



Guidance on representatives appointed under CPR 19.12: Answers... and more questions

Article by Benedict Evans, 29th August 2024

1. The role of a representative appointed to represent an estate for the purpose of litigation only was first created by section 44 of the Court of Chancery Act 1852 and is now governed by CPR 19.12. Despite its long history, and in contrast to personal representatives under formal grants, there is very little guidance on the role, powers, and duties of a representative appointed under CPR 19.12 (“**a 19.12 representative**”).
2. That is why Mr Justice Smith’s judgment in *Bourlakova v Bourlakov* [2024] EWHC 1937 (Ch), dated 29 July 2024, is essential reading for private client lawyers considering making use of the CPR 19.12 procedure.

The facts

3. The judgment is the latest instalment in long running litigation concerning the estate of Russian businessman Oleg Bourlakov. The English proceedings were commenced in July 2020 by Mr Bourlakov’s wife and daughter, who alleged that Mr Bourlakov had orchestrated a dishonest scheme designed to maximise his share of “family” assets at the expense of his wife and daughter. In addition to Mr Bourlakov himself, Mr Bourlakov’s sister and brother-in-law were also among the defendants to the claim.
4. Mr Bourlakov died in June 2021 and the litigation has proliferated, with proceedings in Monaco and Latvia concerning the validity of a 2019 will and further proceedings in Russia. There is no personal representative of Mr Bourlakov’s estate in England and Wales, Mr Bourlakov apparently not possessing any assets here.
5. In October 2023, Mr Justice Smith appointed Mr Jacob (a partner at Forsters LLP and a trusts and estates specialist) as a representative for Mr Bourlakov’s estate under CPR 19.12. At a consequential hearing, Mr Justice Smith made further orders including that Mr Jacob was entitled to copies of any material to which Mr

Bourlakov was or would have been entitled and that Mr Jacob could apply for further directions from the court in the future.

6. In February 2024, Mr Jacob sought further guidance from the court on the nature of his duties including any duties of consultation with persons potentially interested in the estate, his ability to seek further directions from the court, his rights to information, his ability to make counterclaims or additional claims, his ability to settle the proceedings, and his liability regarding costs of the proceedings.

The judgment

7. The judgment provides useful guidance on the appointment of a 19.12 representative, including that:
 - a. The words “*no personal representative*” in 19.12(1) mean no personal representative *in England and Wales*.
 - b. The appointment of a 19.12 representative can be appropriate in complex, high value and highly contested proceedings and will often be more appropriate than the issue of a grant of representation under non-contentious probate rules.
 - c. Disputes as to the identity of those entitled to administer or benefit from the estate and a multiplicity of claims on the estate will favour the appointment of an independent and experienced professional.
8. Mr Justice Smith emphasised that the role of Mr Jacob was not to administer the estate generally but to represent it in the proceedings concerned. In doing so, Mr Jacob would need to familiarise himself with the claims and to weigh impartially the interests of all persons potentially interested in the estate (whether as creditors or beneficiaries) and consider their interests collectively not individually without adjudicating between claims to or on the estate.
9. Mr Jacob had no wider duty to recover assets for the estate, nor was there a duty to act as the deceased would have acted. Mr Jacob had no duty to consult any particular beneficiaries or creditors of the estate, any personal representatives of the estate in other jurisdictions, or any entities holding assets alleged to belong to the estate. However, the duty to inform himself about the claims might require him to contact such persons or entities.
10. Mr Jacob had the ability to apply to court for further directions in advance of taking any step or course of action and Mr Justice Smith declined to circumscribe the circumstances in which such applications should be made.

11. Mr Jacob's power to demand documents to which Mr Bourlakov was or would have been entitled extended to documents held outside the jurisdiction and entitled Mr Jacob to take "*such steps as may be available to him*" to procure such documents and discharge any reasonable costs requested by the provider of the information. Mr Justice Smith did not comment on Mr Jacob's examples of possible steps, such as applying for his appointment to be recognised in foreign jurisdictions, seeking a letter of request under CPR 34.13, or seeking further orders of the English court.
12. Despite the parties appearing to agree that Mr Jacob could not do so, Mr Justice Smith held that Mr Jacob could make counterclaims and other additional claims pursuant to CPR Part 20.
13. Mr Jacob had the power to settle the proceedings and Mr Justice Smith did not impose any requirement that such a settlement be approved by the court, although he noted that Mr Jacob had indicated that he would wish to seek the court's approval and agreed that this would be an appropriate course.
14. Mr Jacob would not be a proper respondent to a costs order because he is not a party, however he would be amenable to the powers under s51 of the Senior Courts Act 1981 and CPR 46.2 to make costs orders against non-parties.
15. Mr Justice Smith was satisfied that the court had the power to make an order prospectively exonerating Mr Jacob from liability as 19.12 representative except in respect of fraud, dishonesty or bad faith and that it was appropriate to do so in this case.

Discussion

16. Like many judgments that provide guidance in underdeveloped areas of law, this judgment both answers and raises questions. Chief among the questions raised is to what extent the courts will develop a body of principles that are generally (or perhaps universally) applicable to 19.12 representatives and to what extent the powers and duties of 19.12 representatives will be determined on a fact-specific, case-by-case basis.
17. One approach to CPR 19.12 is that, given the absence of guidance in s44 of the Court of Chancery Act 1852 or the CPR, it is essentially a "blank canvas" and in each case the court can construct the powers and duties of the 19.12 representative according to the circumstances. Another approach is that guidance can be extracted from the nature of the particular role of a 19.12 representative, eventually resulting in a body of principles applicable to all 19.12 representatives.

