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Bringing Proceedings Prior to a Grant of Representation - CPR 3.10: No Cure for the Incurable

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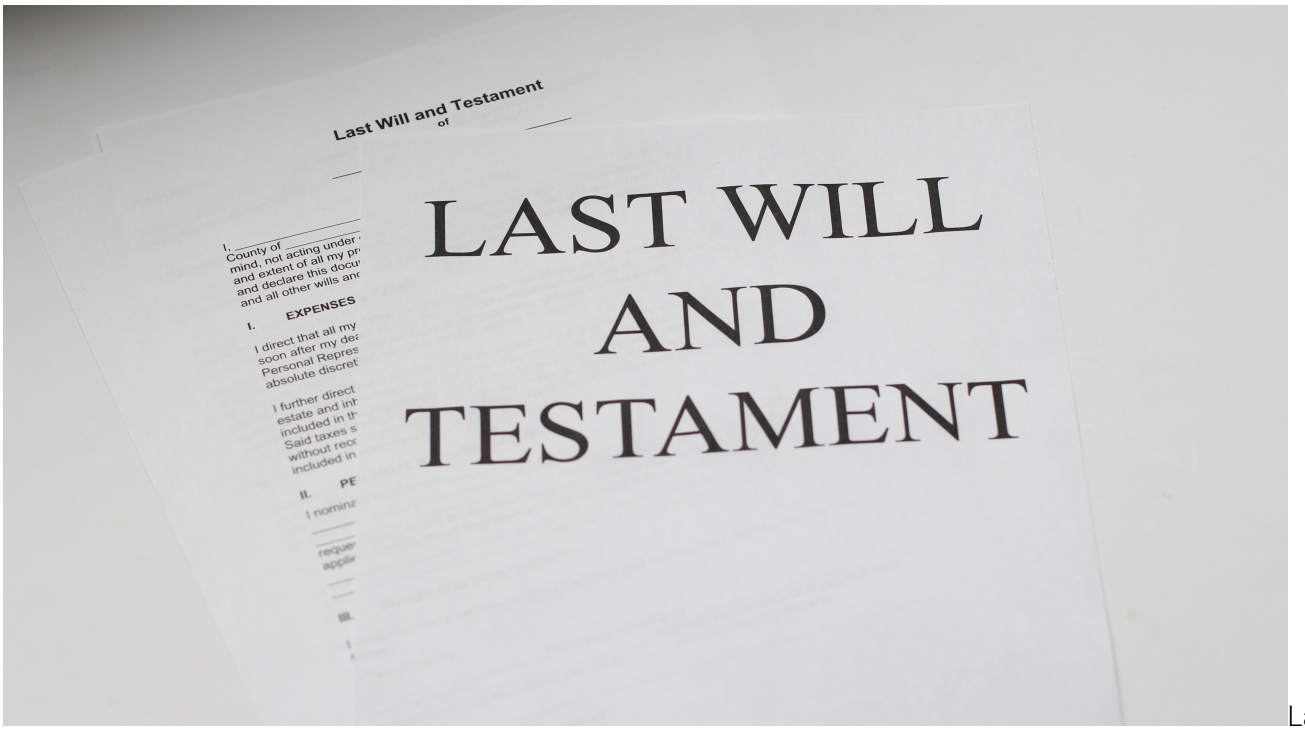
Clinical Negligence , Personal Injury



Late last year, the Court of Appeal gave judgment in *Jennison v Jennison & Anor* [2022] EWCA Civ 1682 on the following issues:

1. Whether an executor appointed under a foreign will had title to bring a claim in England and Wales prior to a grant of probate or resealing of a foreign grant in this jurisdiction; and,
2. If not, and the proceedings were thus a nullity, whether CPR 3.10 could cure the defect.

This article focuses primarily on the second issue which is of particular significance to claims brought under the Law Reform (Miscellaneous Provisions) Act 1934 and/or Fatal Accidents Act 1976. It occurs all too frequently in such claims that proceedings are issued without it having been properly established (often due to the pressure of limitation) that the person bringing the claim on behalf of the deceased's estate and/or their dependants actually has title to do so.

