PROFESSIONAL NEGLIGENCE: WILLS, PROBATE AND TAX.

Delay in preparing Will

The starting point is the House of Lords' decision in *White v Jones* [1995] 2 AC 207 in which it was confirmed that that a solicitor or will draftsman may be liable to disappointed beneficiaries under a Will where the solicitor is guilty of undue delay in drawing up a Will for execution by the testator before the testator's death.

In *White v Jones* the testator quarrelled with his two daughters, and executed a Will cutting them out of his estate. He was then reconciled with his daughters. On 17 July 1986 the defendant firm of solicitors received a letter from the testator asking them to prepare a new Will to include legacies of £9,000 each to his daughters. The testator died on 14 September 1986, without the new Will having been put in place (a delay of 59 days after receipt of the letter of instruction). The defendant firm of solicitors were guilty of negligent delay.

In spite of the absence of any contractual relationship between the solicitor and the daughters, the daughters were awarded a cause of action in tort to recover damages equal to the value of the legacies to which they would have been entitled under the Will (£18,000).

Liability

The testator had suffered no loss. He had died. His estate had suffered no loss. The value of the estate was unaffected by the solicitor's negligence. The consequence of the negligence was that the "wrong" persons had benefited from the estate, to the extent of £18,000.

The daughters had suffered a loss. They had not received legacies of £18,000. However, they had no contractual claim. If they were not given a remedy in tort, the solicitors would get off scot-free, and there would be a "lacuna" in the law.

There was an impulse to do practical justice by giving the disappointed beneficiaries a remedy in tort. It would be unacceptable if, because of some technical rules of law,

the wishes and expectations of testators and beneficiaries generally could be defeated by the negligent actions of solicitors without there being any redress.

Delay and capacity

White v Jones was a clear case of negligent delay. The Will had not been prepared 59 days after instructions were given.

A solicitor, instructed to prepare a Will, is under a duty of reasonable care to present the Will for execution within a reasonable time. There is, however, no fixed period which is to be regarded as reasonable, although delays for even comparatively short periods of time may be negligent. It depends upon matters such as the age and state of health of the testator, and possibly as to whether the terms of the Will are complex, e.g. requiring expert tax advice.

Typically, there may be a dilemma if the solicitor has doubts as to the testator's capacity. Is he justified in delaying the execution of the Will pending receipt of a report from a doctor as to the testator's testamentary capacity? Or should he press on with the execution of the Will so as to avoid any allegation of negligent delay?

One way out of this dilemma is for the solicitor to refuse instructions if not satisfied as to capacity.

No liability for refusing to act

Indeed, it is questionable whether a solicitor would have any liability to a disappointed beneficiary of a Will in respect of which the solicitor declines to accept instructions, at least if the solicitor so declines in the reasonable belief that the testator lacked capacity.

The basis for the liability in tort to the disappointed beneficiary is that the solicitor has contracted with the testator to confer a benefit on the beneficiary who would foreseeably be harmed if the solicitor performed his contract negligently. The solicitor has a duty in care in tort to the beneficiary to perform his contractual duties

competently. It follows that no duty is owed to a beneficiary if the solicitor refuses instructions. There is a Canadian case (*Hall v Estate of Bruce Bennett* [2003] WTLR 827) to that effect. The lack of any retainer meant that there could be no duty to the intended beneficiary.

Acceptance of instructions

The nature and extent of the solicitor's duty was explored in *Feltham v Freer Bouskell* [2013] EWHC 1952 (Ch). The Judge said, at para. 53:

> *Where a solicitor is instructed to prepare and execute a will for a client, if the client does not have mental capacity, he has no client and cannot accept instructions. If he has concerns as to mental capacity, he must either refuse the instructions and make the position clear to the client, or take steps to satisfy himself as to his client's mental capacity promptly.*

This confirms that the solicitor has a choice to refuse instructions or to accept them; and that if he accepts them, he must take steps to satisfy himself as to his client's mental capacity promptly.

