in the same way as a misnomer. The thing which cannot be cured is the bringing of an action in a representative capacity when the capacity does not exist."*

23. The Judge held, accepting the submission of Mr Pachai, that the claim made in the Writ on its proper construction is a personal proprietary claim against the First Respondent in respect of the Chattels. In addition to the absence of any statement in the Writ that the Appellant was pursuing this claim on behalf of the estate the judge relied upon (i) the fact that the First Respondent was named in her *personal capacity* and as an executor of the estate; and (ii) in the prayer for relief the Appellant is asking the Court to declare that he is the owner of the Chattels and is asking for the Chattels to be delivered to him and be "*held by and for*" him pending the administration of the estate.

24. The proper identification of the claim made in the Writ is primarily a matter of construction of the document. I accept, as this was a trial of a preliminary issue (as opposed to the determination of a strike-out application), the Court is entitled to look at other admissible evidence which provides the setting for the commencement of these proceedings. In identifying the nature of the claim made in the Writ the following provisions appear to have particular relevance:

    (i) All three executors and trustees of the Will of Mr Cox are added as defendants to the action. No claim is made against the executors in their capacity as executors. In my view if the claim was in the nature of a personal proprietary claim against the First Respondent in her personal capacity, it would serve no useful purpose to add the three executors as parties to these proceedings. Indeed, it would have been an abuse of process to do so. However, if the claim in the Writ is in the nature of a derivative claim on behalf of the estate, it is an essential requirement that the executors of the estate be added as parties (See *Roberts v Gill & Co* at [32] per Arden LJ). The reasons for joining the executors to these proceedings are (i) to bind the executors so that there cannot be any further claim based on the same cause of

action; and (ii) the executors can seek to enforce any judgment of the Court if it becomes necessary to do so. It is for these reasons that trustees are added as nominal defendants in derivative actions brought to enforce causes of action belonging to them. In my judgment the fact that all three executors were added as nominal defendants to this action was a powerful indicator that the claim sought to be pursued in the Writ was a derivative claim belonging to the estate of Mr Cox.

(ii) In paragraphs 8 and 9 of the Statement of Claim, dealing with the removal of the Tall-boy and the Mantel Clock by the First Respondent, the Appellant states that the First Respondent refuses "*to deliver it up to be held for the Plaintiff pending the administration of the Deceased's estate*." Again, if the claim made by the Appellant was in the nature of a personal proprietary claim, the Statement of Claim would not have provided that the Chattels be held by the executors "*pending the administration of the estate*." There would have been no reference to the "*administration of the estate*" at all. The qualification "*pending the administration of the estate*" is a clear indicator that the Chattels are in fact the property of the estate and thus the claim being pursued is a derivative claim.

(iii) The relief sought by the Appellant is (i) a declaration that the Appellant is entitled to the Tall-boy and the Mantel Clock "*pursuant to clause 5 (c) of the Deceased's Will pending the administration of the Deceased's Estate*" ; (ii) an order that the First Respondent "*deliver up possession*" of the Tall-boy and the Mantle Clock to the Appellant at Mayflower forthwith "*to be held by the [Appellant] pending the administration of the Deceased's Estate*." If the claim being pursued by the Appellant was a personal proprietary claim the Appellant would simply have sought (i) a declaration that he is entitled to the ownership of the Chattels; and (ii) an order that the Chattels be delivered to him forthwith. However, both the declaration and the order for delivery up are made subject to and conditional upon "*pending the administration of the Deceased's Estate.*" That clearly relates, not to ownership, but to interim possession by the Appellant. I accept Mr Kessaram's submission that the relief sought in substance seeks confirmation order that (i) the Chattels are part of the estate of Mr Cox and not the personal property of the First Respondent; and (ii) under clause 5 (c) of the Will the Appellant would be entitled to them upon completion of the estate.

25. Accordingly, I am satisfied that the Writ in substance does plead a derivative claim on behalf of the estate. The pleaded case is wholly consistent with the Appellant pursuing a derivative claim on behalf of the estate and, inconsistent with the Appellant seeking to pursue a personal proprietary claim against the First Respondent.