The background

In *Jennison*, the deceased was a resident of, and died in, New South Wales ('NSW'), Australia. He appointed his wife as his executrix under his NSW will. His estate comprised property in NSW and England, including land near Sheffield. His wife ('the claimant') brought a claim in Manchester County Court against the deceased's brother and his brother's wife ('the defendants') for breach of trust in respect of various transactions in relation to that land.

At the time of issue, the claimant had obtained a grant of probate in NSW but she had neither obtained a grant of probate in this jurisdiction nor had the NSW grant been resealed here (the latter only occurring some months after issue). In light of which, the defendants sought to strike out the proceedings as a nullity. That application was dismissed by the trial judge. That decision was upheld on first appeal. The defendant appealed further.

The decision

First issue: title

As to the first issue, Newey LJ (with whom Coulson LJ and King LJ agreed) ruled that domestic law applied and, therefore, the claimant, as named executrix, derived her title from the will (unlike an administrator of an intestate's estate who lacks title until granted letters of administration). Accordingly, the claimant acquired title as soon as her husband died such that she had title to bring the claim when she did. The appeal failed on that basis.

Second issue: CPR 3.10

Newey LJ nevertheless went onto to consider the second issue, namely, if the claimant had no title at the point of issue and thus the proceedings were a nullity, whether CPR 3.10 could cure the defect.

By way of reminder, CPR 3.10 reads:

"Where there has been an error of procedure such as a failure to comply with a rule or practice direction—

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
(b) the court may make an order to remedy the error."

Having reviewed the previous conflicting authorities on this point, Newey LJ ruled:

"59…CPR 3.10 is not applicable where the proceedings that have purportedly been brought are to be regarded as a nullity. CPR 3.10 allows existing proceedings to be regularised, not the creation of valid proceedings. It is not, to use words of Stewart J, "a cure-all for every defect however fundamental, whether or not it is one of law, and whether or not the authorities have previously determined that there is a nullity"…

60. Turning to the present case, the bringing of a claim on behalf of an estate by a person who, at the time, lacks standing to represent it is not a mere "error of procedure", but renders the proceedings a nullity… They are, in the circumstances, "a dead thing into which no life could be infused" (to quote Hodson LJ in Burns v Campbell) and "born dead and incapable of being revived" (to quote Rimer LJ in Millburn-Snell v Evans)…"

The practical import

To the extent that there was previously any doubt as to the applicability of CPR 3.10 where a claimant has brought proceedings purportedly on behalf of a deceased's estate and/or their dependants without title to do so, *Jennison* has dispelled it. Proceedings brought in those circumstances are a nullity for which CPR 3.10 provides no cure, regardless of the fact that the claimant may subsequently acquire the requisite title.

It is a stark warning to those handling representative claims that they must ensure that the claimant has requisite title at the point of issue. Failing which, the claim will stand to be struck out as a nullity (save possibly as discussed below). Adverse costs consequences will likely follow, not only against the claimant but also potentially against their representatives on a wasted cost basis (see, for example, *Rafferty v Royal Wolverhampton NHS Trust*, Wolverhampton CC, 31.05.22).

All is not necessarily lost for a claimant who only acquires title after issue. Their recourse will depend on limitation. If within limitation, they can re-issue a properly constituted claim as discussed in *Millburn-Snell* [2011] EWCA Civ 577. If outside limitation, they can, it seems, apply under CPR 17.4(4) for permission to alter the capacity in which the claim is brought (assuming there has been such a change) to plead the newly-acquired title (which issue did not arise for consideration in *Jennison*).

The use of CPR 17.4(4) in that way was endorsed, albeit obiter, in *Haq v Singh* [2001] EWCA Civ 957, *Roberts v Gill & Co* [2010] UKSC 22 and *Jogie v Sealy* [2022] UKPC 32. However, in *Millburn-Snell*, Rimer LJ

doubted, also obiter, that that was correct. He questioned how a claim which *"is born dead and is a nullity can be given life by an amendment"*. Whether CPR 17.4(4) can truly do what CPR 3.10 could not is, therefore, ripe for further consideration at appellate level.

Watch this space!

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