Concerns as to capacity and/or influence

In *Feltham* the testatrix, Mrs Charlton, was a 90-year old woman in 2006. She had a step-daughter, Ms Feltham, who was not a beneficiary under three previous Wills made by Mrs Charlton.

In 2006 Ms Feltham arranged for Mrs Charlton to move to a nursing home down the road from her. She telephoned the defendant solicitor saying that Mrs Charlton wanted to make a new Will leaving the bulk of her estate to her. She sent the solicitor instructions for the new Will, signed by Mrs Charlton.

The solicitor had concerns about Mrs Charlton's capacity, and as to whether Ms Feltham was seeking to take advantage of a vulnerable old lady by securing a change in the Will in her own favour, on a number of grounds:

(a) Mrs Charlton suffered from short-term memory loss and was probably suffering from dementia;
(b) She was not coping, which was why she had been moved to a residential nursing home near Ms Feltham;
(c) Mrs Charlton complained to him that Ms Feltham was stealing her furs and ball gowns and was using her key to clear her house;
(d) Mrs Charlton had, according to one of the beneficiaries of the 1998 Will, complained that Ms Feltham was after her money, and wanted her to change her Will.

Instructing a doctor

The solicitor did the right thing in that he instructed Mrs Charlton's GP to examine her and to prepare a report as to her capacity. However, the report took 5 weeks to produce (2 March 2006) during which period the solicitor failed to chase it up.

The medical report stated that Mrs Charlton had testamentary capacity. However, the solicitor decided to do nothing, unless Mrs Charlton decided to raise the matter of the Will with him again. He admitted in Court that he had formed the view that Mrs Charlton did not really want to change her Will. He had had a number of telephone calls with her in which she had not said that she wanted to change her Will. He did not raise the Will with her in any of these calls, but discussed other matters.

Mrs Charlton lost patience. She asked Ms Feltham to draw up the Will, which she executed on 24 March 2006, shortly before her death, in the absence of a solicitor to confirm that the Will represented her genuine, independent, wishes. This obviously gave rise to the risk of a claim that Mrs Charlton did not know and approve of the contents of the Will.

Probate claim

The solicitor wrote to the beneficiaries of the previous Will effectively encouraging them to challenge the Will. They did so, on the grounds of want of knowledge and approval. Ms Feltham was advised that, as she had organized the execution of the

Will in circumstances where there was a suspicion that she did not want to change her existing Will, there was a 70% chance of the Will being set aside. She paid out £650,000 to compromise the claim of the beneficiaries of the previous Will.

Negligence claim

Ms Feltham sued the solicitor alleging that, if he had acted promptly on his instructions to prepare the Will, the Will would have been executed, and would not have been open to challenge. She claimed to recover the £650,000 that she had to pay to the beneficiaries of the previous Will to settle their claim of want and knowledge and approval.

Duty of solicitor to act promptly having accepted instructions

The Judge found that the solicitor had not taken sufficient steps to satisfy himself as to the client's mental capacity promptly.

He did not refuse to accept instructions (which would have absolved him from any liability). Instead, he accepted instructions, and instructed the GP to produce a report on capacity, but then failed to act on its finding that Mrs Charlton had capacity. He then decided to do nothing, unless Mrs Charlton chased him about the Will. This course of inaction was described by the Judge as being "entirely inadequate" in the case of a 90-year old client who had instructed him to alter her Will.

The solicitor was under a duty to chase up the doctor, after 10 days from the doctor being instructed, to remind him that he needed to produce the report promptly. If the doctor did not report promptly, the solicitor should have pressed him again a few days later. Even if the report was not available immediately, he should have obtained verbal confirmation, which would have been sufficient for him then to visit Mrs Charlton. He should have arranged for another doctor to be instructed in the event of undue delay.

Once he had received the doctor's report or oral opinion, the solicitor should have visited Mrs Charlton to discuss her intentions. The Judge accepted that a personal visit was appropriate in the circumstances (even though Mrs Charlton was living some distance away, and a visit would have meant further delay).

The solicitor owed a duty to Ms Feltham, as the intended beneficiary under the proposed Will, to carry out these steps promptly, it being reasonably foreseeable that she would suffer loss if he failed to do so.

