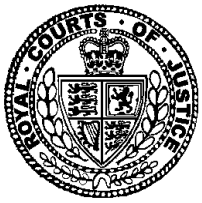

Claim No: PT-2018-000876

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Rolls Building
Royal Courts of Justice
Fetter Lane London EC4A 1NL

Date: 31st October 2019

Before:

Deputy Master Bartlett

- -

Between:

Douglas Steven Antonio

Applicant

And

Rodney James Naib

Respondent

- -

Ms. Emily Campbell (instructed by Druces LLP) for the Applicant

Mr. Alexander Learmonth (instructed by L E Law Solicitors) for the Respondent

Hearing date: 29th August 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A Para. 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Deputy Master Bartlett:

1. In this matter I have to determine an application by the Applicant by application notice dated 16th November 2018 for pre-action disclosure against the Respondent. The application relates to potential proceedings in respect of the estate of the late Professor Shafik Kasim Al-Naib, who died on 14th May 2012. The Applicant and the Respondent are his two children. Professor Al-Naib was a widower, his wife Alice Naib having died on 20th April 1999. On 8th January 2014 the Respondent obtained a grant of probate of a will apparently made by the deceased on 16th January 1999 and has since then been in the process of administering his estate.

2. The Applicant seeks disclosure under 36 heads set out in a schedule. The Respondent invites me to reject the application in its entirety as completely inappropriate in addition to disputing each individual category of documents sought. I had extensive witness statements from both parties with exhibits running to some 600 pages. I also received very helpful skeleton arguments and oral submissions from both counsel.

Background facts

3. Professor Al-Naib was a distinguished civil engineer. He was for many years until his retirement Professor of Civil Engineering and Head of Department at the University

of East London. He published a number of specialist works in this area. In addition to his academic work he had a strong interest in the history of the Docklands and East London area and published a significant number of books relating to that interest.

4. On 16th January 1999 both Professor Al-Naib and his wife apparently made home-made wills handwritten on printed forms. Each will appointed the testator's spouse and the Respondent as executors. Each then left that testator's half share of their matrimonial home at 45 Wilmer Way, London N14, to the Respondent subject to a right for the other spouse to remain living there for life. Each then similarly left the testator's half share of Cwm Farm, Llandeilo, Dyfed, to the Respondent subject to a right for the other spouse to keep the farm for life. Finally each will left the residue of the testator's estate to the other spouse absolutely.

5. Assuming for the present that both wills were valid there was no difficulty in Mrs. Naib's will taking effect in accordance with its terms provided that she and her husband held 45 Wilmer Way and Cwm Farm as tenants in common and not joint tenants. No grant of probate was ever taken out to her estate and the Respondent's position is that none is necessary. There was however a lacuna in Professor Al-Naib's will because it makes no provision for the residue of his estate if as happened his wife predeceased him. It is common ground that the effect is to create a partial intestacy and that the Applicant and Respondent are accordingly entitled to his residuary estate in equal shares.

6. According to estate accounts prepared by the Respondent Professor Al-Naib's estate consisted in substance of:

    (a) 45 Wilmer Way;

    (b) Cwm Farm;

    (c) 19 residential investment properties and 3 pieces of land;

    (d) 2 bank accounts at Barclays Bank and 4 accounts with the Nationwide Building Society;

    (e) Publishing rights stated to be worth only £300.

After deduction of certain loans and mortgages the net estate was valued at just under £2.5 million on which inheritance tax of just over £500,000 was payable. The

estate now available for distribution is somewhat larger because of income received from the residential properties and increases in their value since 2012.

7. Since shortly after the death of Professor Al-Naib the Respondent has persistently raised concerns on a number of issues. First, he has challenged the validity of the 1999 wills of both Professor and Mrs. Al-Naib. He has suggested that Professor Al-Naib made a further will thereafter. He has also put in doubt the validity of the wills themselves on grounds which I will set out in more detail later. Secondly, he has suggested that Professor Al-Naib's publishing and literary estate was far more extensive and valuable than appears from the estate accounts. Thirdly, he has made various more general complaints regarding the administration of the estate by the Respondent, in particular relating to bank accounts of Professor Al-Naib. Fourthly, he has raised issues regarding assets and property belonging to Mrs. Al-Naib.

8. The only litigation between these parties to date has been a claim brought by the Respondent for a determination that 45 Wilmer Way and Cwm Farm were held by Professor and Mrs. Al-Naib as tenants in common in equity in equal shares. The Applicant was then contending that they were held as beneficial joint tenants. Those proceedings were settled on terms which involved agreement that they were held as tenants in common in equal shares.

Legal principles

9. The court's power to grant pre-action disclosure is governed by Civil Procedure Rules Rule 31.16:

> "(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where–
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6 , would extend to the documents or classes of documents of which the applicant

seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

(4) An order under this rule must –

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents –

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may –

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection."

10. The leading authority on the rule is the judgment of Rix L.J. in Black & ors. v. Sumitomo Corpn. & ors. [2002] 1 W.L.R. 1562, from which the following points can usefully be extracted:

1. The requirement that the respondent must be likely to be a party to subsequent proceedings means that it must be likely that if proceedings are brought the respondent will be a party to them, not that it must be likely that proceedings will be brought (Para. 71).