18. The judgment in *Bourlakova v Bourlakov* appears to adopt both approaches, giving some guidance that appears generally applicable and some that appears case specific. Aspects of the guidance which flow from the nature of the appointment or an analysis of what it means to “*represent the estate of the deceased*” appear to be generally applicable to 19.12 representatives. For example:

- a. The analysis of Mr Jacob’s general duties appears to have been an examination of what it means to “*represent the estate*” rather than a consideration of what duties would be appropriate in the particular case.
- b. The ability to bring counterclaims and additional claims under CPR Part 20 appears to have followed from the fact that once a representative is appointed, the claim continues “*in accordance with the provisions of the CPR*”, meaning that the whole of the CPR is open to a 19.12 representative. This is an analysis of the effect of CPR 19.12 itself rather than a customisation or tailoring of the process to the needs of the particular case.
- c. The ability to settle proceedings was held to be “*inherent in his appointment*” and “*part and parcel of the conduct of proceedings generally*”.
- d. The fact that Mr Jacob would not be a proper respondent to costs orders followed from the fact that a 19.12 representative is not personally a party to proceedings.

19. In other places, the guidance flows from the court’s power to control its own process and procedures. These aspects of the guidance appear to be stipulations the court has given in this particular case rather than necessary or inherent features of the 19.12 representative’s role. For example:

- a. Mr Jacob’s ability to demand documents was analysed as a matter of construction of Mr Justice Smith’s earlier order, rather than an inherent power of 19.12 representatives (although one might expect similar powers to be given to 19.12 representatives in most cases).
- b. When considering the ability to give further directions to Mr Jacob, Mr Justice Smith treated the court’s ability to do so as part of “*the Court’s general powers of case management*” and “*the inherent power to control its own processes and procedures*”. This suggests further directions to 19.12 representatives may be based on the circumstances of the case and not (or not just) the nature of their role.

- c. The issue of exoneration was regarded as “concerned with the exercise by the Court of its power to appoint” and that “Inherent in that power is the Court’s ability to determine the terms of that appointment”. In other words, the exoneration of Mr Jacob was a term of his appointment and not a necessary feature of his role.
20. The law is therefore likely to tread both paths with some duties and powers of 19.12 representatives being inherent in the nature of the role and others being attached to particular 19.12 representatives in accordance with the needs of the particular case. It is therefore important to give proper consideration to the scope of the order appointing a 19.12 representative and whether particular directions should be included (or later sought) to tailor the role to the case.
21. Some of the specific guidance given is also worth commenting on. Firstly, the guidance that 19.12 can be used in complex, high value and highly contested proceedings is an important addition to the guidance in *Berti v Steele Raymond (A Firm)* [2001] EWCA Civ 2079 where the focus was on “relatively small claims” where “the need for a formal grant may be disproportionate and cause unnecessary delay and expense”.
22. Secondly, the fact that an experienced, independent professional might be more appropriate than the person most likely to have the right to apply for a formal grant of representation is a useful counter-weight to the favouring of family members of the deceased in *Gattaz Properties Limited and another v Versant Developments and Homes Limited and nine others* [2021] EWHC 3657 (Comm) and *Berti v Steele Raymond (A Firm)* [2001] EWCA Civ 2079.
23. Thirdly, the ability of a 19.12 representative to bring counterclaims and other additional claims is perhaps the most controversial aspect of the judgment. It might have been partly motivated by the analogy with a litigation friend (which Mr Justice Smith found “helpful”) however it is not clear how far that analogy can be taken given the acceptance that CPR 19.12 cannot be used where the estate is the claimant and no proceedings have been issued at the time of the deceased’s death (whereas litigation friends can bring entirely new proceedings). Mr Justice Smith also considered that a 19.12 representative should have all the provisions of the CPR at their disposal and wanted to avoid unprincipled distinctions between asserting a right of ownership in a defence and seeking a declaration to that effect by way of counterclaim. Mr Justice Smith did not limit the extent of a 19.12 representative’s ability to bring such additional claims but he was clear that a 19.12 representative’s role was not to administer the estate generally and he rejected a duty to realise assets for the benefit of the estate. This raises the question of whether there is a limitation on the type of counterclaims or other additional claims that a 19.12 representative can properly bring, perhaps in terms of the connection between the additional claim and the extant proceedings.

24. Finally, the combination of exonerating Mr Jacob and not imposing a need for settlements to be approved by the court is interesting. Mr Justice Smith did not extend the litigation friend analogy to require court approval for settlements entered into by Mr Jacob, noting that there was no such requirement in the CPR. Mr Jacob was prospectively exonerated largely on the basis that absent an exoneration it would be practically impossible to find a professional willing to act as representative (Mr Jacob had already been “warned” by other parties of potential personal claims over his conduct of the proceedings). Neither of these is necessarily objectionable in themselves, however the combination of both creates a potentially dangerous lack of protection for the estate. In cases where the 19.12 representative is prospectively exonerated, it might be prudent to seek an order that any settlement must be approved by the court.
25. Mr Justice Smith’s judgment makes considerable progress in understanding the role of 19.12 representatives. The guidance given offers a clearer picture of what parties can expect when utilising this process, and which unanswered questions they should be considering to ensure that the process operates favourably.

Thomas Grant KC acted for the representative of the estate of the 1st Defendant.

Alan Gourgey KC acted for the 7th and 8th Defendants.

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