Causation

The Judge found that, if the solicitor had so acted, Mrs Charlton would have confirmed that she wished to execute the Will, and that she would have done so before her capacity deteriorated.

The Judge also found that she would have been mentally capable of making such a Will, and that the Will would not have been challenged, if prepared by a solicitor.

The significance of obtaining a medical report promptly was that the solicitor could then have proceeded promptly to take the testatrix's instructions personally at a meeting, and to have procured the execution of the Will shortly thereafter. If this had happened, it would have been particularly difficult for the Will to be challenged on the grounds of either lack of testamentary capacity, or (as was the case) want of knowledge and approval. A Will drafted by an experienced independent lawyer, who has formed the opinion from a meeting that the testatrix understood what she is doing, should only be set aside on the clearest evidence of lack of mental capacity, or want of knowledge and approval.

Loss of a chance

The Judge raised the question as to whether it was necessary to establish that a valid Will would have been executed, on the balance of probabilities, or as a percentage chance. He expressed the view that, in principle, damages could be assessed on the loss of a chance basis, i.e. based on the percentage chance that the testator would have made a valid Will in favour of Ms Feltham, if the solicitor had not been negligent.

Damages can be assessed on a loss of a chance basis if the issue is what a third party, i.e. someone other than the claimant, would have done. The testatrix was a third party vis-a-vis the claimant, Ms Feltham, the disappointed beneficiary. The task would be to evaluate what the testatrix would have done in percentage terms.

However, the Judge's comments were obiter, as he determined he was in no doubt as to what the testatrix would have done if the solicitor had properly discharged his obligations. Therefore, the claimant succeeded on the balance of probabilities, in any event, in recovering 100% of her loss. She also would have succeeded in recovering 100% of her loss on the alternative basis of a loss of a chance as there was no doubt what the testatrix would have done. Therefore, on any basis, there was no reason for applying any percentage reduction.

The Judge stated, however, that there was no authority on the loss of a chance point, and it was something which would have to be decided upon in due course by an appellate Court. There have, however, been no subsequent decisions on a loss of a chance in respect of a claim by a disappointed beneficiary.

Damages

Ms Feltham recovered as damages:

(1) £650,000 paid to settle the probate action (which was a reasonable sum to pay in the light of the advice that there was a 70% chance that the Will would be set aside); and

(2) her legal costs in relation to the probate action (which she agreed to pay pursuant to the settlement of the probate action).

Failure to observe the golden rule

There have been a number of cases where there has been a failure to observe the golden rule at all.

In *Key v Key* [2010] EWHC 408 (Ch) Mr Key, an 89 year old farmer made a Will, 10 days after the unexpected death of his wife of 65 years, providing for the bulk of his estate to be divided between his two daughters, one of whom accompanied Mr Key to the solicitor's offices on the day when he executed his Will.

The Court found that Mr Key was devastated by the recent death of his wife when he made his Will. This amounted to a severe affective disorder which on its own, or together with the mild dementia from which Mr Key was suffering, deprived him of testamentary capacity.

The solicitor was roundly criticised by the Judge who said:

> *As will appear, a significant element of responsibility for this tragic state of affairs lies with Mr Cadge. Contrary to the clearest guidance, in well known cases, academic texts and from the Law Society, Mr Cadge accepted instructions for the preparation of the 2006 Will, from an 89 year old testator whose wife of 65 years' standing had been dead for only a week without taking any proper steps to satisfy himself of Mr Key's testamentary capacity, and without even making an attendance note of his meeting with Mr Key and Mary, at which the instructions were taken. Mr Cadge's failure to comply with what has come to be well known in the profession as the Golden Rule has greatly increased the difficulties to which this dispute has given rise and aggravated the depths of mistrust into which his client's children have subsequently fallen.*

The Judge ordered a hearing on the issue of the solicitor's liability for the costs of the parties pursuant to s. 51 of the Senior Courts Act 1981 (which allows the court to make Saunders against a non-party). The costs claim was settled, no doubt on payment by the solicitor's insurers of some of the costs of the probate action.