2. "Likely" in this context means no more than "may well". Proof on the balance of probabilities is not required (Para. 72).

3. One cannot determine the question whether the documents sought would be within the respondent's duty of disclosure in any such proceedings without clarity as to what the issues in those proceedings are likely to be (Para. 76). "The court should be slow to allow a merely prospective litigant to conduct a review of the documents of another party, replacing focussed allegation by a roving inquisition" (Para. 92).

4. If the applicant satisfies the four jurisdictional requirements the court then has to exercise an overall discretion as to whether to grant the order. The issue as to the desirability of the disclosure for the specified purposes may well overlap with the issue of discretion but the court must consider those two issues separately (Paras. 81 – 83, 85).

5. The more focused the complaint and the more limited the disclosure sought the easier it is for the court to exercise its discretion in favour of the applicant, even where the complaint may seem speculative. The court is in such a case entitled to take the view that the interests of justice and proportionality require transparency. However the more diffuse the allegations and the wider the disclosure sought the more sceptical the court is entitled to be about the merit of the exercise. (Para. 95).

11. I would add the following points from the other authorities to which I have been referred:

1. The purpose of the rule is not just for the assistance of a prospective claimant to improve his pleading but also to enable him to decide whether to litigate at all or assist him as to a vital ingredient of his case (Snowstar Shipping Ltd. v. Graig Shipping Plc [2003] EWHC 1367 (Comm) per Morison J. at Para. 3).

2. There is no requirement that the applicant must satisfy any merits test in respect of his proposed proceedings. However when the court is considering the exercise of its discretion it is entitled to take into account the prospects of the applicant being able to establish a viable claim (Smith v. Secretary of State for Energy [2014] 1 W.L.R. 2283 per Underhill L.J. at Paras. 23 – 24).

3. In Hutchinson 3G UK Ltd. v. O2 (UK) Ltd. & ors. [2008] EWHC 55 (Comm) David Steel J. made the point that an applicant cannot obtain wide-ranging disclosure by asking for classes or categories of documents only some of which would be disclosable in any proceedings. While he accepted that some degree of flexibility may be necessary in this respect, he emphasised the need for applications to be "highly focussed" (see Paras. 38 – 40).

4. Mr. Learmonth drew my attention to the judgment of Mr. Richard Spearman Q.C. sitting as a Deputy High Court Judge in Ittihadieh v. Metcalfe & ors. [2016] EWHC 376 (Ch), where at Para. 65 the Judge said that the state of entrenched hostility between the parties led him to conclude that disclosure would almost

certainly not enable the dispute to be resolved without litigation. He invited me to draw the same conclusion in this case. I need not pursue that point in detail since Ms. Campbell sensibly did not suggest that disclosure in this case would enable the disputes between these parties to be resolved without litigation except perhaps if it revealed that the Applicant's proposed claims are wholly without merit. She based her case primarily on the disclosure being desirable in order to dispose fairly of the proposed proceedings and to a lesser extent in order to save costs.

This application in general

12. There can in my view be no doubt in this case that if proceedings are brought the Applicant and the Respondent are likely to be parties to them.

13. In order to determine what documents would be disclosable in any such proceedings it is necessary to identify the likely issues in them. In relation to Professor Al-Naib's will this is fairly straightforward as draft particulars of claim were prepared on the Applicant's behalf as long ago as December 2016. That draft contains a curious averment that the Claimant considers it unlikely that Professor Al-Naib made no will later than 1999, which leads nowhere in the absence of any positive allegation of the existence of any such later will. It also accepts that the Applicant allowed the Respondent to obtain a grant of probate although at the same time his solicitors reserved his right to apply for a revocation of the grant at any time prior to the conclusion of the administration of the estate, which has not yet occurred.

14. The first ground of alleged invalidity of the 1999 will relates to its attestation. It purports to be executed by two sisters, Sonia Dunlop and Dawn Wright. It is alleged that the signature purporting to be that of Dawn Wright is not her signature or that she did not sign the will in the presence of the other witness or the testator. The draft pleading refers to reports which have been obtained from two handwriting experts, Ruth Myers and Dr. Audrey Giles. Ms. Myers concluded that the signature purporting to be that of Ms. Wright was not genuine and had been written by Ms. Dunlop. Dr. Giles originally concluded that Ms. Wright's signature was not genuine but disagreed strongly with the view that it was written by Ms. Dunlop. Having been provided with further comparison material Dr. Giles revised her view and concluded

that there is evidence that Ms. Wright's signature is genuine although that evidence is weak.

15. The second ground of invalidity alleged is that the circumstances of execution of the will are such as to put the Respondent to proof that the testator knew and approved of the contents of his will. This ground appears to rely in part upon the circumstances relating to the execution of Mrs. Naib's will, which purports to have been executed on the same day and witnessed by the same witnesses. It is alleged that at the time Mrs. Naib was suffering from cancer of the brain with extensive adverse consequences for her health and was under treatment which included radiotherapy and sedation including the use of morphine. It is alleged that she complained that her husband had asked her to sign something which did not correspond with her true testamentary wishes and that her purported signature on her will is shaky and different from her normal signature. The suspicious circumstances are also apparently alleged to include that the witnesses to the wills, while asserting that they did duly witness it, have only given a limited account of the circumstances and have not been willing to assist the Applicant in his investigations into them.