26. This conclusion is consistent with the pre-action correspondence and the written submissions filed on behalf of the Appellant in the Court below. In his letter to the First Respondent's attorneys dated 20 March 2023, the Appellant advised that:

"*For immediate purposes, this letter is to put your client on notice that I intend to commence proceedings in the Supreme Court of Bermuda for the return of the Tall-boy to Mayflower (which I undertake to keep there pending the administration of the Estate).*"

27. In a letter dated 28 March 2023, the Appellant further advised the First Respondent's attorneys that:

"*… I intend to name the three executors as Defendants to the proceedings so that they are bound by any order the Court may make in the administration of the estate, notwithstanding that I fully expect that the three executors will adopt a neutral and passive role in the precedings, save to provide such information and discovery (if any) as they may have in respect of the issues in the precedings*."

28. The written submissions filed on behalf of the Appellant with the Court below dated 22 January 2024 state at paragraph 9:

"This action is brought on behalf of the Estate. It is a derivative action… Such an action is permitted to be brought because there are special circumstances by reason of which the action cannot or will not be brought by the person entitled to bring it, i.e., in this case, the Executors."

29. There is a dispute between the parties whether the Appellant is in any event entitled to pursue a derivative action. It is recognised that ordinarily in relation to claims concerning the estate of a deceased only the executors of the estate are the proper plaintiffs (See *section 22(1) of the Administration of Estates Act 1974*; *para 1142, vol. 102 of Halsbury's Laws of England*). However, it is well established that a beneficiary of an estate may be able to pursue a derivative action on behalf of the estate where special circumstances exist (similar to the position of a shareholder in a company or a beneficiary under a trust). Thus, in *Lewin on Trusts* at para 40.05 the editors state:

"However, as an alternative to proceedings brought in the name trustees, a beneficiary may, sometimes, bring an action in its name on behalf of the trust against the third party. The fact that the action is brought in the name of the beneficiary rather than the name of the trustees does not alter its character. The action is a derivative action in which the beneficiary stands in the place of the trustees and sues in right of the trust and does not enforce duties owed to him rather than to the trustees; a beneficiary can be in no better position than the trustees carrying out their duties in a proper manner. ***A beneficiary can bring a derivative action only in special circumstances, for example circumstances which tend to disable the trustees from pursuing (as where their acts and conduct with reference to the trust fund are impeached), or circumstances rendering it difficult or inconvenient for the trustees to sue, as where there is a conflict between the interest and duty***." (emphasis added)

30. In *Roberts v Gill & Co* Arden LJ also dealt with the requirement of special circumstances, in the factual context of a derivative claim by a beneficiary under a will, and stated at [40] and [42]:

"40. ..[The authorities] show that the courts have required there to be special circumstances where a beneficiary seeks to bring a derivative claim. In my judgment, it is in general no longer necessary to cite these authorities, which are merely an application of the general principle. That general principle was summed up by Lord Templeman in Hayim v Citibank NA [1987] 1 AC 730 at 748, in these terms, namely, as

> *"Special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate"*

42. .. in very many cases, the fact that the derivative claim will enable an asset that could not otherwise be realised to be realised will be a powerful consideration, subject, however, to bring into account the risk to the estate involved in bringing the action."

31. Ordinarily it would be for the plaintiff to show to the Court that special circumstances exist in a particular case. It is the beneficiary who must establish special circumstances which justify the bringing of the claim (See *Roberts v Gill & Co* at [55] per Pill LJ and at [52] per Arden LJ). Whilst I accept that it might be helpful to plead the special circumstances relied upon, I do not consider that there is a strict requirement that the grounds giving rise to special circumstances be formally pleaded.

32. Here the primary facts relied upon for giving rise to special circumstances are set out in the Statement of Claim. Indeed, they are positively asserted by the First Respondent in the Amended Defence. The Appellant asserts that the First Respondent has misappropriated the property of the estate (the Chattels) and claims that they are her property (paragraph 8 and 9 of the Statement of Claim). These facts are confirmed by the First Respondent in the Amended Defence (paragraphs 5 and 7). Accordingly, there is a direct conflict between the First Respondent's personal interest and the interest of the estate of Mr Cox. The Court is entitled to assume that the First Respondent could not be expected to bring an action against herself to recover the property of the estate.