Value of golden rule

In *Perrins v Holland* [2009] EWHC 1945 (Ch), para. 59, Lewison J cast doubt on the medical validity of the golden rule pointing out that a GP might not be up to the task, and that it is not necessarily easy to get a specialist neurologist. Even for a specialist, it may be a difficult task to assess testamentary capacity.

Indeed, if a specialist neurologist is to be engaged, this will involve considerable delay and expense. The solicitor is at risk of a negligence claim if guilty of unreasonable delay in procuring execution of the Will should the testator die in the meantime.

One solution may be for the Will to be duly executed and witnessed, and then be re-executed by the testator, and witnessed by the specialist.

Failure to follow rule not necessarily negligent

There are some comforting comments by Norris J in Wharton v Bancroft [2011] EWHC 3250 (Ch). Mr Wharton, who was terminally ill, made a death-bed Will in contemplation of marriage, leaving his entire estate to his partner, Maureen, of 32 years. Immediately after executing the Will, Mr Wharton married Maureen. He died a couple of days later.

Norris J had this to say, at para. [110]:

> *I consider the criticism of Mr Bancroft for a failure to follow "the golden rule" to be misplaced. His job was to take the will of a dying man. A solicitor so placed cannot simply conjure up a medical attendant. He must obtain his client's consent to the attendance of and examination by a doctor. He must procure the attendance of a doctor (preferably the testator's own) who is willing to accept the instruction. He must make arrangement for any relevant payment (securing his client's agreement). I do not think Mr Bancroft is to be criticised for deciding to make his own assessment (accepted as correct) and to get on with the job of drawing a will in contemplation of marriage so that Mr Wharton could marry. I certainly do not think that "the golden rule" has in the present case anything to do with the ease with which I may infer coercion. The simple fact is that Mr Wharton was a terminally ill but capable testator.*

Failure to ensure due execution

There have been a number of cases where a solicitor has been negligent in failing to ensure that the Will was validly executed in accordance with s. 9 of the Wills Act 1837.

In *Esterhuizen v Allied Dunbar Assurance* [1998] 2 FLR 668 the Will was invalid, not having been attested by two witnesses. The entire estate passed on intestacy to the testator's adopted daughter. The defendants were held to be negligent in failing to take reasonable steps to assist the testator in the execution of his Will, by inviting the testator to their offices to execute the Will, or by visiting his home with another member of staff. It was held to insufficient to advise in writing as to the mode of execution.

In *Gray v Richards Butler* [2000] WTLR 143 the Will was invalid as the witnesses were not both present at the same time when the testatrix signed the Will. However, the solicitors who prepared the Will were not held liable in negligence. Even though the solicitors did not personally supervise execution, they left the testatrix a standard set of instructions on execution, described by Lloyd J as “most comprehensive”.

Gray in apparent conflict with *Esterhuizen* where it was held to be insufficient to give written instructions as to execution, and where personal attendance was required. However, in *Gray* the solicitor made a reasonable assessment that the testator was capable of following written instructions. In *Esterhuizen* the testator was not so capable. If, therefore, there is any doubt as to whether the testator is capable of following written instructions, it would be safer to supervise execution personally.

In *Humblestone v Martin Tolhurst Partnership (a firm) [2004] EWHC 151* the Will was not signed by the testator. The solicitors failed properly to check the Will, when returned to them for safe-keeping to check whether its execution was ostensibly valid. It had, in fact, been checked by a secretary who decided that it had been validly executed: a clear case of negligence!

Marley v Rawlings

In *Marley v Rawlings* [2012] EWHC Civ 61 Mr and Mrs Rawlings signed mirror Wills leaving their respective estates to the surviving spouse but, if the spouse failed to survive, to their adopted son. Unfortunately, Mr Rawlings mistakenly signed Mrs Rawlings’ Will, and vice versa, prima facie rendering the Wills invalid on the grounds that the testators did not intend by their respective signatures to give effect to the Will they in fact signed: s. 9(b) of the Wills Act 1837. In consequence, the survivor’s estate passed on intestacy to two natural sons.