16. In relation to the administration of the estate the application as issued stated that the anticipated proceedings are for "devastavit and an account of dealings". During the course of the argument it was clarified that there are broadly three types of claim which can be brought by a beneficiary against the personal representative of an estate relevant to this application. First, there is a simple claim for an account of the estate. Secondly, there is a claim for wilful default, which involves a failure on the part of the personal representative to carry out his duties properly resulting in loss to the estate. Thirdly, there is a claim based on deliberate wrongdoing by the personal representative causing loss to the estate. The second and third types of claim can be framed as claims for an account but in an appropriate case can be brought as a direct claim to recover the loss to the estate.

17. In the course of her submissions Ms. Campbell expressly disclaimed any suggestion that there is any potential claim against the Respondent here for deliberate wrongdoing. A notable feature of this case is that there has been a very large amount of correspondence between the parties through solicitors instructed by them

throughout the period since 2012 about many different aspects of Professor Al-Naib's estate. The bundles before me contained only a small selection of that correspondence. It is however sufficient to convey a strong impression that the Applicant's main concern has been that the Respondent has not been adequately diligent or thorough in investigating the estate and getting in all its assets. His main claim is therefore likely to be one falling into the second of the categories I have mentioned above.

18. In my view an application for pre-action disclosure in support of a potential claim of this kind is inherently likely to face problems. Unless it is carefully focussed on specific issues it can very easily become a roving enquiry into the personal representative's conduct of the administration of the estate. Not only is that impermissible on the principles which I have set out above, but it also risks prejudging issues which may arise in the subsequent proceedings as to what accounts and information the personal representative should be required to provide.

19. The position in this case only serves to reinforce my concerns in this respect. In the course of her submissions Ms. Campbell said that at least in relation to some of the areas where the Applicant seeks disclosure the object is to enable him to review or audit the Respondent's conduct of the administration of the estate. In my judgment that is not the proper purpose of an application for pre-action disclosure. If there are real concerns which mean that some kind of general review of the Respondent's conduct is required there are substantive remedies available to the Applicant. The nature of the application also reinforces my concerns. Not only does it run to 36 categories but many of the requests are individually wide-ranging such as requests for entire solicitors' files and requests for bank statements covering seven years prior to Professor Al-Naib's death.

20. In addition this is not a case where the Respondent appears to have in any general way failed to progress the administration of the estate, failed to provide information to the Applicant or refused to answer queries from the Applicant. The Applicant has been provided with extensive estate accounts for the period up to 5th April 2017 and the Respondent says that more recent accounts would have been provided if he had not had to turn his time and attention to dealing with this application. Those accounts have been professionally prepared by accountants. The same accountants carried out

on the Respondent's instructions in 2013 a forensic review of Professor Al-Naib's bank statements for a period of two years prior to his death followed by further investigations of certain specific transactions disclosed by those investigations. They advised the Respondent that it would not in their view be necessary or proportionate for them to carry out any further review for any earlier period.

21. The correspondence before me shows that there have been numerous instances where the Applicant has raised queries with the Respondent. In many cases the Respondent has taken steps to investigate the points raised and provide information and documents although often not to the Applicant's satisfaction. There have been instances where the Respondent has declined to take any such steps on the ground that they are unnecessary, disproportionate or impractical. I find it useful to pick up the position with a letter from the Applicant's former solicitors on 27th November 2017 in which they set out what they describe as the outstanding specific requests relating to the estate under fifteen heads. The Respondent's solicitors replied on 8th February 2018 giving answers to all those questions although those answers plainly did not satisfy the Applicant.

22. On 14th May 2018 the Applicant's solicitors sent to the Respondent's solicitors a schedule of documents to which they claimed that he is entitled and indicated that if they were not provided this application would be made. The Respondent's solicitors replied on 22nd June refusing to provide further documents for reasons set out in that letter. However on 25th September they provided a more detailed response to the schedule and about 100 pages of documents, although it seems likely that some of these documents had been provided previously.

23. The Applicant submits that the process on which he has been engaged over this period has been one of slowly extracting from the Respondent piece by piece relevant information and disclosure which still remains far from complete and having to press him repeatedly to make proper enquiries into the assets of the estate. The Respondent submits that on the contrary he has been subjected to a constant barrage of excessive and unreasonable demands from the Applicant for information and documents accompanied by pressure to make extensive investigations into possible assets which are unjustified and would be disproportionately expensive. I

am very wary of coming to any firm conclusions on these points because I am conscious that I have only seen a fairly small selection of the relevant correspondence. However on the material which I have seen I do not get the impression that the Respondent appears to be unwilling to administer this estate properly or incapable of doing so, although it remains open for argument in any future proceedings whether he should have taken further steps. I also do not get the impression that the Respondent is seeking to withhold information or documents from the Applicant except where he genuinely believes that the Applicant's requests are unjustified.

