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IN THE GRAND COURT OF THE CAYMAN ISLANDS HOLDEN AT GEORGE TOWN, GRAND CAYMAN

PROBATE AND ADMINISTRATION NO: 66/96

IN THE ESTATE OF ERIC LOWDEN, DECEASED

APPEARANCE: Andrew J.Cosedge for Executrix

10 December, 1996

BEFORE MURPHY J

REASONS FOR DECISION

This is an application for a grant of probate which, pursuant to my direction, was argued by counsel in chambers.

When local counsel appeared before me on a previous occasion, I indicated that I had some concerns about the state of the material filed, and also some queries as to my jurisdiction.

Since then, much fuller affidavit material has been filed, and this has greatly clarified the factual picture. In addition, I have had the benefit of very useful written

submissions, and the jurisdictional point has now been canvassed in oral submissions.

Briefly stated, the facts are as follows. Eric Lowden (" the deceased") died on 15 February 1996 leaving a Will dated 11 December, 1995. Probate is now sought by one of the two executrices named therein, Sally Van Torren, the other executrix, the deceased's widow, having renounced. According to the affidavit evidence filed, the deceased's estate consists solely of 997 shares in Wakelow Limited, a company incorporated under the laws of the Cayman Islands. This company presumably is an estate planning vehicle.

For purposes of this application, and on the basis of the evidence before me, I accept that these shares are the sole assets of the estate, and that they are situated in the Cayman Islands. It is also clear from the evidence that the deceased was not domiciled in the Cayman Islands. His domicile was either England or France (or possibly even Scotland), but this is not clear. I expressly decline to decide the issue of domicile, but merely accept for purposes of this application that domicile was somewhere other than this jurisdiction.

The reason I asked for more extensive submissions as to jurisdiction is that I understand that in quite similar factual scenarios, this Court has in the past declined to grant applications for probate. In this regard, I do not have the benefit of any reported decisions, nor even any unreported written reasons. I confess that I was somewhat startled at the suggestion that this Court has previously declined

jurisdiction in such cases. I have acceded to counsel's request that I furnish brief reasons on the basis of the facts in this case.

I have examined the material filed on this application and I am satisfied that it meets the requirements for a grant. Two of the most basic requirements are that the testamentary document sought to be admitted to probate must be formally valid; and, in the case of movables, the document must have been executed in accordance with the formalities required by the law of the domicile of the deceased at the time of his death. On the basis of the supplementary affidavits filed, I accept that these requirements are met according to the law of England, the law of France, and the law of Scotland.

As indicated, I expressly decline to decide the issue of the testator's domicile. I regard this as unnecessary and, arguably, premature on an application for a grant of probate. While rule 20 of the Probate and Administration Rules requires the oath in support of the application for probate to state "to the full extent of the applicant's knowledge and belief...(b) the deceased's domicil at death", I note that it is the practice of the English courts in appropriate and exceptional cases to dispense with the requirement to state domicile and to omit any definite statement of domicile in the grant itself. I note that the executrix, in her affidavit , is of opinion that the domicile was England, while other evidence suggests much more uncertainty on this issue.

The law of the domicile of the deceased will be relevant in determining the substantial or material effect of the beneficial dispositions contained in his Will , at

least insofar as movables (the shares in Wakelow Limited) are concerned. If the deceased died domiciled elsewhere than in England that might (but not necessarily will) , it is submitted, raise issues as to the extent to which the provisions of the Will purport to, and legitimately can, override any entrenched succession rights enjoyed under Scottish or French law (respectively legitim and la reserve). However, it is argued that such considerations do not arise on this application for a grant of probate. Certainly upon an application for probate it is not the practice of the English court to inquire into any matters other than those relating to formal validity, and the practice of this Court is arguably the same (if for no other reason than by virtue of section 42 of the Succession Law which imports the English practice, in some circumstances, where there are gaps).

The applicant is concerned, if possible, to avoid having the issue of domicile determined prematurely when it could become a matter of great moment in subsequent proceedings. I agree that it is not necessary for me to decide domicile at this stage. As indicated, I am satisfied that the testamentary document is valid under the law applicable in England, France and Scotland, and that is sufficient for the purposes of the present application.