The Supreme Court held that the Will of the husband (who was the second to die) should be rectified so as to be effective, taking a generous view as to what is meant by a clerical error for the purposes of s. 20 of the Administration of Justice Act 1982.

The Will that he signed was corrected so that it referred to him, not his wife, as the testator, and made provision for his adopted son out of his estate, as he intended.

Costs

The Supreme Court gave a separate judgment on the issue of costs (*Marley v Rawlings* (No 2) [2014] 4 All ER 619. They ordered that the costs of the parties should be paid by the solicitors' insurers on the basis that:

(1) The Court would have ordered that the costs of the parties be paid out of the estate, rather than ordering the defendants to pay the claimant's costs as it was the error of a third party (the solicitor) which had caused the litigation and the defendants had not acted unreasonably in defending the claim.

(2) The claimant (as the Executor and residuary beneficiary of the estate) would have had a claim in professional negligence against the solicitor to reconstitute the estate by the depletion of the costs of the parties.

(3) The solicitors would recover their costs from their insurers.

(4) Therefore, the pragmatic course was to order that the insurers should pay the parties' costs of £70,000.

A slightly different order was made for the costs of the unsuccessful respondents in the Supreme Court to reflect the fact that they had entered into a conditional fee agreement.

Failure to advise that something be done to give effect to provision in will

The negligence may consist of a failure to take steps which are part of "the will-making process" in order to give effect to the testator's intentions, such as a failure to advise that a joint tenancy be severed.

In *Carr-Glynn v Frearsons* [1999] Ch 326 the testatrix owned a property jointly with her nephew. She instructed her solicitor to prepare a Will leaving her share to her

niece. The testatrix (who was 81) died without any notice of severance having been given. The Will was, therefore, ineffective to pass a half share in the property to the niece.

The solicitor was held to be liable to the niece for failure to advise the testatrix to sever the joint tenancy. If that advice had been given, it would have been accepted. Severance was part of the will-making process in that, without it, the testator's intention to benefit her niece could not be effected.

The decision illustrates that the duty of care is not restricted to a failure to record the testator's instructions, but may extend more widely to a failure to give effect to those instructions, by advising that something needs to be done to make sure that those instructions have proper legal effect, e.g. that a notice severing a joint tenancy be served.

Correct claimant

Given that the negligence lay in failing to ensure that an asset fell into the estate by advising that a notice of severance be served promptly, the relevant loss would appear to have been suffered by the estate. Generally, the correct claimants for loss to the estate are the personal representatives.

However, the Court of Appeal allowed a claim by the testatrix's niece, as the intended specific devisee of the severable half share in a property, on the basis that, if the damages were paid to the personal representatives, they would form part of the residuary estate distributable to the residuary beneficiaries, and not to the claimant as the testatrix intended.

Shah v Forsters

Shah v Forsters [2017] EWHC 2433 (Ch) is another case where there was an alleged, negligent, failure to advise that a joint tenancy be severed.

Mr and Mrs Collins owned two valuable properties as joint tenants. In 2011 Mrs Collins instructed Forsters to advise about her own Will and its effect on two jointly owned

properties she held with her husband, who was suffering from dementia and was 10 years older than her.

There was some discussion as to severing the joint tenancies in order to avoid the risk that Mrs Collins' half share would pass, in the unlikely event that Mrs Collins predeceased her husband, to the ultimate beneficiary of Mr Collins' residuary estate, the National Trust, against whom Mrs Collins had developed some antipathy.

Mrs Collins did not, in the event, sever the joint tenancies. She simply made a Will which left her estate to charities, with a letter of wishes asking her personal representatives to sever the joint tenancies after her death (which she was wrongly advised might be legally effective).

In fact, unexpectedly, Mrs Collins predeceased Mr Collins. Her half share in the joint properties passed to Mr Collins and ultimately, to the National Trust, contrary to her apparent wishes.

The claim

A professional negligence claim was brought by Mrs Collins' Executors for loss to her estate, i.e. the loss of a half share in the two joint properties, on basis that Forsters owed a duty to consider and advise as to severance, so that her wishes not to benefit the National Trust were implemented.