24. One of the features of this case which causes me considerable concern is the costs which have already been incurred in the administration of this estate. Between May 2013 and July 2017 the Respondent instructed Taylor Wessing Solicitors to act for him in dealing with the estate and their costs incurred during that period totalled £356,105. Substantial further costs have been incurred since then including of course the costs of dealing with this application. It is impossible for me to form any view as to how much of the costs incurred prior to this application have represented the costs of corresponding with the Applicant and his solicitors and dealing with enquiries raised by him but it must be a significant part. I consider that there is a serious risk that embarking on a process of further disclosure under an order on this application will not merely fail to save costs but may actually result in yet more costs being incurred which may not be justified by any worthwhile benefit in enabling any proceedings to be disposed of fairly.

25. In the course of her submissions Ms. Campbell said that if the court considered that not all of the categories of document sought in the application are justified it could and should allow such parts of the application as are justified. I would emphasise as has been said in several of the authorities that it is the responsibility of an applicant to put before the court a carefully prepared and properly focussed application. If he does so the court may well allow the application with amendments where appropriate if it considers that some categories of document should not be allowed or should only be allowed in part. There is however a temptation for applicants to put forward a wide-ranging application drafted in vague terms in the hope that the court will work out what they are actually entitled to and make some more limited order.

In my view the court is not obliged to embark on any exercise of that kind and is perfectly entitled to dismiss any such application without considering it in detail at all. I have seriously considered taking that course in this case but in the end have concluded that I will not do so, if only because it risks the Applicant then making a further and more limited application resulting in more delay and expense.

26. One further complication is that after this application had been brought and evidence on it filed the Applicant's solicitors wrote to the Respondent's solicitors on 20th May 2019 requiring information and documents in his capacity as a beneficiary of the estate. This relies on the principles of trust law explained by the Privy Council in Schmidt v. Rosewood Trust Ltd. [2003] 2 A.C. 709. In substance what is requested is statements for all Professor Al-Naib's bank and building society accounts for a period of seven years prior to his death. There has to date been no detailed response to that request beyond an enquiry as to how it is intended to be related to the present application.

27. It is not in my view necessary or appropriate to explore in this judgment the principles governing an application based on the right of a beneficiary to information and documents regarding the trust or estate under the law of trusts. These are discussed at length in Chapter 23 of Lewin on Trusts (19th Edn.). As the editors observe at Para. 23-021 it is a quite different jurisdiction from that under CPR Part 31.16. I do not have an application under that jurisdiction before me and I agree with Mr. Learmonth that I have to be careful not to start treating the application which is before me as if I was in any way exercising that jurisdiction. Such an application would fall to be decided on different principles and the evidence on it might well be different. Furthermore I am not convinced that the fact that the Applicant has such rights as a beneficiary should carry any significant weight in the exercise of the court's judgment as to whether disclosure is desirable under CPR Part 31.16 or in the exercise of its discretion. I have already pointed out that at least in some cases the desirability of transparency is a factor which the court should take into account. I would add that in my view the court should have in mind that a beneficiary of a trust or estate will often be at a disadvantage in bringing a claim against the trustee or personal representative because he has only limited information as to the way in which the trust or estate has been administered. Cases of this kind are cases where it

may well be desirable in the interests of fairness to order pre-action disclosure but that must depend on the facts of the particular case. The existence of the beneficiary's rights to documents and information under the general law of trusts may perhaps reinforce that point but otherwise in my view is of no real assistance.

28. Looking at the general points which I have discussed in this section of my judgment overall, I conclude that they point strongly in favour of the court adopting a sceptical approach to this application. With that in mind and applying the legal principles which I have set out above I will consider the individual categories of documents requested.

Items 1 – 7 (validity of the 1999 wills) [1]

29. These items can to a large extent be dealt with together. The Applicant's counsel was able to draft coherent and detailed particulars of claim challenging the validity of Professor Al-Naib's 1999 will in 2016. It is not always the case that the fact that such a pleading can be prepared is decisive against the need for pre-action disclosure. There might for example be some limited disclosure which would be of crucial importance to an applicant in deciding whether to pursue the claim or not. In this case however I cannot see that there is any need for any further disclosure in order to enable the Applicant to decide whether to bring and to bring this claim. He has for a number of years been indicating that he disputes the validity of the will on the grounds I have outlined but does not intend to commence proceedings yet. I regard it as neither necessary nor desirable that there should be any further delay in him deciding whether to proceed with such a claim.

30. There are additional reasons for rejecting individual items in this part of the schedule:

(a) Item 1 requests the entire files of Michael Smith, who acted as Professor Al-Naib's solicitor for some years prior to his death and for the Respondent for a short time thereafter. This is far too wide to be permissible. The vast majority of such documents would have no possible relevance to any potential claim by the Respondent. Mr. Smith has confirmed that none of his files contain any will or instructions for a will postdating the 1999 will.

[1] Item 7 has been provided.

(b) Items 2 and 3 request the documents referred to in an invoice from Taylor Wessing dated 31/7/15 in which they state that they reviewed the files of Michael Smith and Professor Al-Naib "to review position regarding instructions for further wills". This is not only far too wide-ranging but also appears to be based on a misconception that this reference is evidence of the existence of instructions for further wills. It shows only that Taylor Wessing were looking for such documents, not that they found any.