33. Furthermore, I accept Mr Kessaram's submission that even if the executors were *ad idem* to bring such a claim, it is highly unlikely that the Court would have approved of them doing so. It is reasonable to assume that before doing so the executors would apply to the Court (in a *Beddoe* application) under RSC O.85 r.2 for the Court's approval. On such an application the Court would have directed that the issue of beneficial ownership of the property in question (as between the Appellant and the First Respondent) be left to the rival claimants (See *Ingham et al v Wardman et al* [2022] CA (Bda) 7 Civ; and *Alsop Wilkinson (a firm) v Neary and others* [1995] 1 All ER 431.

34. Mr Pachai urges that in considering whether special circumstances exist the Court should keep in mind that at least in relation to the Tall-boy the executors had agreed for this item to be retained by the First Respondent. In my view the legal effect of any such agreement by the executors can only properly be explored at the trial of this action. The Appellant maintains that he is not a party to any such agreement. Furthermore, Mr Pachai accepts that there is no such agreement in relation to the Mantel Clock.

35. Having regard to the uncontested facts outlined above, I accept Mr Kessaram's submission that they demonstrate a classic textbook example of special circumstances. Accordingly, on proper analysis of the facts I find that special circumstances have been established by the Appellant entitling him to pursue the derivative action. Cases such as *Roberts v Gill & Co* clearly establish that in these circumstances the Court has jurisdiction to determine the claim.

36. The only remaining issue to consider is whether the Court should give the Appellant leave to amend the Writ so as to comply with O.6 r.3 and other amendments in the body of the Statement of Claim aimed at making clear that the claim pursued by the Appellant is a derivative claim on behalf of the estate. As a general principle the Court will always give a party leave to amend its pleadings and this is particularly so where the amendments merely seek to clarify the pleaded case (as opposed to adding a new cause of action) and there is no question of depriving the defendant of an accrued limitation defence. Thus, the commentary in the Supreme Court Practice 1999 states at 20/8/6:

> *"It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings" (see, per Jenkins LJ in G.L. Baker Ltd v Medway Building & Supplies Ltd [1958] 1 WLR 1216 at 1231)."*

37. It appears that the Judge below did not give leave to the Appellant to amend the Writ to clarify that the claim pursued was indeed a derivative claim primarily on the ground that even if the Writ was amended to confirm that the action was in a representative capacity that would not cure the issue of standing. This was on the basis that, as the Judge held, there were not special circumstances in this case which would entitle the Appellant to pursue a derivative claim as a matter of law. As noted earlier, I consider the Judge was in error in finding that there were no such special circumstances. I also consider that this is an appropriate case where the Appellant should be given leave to amend the Writ.

38. For those reasons, subject to my Lords, Kawaley and Hickinbottom JJA, I would allow this appeal and set aside the order of the Supreme Court dismissing the Appellant's claim. I confirm that special circumstances exist entitling the Appellant to pursue a derivative action on behalf of the estate. Finally, I give leave to the Appellant to amend the Writ so as to comply with O.6 r. 3 and other amendments in the body of the Statement of Claim for the purposes of making it clear that the claim pursued by the Appellant is a derivative claim on

behalf of the estate. Specifically, I give leave to amend the Writ in terms set out in the draft Amended Writ provided to the Court by Mr Kessaram on 17 March 2025. The matter is remitted to the Supreme Court for trial of the remaining issues.

39. Unless either party applies by letter to the Registrar within 14 days of the date of delivery of this Judgment to be heard on the papers in relation to costs, the Appellant shall be awarded his costs of and occasioned by the trial of the preliminary issue in the Court below on the standard basis to be taxed if not agreed; and his costs of this appeal on the standard basis to be taxed if not agreed.

HICKINBOTTOM JA:

40. I agree.

KAWALEY JA:

41. I also agree.