It was claimed that Mrs Collins should have been advised to sever the joint tenancies by serving a notice, rather than relying on a meaningless letter of wishes that her personal representatives effect a post-death severance.

No breach

The claim was rejected on the facts. The Judge found that Mrs Collins had been advised as to the possibility of severing the joint tenancies, and that such severance would prevent her half share in the properties from passing ultimately to the National Trust. However, she had given very clear instructions that she wanted to leave other matters for further discussion of the later date. At that stage she had not wanted to

sever the joint tenancies. She had known that she had not done so and had understood the consequences of that decision.

As the Judge said, there was no duty to ensure a particular outcome, i.e. that Mrs Collins' interest in the joint properties ended up with her chosen beneficiaries, rather than with the National Trust. The only duty is to take care that effect is given to the testator's intentions. There was, therefore, no breach, as the solicitors acted on her instructions.

Duty

The Judge did, however, make some pertinent comments on the scope of the solicitor's duty. He said that the defendant solicitors owed duties to explain the effect of joint tenancies, and the effect that non-severance would have in terms of the distribution of assets that would otherwise have formed part of the testatrix's estate on her death. Furthermore, there was a duty to ascertain the testatrix's wishes in the light of such explanations.

Absent instructions to the contrary, the duty upon the solicitors was to take care that effect was given to the testatrix's testamentary intentions, which would extend to her wishes as to how she would have wanted her assets to have devolved in certain readily foreseeable eventualities. The duty would, again subject to the course of discussion, thus require reasonable enquiries for the ascertainment of matters which might have an impact upon how the testatrix's intentions and wishes would play out in various scenarios including anticipated life expectancies, gifts and inheritances.

Again, this decision illustrates that the scope of the duty goes further than faithfully recording the testator's instructions. There is a duty to explore and explain how the testator's wishes and intentions are best effected, and to advise accordingly.

Loss of a chance/causation

The Judge also made some findings and remarks on causation and loss of a chance. On causation, he found that, on the balance of probabilities, Mrs Collins would not have severed the joint tenancies, even if she had been advised to do so.

On a loss of a chance, the claim was brought by the personal representatives of Mrs Collins' estate. The claim was not one by a disappointed beneficiary. The issue was, therefore, what Mrs Collins would have done if properly advised. Mrs Collins' personal representatives stood in her shoes. The question was not, therefore, what a 3rd party would have done. Damages were not, therefore, to be assessed on a loss of a chance basis as to what Mrs Collins would have done, but on the basis of what she would have done on the balance of probabilities.

Duty to clarify relevant matters

A solicitor may also be liable for a negligent failure to clarify facts relevant to their instructions.

In *Herring & Hartley v Shorts Financial Services*, Lawtel, 9 May 2016, a solicitor drafted a Will including pecuniary legacies of £54,000 to the two claimants. The testatrix had intended that they should both receive £200,000 in total taking into account the value of their respective interests under two trusts, including a loan trust which the testatrix had set up in her lifetime for the claimants' benefit.

The testatrix wrongly believed that the value of the claimant's existing interests was £146,000, rather than £21,000. The claimants, therefore, received smaller legacies than the testatrix had intended.

The claimants faced a difficult decision as to whether to pursue the financial adviser (who, arguably, had provided inaccurate or confusing information) or the solicitor (who had drafted the Will and who, arguably, was responsible for querying any uncertainty in the information provided by the financial adviser).

The claimants sued both, but then settled the claim against the solicitors. This was, perhaps, a mistake. The claim against the financial adviser failed on the grounds that the testatrix did not rely on the financial adviser for advice in relation to the Will. She did not discuss its terms with him nor ask him for advice. He was just asked to provide a valuation of the trusts. He not know how she intended to benefit the claimants.

The Judge, however, commented that it was difficult to resist the conclusion that the solicitor was in breach of his duty to the testatrix and to the claimants. There was a duty of care to make such reasonable enquiries that a competent solicitor should have made, if a reasonably competent solicitor would have made further enquiries having been presented with information which was unclear or which called for further enquiry.