(c) Items 4, 5 and 6 all relate to investigations made by Taylor Wessing into the validity of the 1999 will. Their invoices show that they had discussions with the Respondent and with counsel regarding the instruction of a handwriting expert. They advised the Respondent on the handwriting evidence when it was obtained and on the potential probate claim more generally. They had a conference with counsel and prepared questions to be submitted to the witnesses about the execution of the will. Mr. Learmonth submitted that much if not all of this material was clearly privileged. Ms. Campbell submitted that Taylor Wessing were acting for the Respondent as executor of the estate rather than personally and therefore he could not claim privilege as against the Applicant as a beneficiary of the estate. I had neither sufficient evidence nor sufficient legal argument to be able to come to any conclusion on that issue. In any event I respectfully agree with the view expressed by Morison J. in the Snowstar case at Para. 35 that contested issues of privilege are better dealt with in the course of the normal disclosure process in a substantive claim than in an application for pre-action disclosure. I would as a matter of discretion have refused these requests for that reason even if I thought such disclosure was otherwise desirable.

Items 8 - 17 (Publishing & literary estate)

31. In considering this area it is important to focus on what is or may be relevant for the purposes of administering Professor Al-Naib's estate. The Applicant's case seeks documents alleged to be relevant in two ways. He alleges that the receipts from sales of books were far more than has been so far disclosed and that there must therefore be other bank accounts or assets representing those receipts which have not yet been traced. Secondly, he says that if the receipts were more substantial than so far disclosed that affects the value to be put on the ongoing rights relating to those publications and the stock of them remaining in the estate.

32. I find the Applicant's case on these points to be highly speculative. It appears that Professor Al-Naib published 16 works over many years, most of them relating to his historical interests. They were published by him under a trading name, Research Books, and according to the Respondent none of the historical works were priced at more than £10. There is force in the Respondent's comment that full-size books with photographs published at such prices are unlikely to have generated substantial profits and he has produced a letter from Professor Al-Naib dated 31st February 2005 (sic) in which he says that all income from his books is ploughed back into further research and publications as a public service. A search carried out by the Applicant on the Amazon website in 2015 showed a wide range of prices for the books but I do not regard this as reliable evidence because it is wholly unclear who is offering them for sale and it is not evidence of any actual sales. The Applicant has produced evidence suggesting that in two cases there were print runs for the books of 4,000 and 5,000 respectively but that is no evidence of the level of sales or profits. There is evidence of sales in 2010 and 2011 to a charity of 150 books for £1,500. Apart from that and the evidence of very modest sales to which I refer in the next paragraph there is no hard evidence of any substantial sales of the books in any recent period. There is a notable absence of any evidence of any significant continuing interest in or sales of the books since Professor Al-Naib's death.

33. Item 8 requests all correspondence with the Publishers Licensing Society, the Authors' Licensing and Collecting Society and the CLA regarding royalties on Professor Al-Naib's publications. A quantity of such correspondence was provided by the Respondent in October 2018 showing that the sums collected in that respect were very modest in recent years. There is no evidence that there are any further relevant documents in this category and even if there were I cannot see that further disclosure is desirable as a matter of fairness or would save costs.

34. Item 9 seeks the computer hard drives relating to Professor Al-Naib's work at the University of East London and/or their content if it exists in some other format. The Respondent's solicitors explained in a letter of 8th February 2018 that he had examined these after Professor Al-Naib's death, found nothing on them relevant to the administration of the estate and disposed of them. There is nothing to cast doubt

on the fact that they have been disposed of and I cannot therefore make any order for their disclosure. I would add that I also see no reason to doubt the statement that there was nothing relevant on them.

35. Item 10 seeks correspondence with Barclays Bank in relation the business account of Research Books. The only evidence that any specific business account may have existed is that the order forms for the books requested cheques to be made payable to Research Books and a small number of copy cheques have been located which were made payable in that way. The Respondent's position is that as mentioned in Para. 20 above forensic accountants have already reviewed all Professor Al-Naib's Barclays accounts for two years before his death and advised that there is nothing to indicate that any further investigation is likely to be productive. I am unable to see how disclosure of correspondence with Barclays about these accounts is at all likely to add anything useful to what is already known and I do not regard such disclosure as desirable.

36. Item 11 seeks correspondence addressed to Professor Al-Naib's P.O. box number. This request arises from the fact that the order forms for his books to which I have referred in the previous paragraph invite purchasers to send their orders to this box number. I can see that such correspondence might provide some evidence of the level of sales of the books. However even if were otherwise desirable to order disclosure of it the Respondent has stated that he has searched for it and cannot find any such correspondence. I see no reason to doubt that and therefore it would be pointless to make any order in respect of this item.

37. Item 12 seeks correspondence relating to grant monies received by Professor Al-Naib and what became of such monies. The Applicant asserts that Professor Al-Naib received substantial third-party grants and funding which was paid into the account he maintained at the University of East London between 1986 and 2009. It seems to me inherently likely that he did receive funding of that kind given the nature of his academic work. However any such funds would presumably have been provided for the purpose of enabling him to carry out his professional work and would not have been his money to spend as he wished. The account in question was closed in 2009. There is nothing to suggest that any such grant money remained in his hands at the

time of his death and even if had done it is very unlikely that it would form part of his estate. In those circumstances I consider that any such disclosure would have no relevance to any claim the Applicant may bring and should therefore be refused.