As to jurisdiction, I accept that, as a matter of practice, once a Will has been recognised as formally valid and the estate comprises assets within the jurisdiction requiring to be administered, " a grant will ordinarily be made as of course" : Dicey & Morris The Conflict of Laws (12th ed) p. 1004; Re Coode (1867) L.R. 1 P&D 449; Re Wayland [1951] 2 All ER 1041; In re Bonnefoi [1912] P. 233; see also Theobald on Wills (15th ed) 1993, ch.12.

In the Privy Council case of Blackwood v The Queen [1882] 8 App. Cas. 82, Sir Arthur Hobhouse giving the judgment of their Lordships (at page 93) said "For the purpose of succession and enjoyment the law of the domicile governs the foreign personal assets. For the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors, they are governed not by the law of the owner's domicile, but by the law of their own locality".

I accept that the law of the Cayman Islands in this regard is the same as the law of England. That is, if a deceased person left property in the Cayman Islands, then irrespective of his domicile this Court has jurisdiction to determine whether the Will is a valid testamentary disposition, what is the construction and effect of the Will, who are the persons entitled to succeed to the property, and generally to determine any question with regard to the succession. (The applicable law may of course be that of another country). In a case such as the one before me, I accept that insofar as there is any discretion, it relates to the person who is to receive the grant rather than as to whether a grant is to be made at all. I am aware of no reported case involving circumstances such as these, in which the Will was not admitted to probate by means of principal (as to opposed to ancillary) grant in the jurisdiction where the movables were situated.

The first category of person to whom a grant may issue is any "person entrusted with the administration of the estate by the court having jurisdiction at the place of domicil"(Probate and Administration Rule 37 (a). The reference to "person

entrusted" requires that the person in question should have received by judicial order authority to collect and administer the estate. Since no grant or order in respect of the deceased's estate has yet been made by any court in any jurisdiction, Rule 37 (a) is inapplicable.

Rule 37 (b) then permits a grant to issue to "the person entitled to a grant by the law of the place of domicil". Rule 37 (b) presents no problem if the deceased died domiciled in either England or Scotland since in either case a grant would issue to the applicant as one of the executrices named in the Will. There would be a problem with Rule 37 (b) if the deceased died domiciled in France, for the French system does not involve the making of anything akin to a grant to anyone. In any case, I have indicated that I decline to make a ruling as to the deceased's domicile.

Rule 37 (c) then provides a safety net by allowing that where no such person as mentioned in (a) or (b) can be ascertained then a grant may be made to such person as the judge may determine. I accept counsel's submission that in the present circumstances the applicant, the remaining named executrix, is an appropriate person. I also accept that it is open to me, in any case, pursuant to section 42 of the Succession Law, to import English Rule 30 (3) (a) (i) N-C.P.R. That provision, absent from the Probate and Administration Rules, provides that probate of any Will which is admissible to proof may be granted, if the Will is in the English language, to the executor named therein.

As indicated, there is nothing in the authorities to suggest that it would be improper for this Court to make a principal grant where all the testator's movable property is

situated in this jurisdiction. While in theory I may have some discretion in this regard, it seems to me inconceivable that a grant would not be made in such circumstances.

This position is implicitly accepted in the modern English texts on succession and conflict of laws. Indeed, the focus seems to be instead upon whether a court has discretion to make the grant where there is no property in the jurisdiction of the court to which the application is made. It has been held that if there is no property of the deceased in England and he died domiciled abroad, the English court will be very reluctant to make a grant: Aldrich v Att.-Gen. [1968] P. 281, 295.

Even if there is still an element of discretion here, I would exercise it in favour of the applicant and admit the Will to probate . The Will cannot be probated in France because that system has nothing akin to our procedure. There may well be a real difficulty in England as there are no assets there and the issue of domicile is unclear. Indeed, it is conceivable that a grant of probate may not be available to the applicant anywhere other than in the Cayman Islands.

Application granted.

Dated this 11th day of December, 1996

J.D. Murphy

Judge of the Grand Court