38. Item 13 seeks disclosure of the statements for the bank account at the University to which I have referred in the previous paragraph for the entire period of its existence. I am assisted in relation to this account by an email from Mr. Woodhouse, an officer of the University, dated 16th March 2015 in which he states that Professor Al-Naib had what he describes as a "budget code" within the University where money was deposited to fund his research activity, some of the money at least coming from Professor Al-Naib himself. He suggests that it is unlikely that any receipts from sales of books was paid into that account, which was closed some time ago with no detailed records now being retained by the University. Professor Al-Naib was not permitted to use this facility after his retirement. The objections I have set out in the previous paragraph apply to this request. Furthermore it seems reasonably clear that any statements relating to this account would be the property of the University and would not be within the control of the Respondent. This request must therefore be refused.

39. Item 14 requests copies of all contracts between Professor Al-Naib and the University. There is nothing to suggest that there would be any such contracts other than his contracts of employment. I am unable to see how any such contracts could have any relevance to any claim the Respondent may bring. This request must therefore be refused.

40. Item 15 requests all correspondence relating to consultancy income earned by Professor Al-Naib. However the general description of this item refers also to income from the sale of inventions and I shall treat correspondence relating to such income as also requested here. There is a reference in the schedule to extensive lists, various bodies and to government contracts in Iraq, Pakistan, the United States and Germany. The Respondent's position is that there was as far as he is aware never any such income and therefore obviously there are no relevant documents. Ms. Campbell accepted in the course of the hearing that if Professor Al-Naib held any patents in the United Kingdom details of them could be obtained from publicly available records.

The Applicant asserted in his evidence in general terms that Professor Al-Naib would have earned substantial sums from this type of work. When the Respondent's solicitors pressed for more specific information regarding this assertion the response showed that it is apparently based on an internet search of which the results are before me. This clearly shows that as one would expect Professor Al-Naib published over many years a substantial number of scientific papers related to his area of expertise. None of the references is dated later than 2001 although a few are undated. There are vague references to consultancies and patents in a few of them, but it is to my mind unclear whether these are consultancies or patents held by him or not.

41. In my view the most that can be inferred from this evidence is that Professor Al-Naib may possibly have had some income from such sources many years ago. It is essential to have firmly in mind that the object of any proceedings brought by the Applicant would be to establish what were the assets of Professor Al-Naib's estate at the time of his death. The possibility that a search made now by the Respondent for documents under these heads would reveal anything of any possible relevance to that enquiry seems to me so remote that it is not desirable to dispose of such proceedings fairly for an order for such disclosure to be made.

42. Item 16 requests a copy of the valuation of the publishing rights included in the estate. The Respondent has explained clearly in correspondence and in his evidence that Ernst & Young advised that the value of those rights was not more than a few hundred pounds and it would not be cost effective to obtain a formal valuation. He therefore did not do so. The letter containing that advice has been disclosed. There is no valuation remaining to be disclosed and therefore this request must be refused.

43. Item 17 requests the files of what is described as the specialist solicitor instructed in relation to Professor Al-Naib's scientific work, publications and inventions. This arises in connection with a request made by the Respondent's former solicitors to Michael Smith as to whether it was correct that he had told the Respondent that Professor Al-Naib had instructed a patent attorney. Michael Smith's response was that he believed that the Respondent had told him that. The Respondent says that Michael Smith is mistaken, he never told him that and he knows nothing about Professor Al-Naib instructing any patent attorney or specialist solicitor. I could order

the Respondent to make a further search to see whether any such files can be located. However in the light of the views which I have already expressed regarding income from Professor Al-Naib's scientific work, publications and inventions I consider that the possibility of anything relevant being disclosed by such a search is so remote that it would not be desirable to make such an order.

Items 18 – 29 (Estate administration) [2]

44. Item 18 requests full statements for both Professor Al-Naib's accounts with Barclays Bank for seven years prior to his death. The Respondent's position is that this request is entirely disproportionate and unnecessary. Ms. Campbell told me that this is from the Applicant's point of view probably the most important request in the schedule. She submitted that these statements are significant in two ways. First, they may reveal assets of the estate which have not yet been disclosed, either by showing other sources of income or by giving cross-references to other accounts not so far disclosed. Secondly, they may show gifts made by Professor Al-Naib which ought to have been brought into account for inheritance tax purposes. The Applicant relies here on his general evidence that the estate as declared for probate is considerably smaller than from his knowledge it should have been. He says that he clearly recalls Professor Al-Naib telling him in 2006 that he was worth £5 - £6 million. He says that the examination carried out by the accountants instructed by the Respondent was only a review of two years' statements and is therefore of limited value. The Respondent points out that it is just as much in his interest as that of the Applicant to identify and get in all the assets of the estate. He denies that it is usual to review bank statements for seven years prior to the death when administering an estate or that it would be reasonable to incur the expense of obtaining and reviewing such statements.

45. I regard it as important that there is no specific evidence before me to suggest that disclosure of such statements would reveal anything significant beyond the general evidence of the Applicant to which I have referred in the preceding paragraph. If the Applicant brings proceedings for an account, it is open to him to allege that the Respondent is in breach of his duties as executor by failing to review the statements for a seven-year period. It seems to me that to order disclosure of those statements

[2] Items 24 and 27 were not pursued by the Applicant at the hearing.

now would risk predetermining an issue which should be decided if necessary in any substantive proceedings. This is to my mind also a roving enquiry of a kind which is not appropriate in an application of this kind.

46. There is also no evidence before me of any relevant lifetime gifts by Professor Al-Naib. I can see that it may well be the duty of an executor to make enquiries of anyone who might reasonably be thought to have been a possible recipient of such gifts. If he is not aware from such enquiries or other information in his possession of any such gifts, I am sceptical of the existence of any duty to search through all the deceased's accounts for seven years prior to his death in case they may reveal any. If he was aware of such gifts the position would probably be different, particularly if there were indications of a pattern of giving. However again it seems to me that the extent of an executor's duty should be decided in any substantive proceedings rather than in the course of this application. For these reasons I do not consider it desirable to order such disclosure.

47. Item 19 seeks disclosure of all correspondence with Barclays Wealth, Barclays Bank Switzerland and UBS regarding bank accounts held by Professor Al-Naib in Switzerland. The Applicant's evidence is that two members of the family have told him that Professor Al-Naib held an account in Switzerland although it appears that this information relates to him holding such an account in the 1980s and 1990s. There has been very extensive discussion of this issue in the correspondence between solicitors. The Respondent's position is that although he has no knowledge of such an account he has made enquiries as requested by the Applicant with no result and that he has fully disclosed those enquiries. I am not persuaded that anything useful would be disclosed by an order in this category in addition to what has already been disclosed and I refuse to order such disclosure.

48. Item 20 seeks copies of receipts for all expenditure incurred in the administration of the estate. The Respondent offered to provide these documents subject to the Applicant paying the necessary copying charges in his solicitors' letter of 8th February 2018 and that offer has not been taken up. There is therefore no basis for the court to make any order on this item.

49. Item 21 seeks all documents relating to enquiries made by the Respondent about a life assurance policy on Professor Al-Naib's life. The evidence before me seems to show that during the last years of his life he was very friendly with a lady named Ros Lynam. The precise nature of their relationship is controversial and I make it clear that I express no view on that point. Ms. Lynam says that he told her that he had life insurance. The Respondent's enquiries produced no trace of any such policy except that he was making regular payments to Axa Insurance. Recent enquiries have eventually revealed that those payments were for motor insurance, not life insurance. Mr. Learmonth said that without admitting any obligation to do so the Respondent would provide the Applicant with such material relating to those enquiries as has not been disclosed to date. Subsequent to the circulation of this judgment in draft the parties informed that this has now been done. I therefore need not express any view on whether an order would have been appropriate in respect of this item.

50. Items 22, 23 and 28 can conveniently be considered together as they all relate to Professor Al-Naib's accounts with Nationwide. The request is as with the Barclays Bank accounts for full statements for seven years prior to his death including for an account held jointly with the Respondent. There is also a request for copy cheques, correspondence and attendance notes relating to these accounts. The existence of the joint account is said in the schedule of requests to be shown by the form IHT406 forming part of the inheritance tax return for the estate. IHT406 would not be the correct form on which to list a jointly owned bank or building society account and simply lists four Nationwide accounts as sole accounts of Professor Al-Naib. The relevant form for jointly owned property does not disclose any such joint account and the Respondent says that there never was any such account. The Applicant's evidence is that there is another account in the Respondent's name which was referred to in draft estate accounts prepared by Michael Smith as a joint account. He also says that Ms. Lynam has told him that Professor Al-Naib told her in 2011 that he had substantial savings in a Nationwide account whereas the balances at the time of death in all four accounts were very modest. Ms. Lynam has signed a statement confirming that such a conversation took place although it is not verified by a statement of truth. Some copy cheques have already been disclosed.

51. In general in my view these accounts stand in the same position as the Barclays Bank accounts and disclosure should be refused for the same reasons. There is however one remaining query regarding those accounts which should be resolved in the interests of transparency. The Applicant has produced a statement for a Nationwide account as at 30th September 2012 with a number ending in 4827, which is not the account number of any of the four accounts disclosed in the estate accounts. Curiously this document as I have it does not show the name of the account holder, but it is addressed to Professor Al-Naib's home address at which as I understand it he had been the only person living for many years prior to his death. The date of the statement is of course after his death and the balance shown is very small, but I think it is sufficiently relevant to any claim for an account that the applicant may bring to justify disclosure at this stage. Mr. Learmonth indicated at the hearing that his client was prepared to make further enquiries about this account. In my draft judgment I indicated that unless this matter has been resolved before I handed down judgment I was prepared to make an order requiring the Respondent to disclose any documents in his control showing whether this was an account solely or jointly owned by Professor Al-Naib and if so showing the balance on it at the time of his death. I need hardly say that if it was such an account the estate accounts and IHT return will need to be corrected to include it. I have now been informed by the parties that the Respondent has voluntarily made further disclosure on this issue and therefore no order is required.

52. Item 25 requests copies of the deeds to Cwm Farm. The Applicant has not identified in his evidence any specific issue in any potential claim to which these deeds might be relevant and Ms. Campbell did not do so in her submissions to me. I regard this request as an instance of the Applicant's desire to conduct a general review of every aspect of the administration of this estate. I have already said that I do not regard that as a proper basis for pre-action disclosure and this request must be refused.

53. Item 26 requests documents relating to a restriction which was apparently entered on the title to 45 Wilmer Way and consideration of that restriction. That property was sold not long after Professor Al-Naib's death. Again the Applicant has not identified in his evidence any specific issue in any potential claim to which these documents

might be relevant and Ms. Campbell did not do so in her submissions to me. This request must be refused for the same reasons as Item 25.

54. Item 29 requests all paperwork relating to the Respondent's dealings with Simons Rodkin Solicitors. According to the Respondent in 2017 he decided to change solicitors because he was finding Taylor Wessing to be too expensive. At that time he had a preliminary discussion with this firm with a view to instructing them but decided not to do so. A copy of an invoice rendered by them was supplied to the Applicant some time ago. It seems to me that even if there are any further documents in the category requested it is extremely improbable that they would contain any material relevant to any claim by the Applicant additional to that which he already has. I do not therefore regard it as desirable to order such disclosure.

Items 30 -36 (Alice Naib estate administration) [3]

55. In relation to this group of items it is important to have in the forefront of one's mind that Mrs. Naib died in 1999. Neither Professor Al-Naib nor the Respondent thought it necessary to take out any grant of probate to her estate. That seems to me unsurprising given the terms of her will and the fact that there never appears to have been any disagreement between them about how it should be carried into effect. The dispute between the Applicant and the Respondent as to whether Cwm Farm and 45 Wilmer Way were held by Professor and Mrs. Al-Naib as joint tenants or tenants in common has now been resolved. In those circumstances it is at first sight very difficult to see how any documents relating to the administration of Mrs. Al-Naib's estate can be relevant to any further claim that the Applicant may bring now.

56. Item 31 seeks all documents relating to "non-disclosed assets/property owned by Alice". This is said to be supported by an invoice from Taylor Wessing dated 1st May 2016. In fact the only reference to this topic as far as I can see in the invoices submitted by Taylor Wessing is in their invoice of 31st October 2016, in which they refer to finalising and submitting to HMRC probate papers relating to Mrs. Naib. I deal with those papers under Item 33 below. There is nothing in any of the evidence before me to even suggest that there were assets of Mrs. Naib's estate which have

[3] Item 30 was not pursued at the hearing and Item 34 has been provided.

never been disclosed. This request is entirely speculative and an attempt at a roving enquiry into her estate when it has not been argued that the Applicant could now bring any claim in respect of that estate. It must therefore be refused.

57. Item 32 requests a copy of legal advice given to the Respondent as beneficiary and not as executor. Payment for this advice is recorded in Taylor Wessing's client account in May 2016 but correctly treated as a payment on account of the Respondent's entitlement to a share of the estate and not an administration expense. Mr. Learmonth submitted that since it is accepted that this advice was given to his client in his personal capacity as a beneficiary it must be privileged from disclosure. I cannot see any answer to that submission. There is in any event no evidence as to the subject-matter of the advice and it is no more than speculation whether it would contain any information relevant to the Applicant's claims which adds anything useful to what he already has. This request must therefore be refused.

58. Item 33 requests the probate papers relating to Mrs. Naib's estate to which I have referred in Paragraph 56 above. The Respondent has already disclosed a letter sent by Taylor Wessing to HMRC dated 16th September 2016 enclosing an inheritance tax account for her estate and the account itself. The letter makes clear that at that time it was the Respondent's intention to apply for a grant of probate to that estate although he subsequently decided that there was no need to do so. The account shows that no inheritance tax was due on Mrs. Naib's estate and that does not appear to have been questioned by HMRC. There is nothing in the account which the Applicant has pointed to or which I can see that has any relevance to any claim which he may bring now in respect of Professor Al-Naib's estate. In those circumstances I cannot see that there is any realistic prospect that any further papers which may exist in this category would provide any such relevant material and I am not prepared to order further disclosure under this head.

59. Items 34 and 35 relates to a statement made by a witness named Robert Davies. The statement itself has been disclosed and the request relates to documents regarding a meeting with counsel to settle his statement. There is a reference in an invoice from Taylor Wessing dated 31st July 2014 to drafting and preparing this statement but nothing to suggest as far as I can see that counsel was involved. Mr. Davies entered

into an arrangement with Professor Al-Naib shortly before his death under which he was permitted to use the land surrounding Cwm Farm for ten months of the year for certain agricultural purposes and it appears that the Respondent has renewed that arrangement each year since then. There is no evidence that the documents requested actually exist and in any event I am unable to see that they would have any relevance to any claim that the Applicant may bring. This request must therefore be refused.

60. Item 36 requests copies of the grazing licences to which I have referred in the previous paragraph. The Respondent says that the agreements have all been oral and there are no such documents, which I see no reason to doubt. In any event I am unable to see that they would have any relevance to any claim that the Applicant may bring. This request must therefore be refused.

Conclusion

61. For the reasons set out above I have concluded that except to the very limited extent which I have set out above this application must be refused entirely. Following circulation of my judgment in draft the parties have agreed an order giving effect to it, which I approve. I will therefore hand down this judgment formally without the need for attendance by the parties.

R. Bartlett
Deputy Master