The solicitor should, therefore, have made sufficient enquiries to satisfy himself that the relevant trust monies would pass to the claimants. Alternatively, he should have devised a form of words to ensure that the claimants each received £200,000 after taking into account the monies they received under the two trusts. It was negligent to draft the will based solely on the limited information provided by the financial adviser.

The case illustrates that a Will draftsman may be liable to the beneficiaries of a will, even if the draftsman has, strictly speaking, followed the testator's instructions, if he should have made some further inquiries relevant to his instructions.

No liability for incorrect advice in Scotland

The Scottish courts have taken a more limited view of the scope of the *White v Jones* duty. In *Fraser v McArthur Stewart* [2008] COSH 159 the defender solicitors gave negligent advice to the testator that it was impossible in law for the testator to leave a croft to the three pursuers, and that the croft could only be left to a single beneficiary.

In reliance on this advice, but unwillingly in the light of his desire to benefit the pursuers, the testator instructed the defenders to draw up the will in favour of a single beneficiary.

The Court of Session held that the ratio of *White v Jones* was restricted to a case where there had been a negligent failure to draw up an instrument giving effect to the testator's instructions. There is no wider, and more general, duty to a disappointed beneficiary in respect of loss caused by negligence advice.

The solicitors were not, therefore, liable because the Will was a correct expression of the testator's last stated testamentary intentions, even if those intentions were formulated on the basis of negligent advice.

The Court purported to apply the law in *White v Jones*. However, it is questionable whether the English courts would reach the same conclusion that there can be no liability for failure to advise a testator as to how best to give effect to his or her wishes.

No duty if no expression of intention to benefit specified beneficiary

There is, however, one significant limitation on the scope of the solicitor's duty. It seems that there can be no liability if the testator has not expressed any intention to benefit an identified person, even if the solicitor could be criticised for not ascertaining the testator's intention with regard to that person.

In *Gibbons v Nelsons* [1999] Ch 326 the testatrix had a power of appointment by her will to appoint a half share in the house, where she was living to her sister, to her sister. She never did so because the solicitor did not advise her that she could do so.

It was held that the solicitor owed no duty to the sister because the testatrix had never expressed a wish to benefit her sister. Therefore, the solicitor did not know that she wished to benefit her sister, even though he never asked.

According to Blackburne J:

> (1) the solicitor must know (a) what the benefit is that the testator wishes to confer and (b) who the person or persons or class of persons are (in each case ascertainable if not actually named) on whom the testator wishes to confer the benefit; and
>
> (2) there must be "convincing evidence" as to what the testator would have instructed if he had been properly advised.

So it is one thing to impose a duty if the testator expresses a wish to benefit someone: there is then a duty to advise how best that intention can be effected.

However, it is another thing to impose a duty to advise as to how to benefit someone where the testatrix has not expressed any intention to benefit that person.

Claims by PRs: losses in the course of administration

It is clear that personal representatives may claim losses to the estate, caused by a solicitors' negligence, where those losses arise post-death during the course of administration.

In *Chappel v Somers & Blake* [2003] WTLR 1085 the solicitors instructed to act in the administration of the estate did nothing to obtain a grant of probate for almost 5 years, after which the executrix obtained a grant of probate through another firm. The Executrix claimed loss of income from two properties comprised in the residuary estate during the period of delay. The failure by the solicitors to obtain a grant promptly amounted to negligence. The issue was whether the Executrix (who had no interest in the residuary estate) had suffered any loss which she could claim.

The solicitors applied to strike out the action contending that any alleged loss had been suffered by the residuary beneficiary, to whom the properties had been devised, and not by the Executrix in her capacity as such. Neuberger J held that the Executrix represented the interest of the deceased owner of the property and was, therefore, the person entitled to recover damages. During the period of administration she was the person entitled to income from the properties comprised in the estate. Those properties did not, during the period of administration, vest in the residuary beneficiary. The Executrix was liable to account to the beneficiary for any damages received. The Executrix had herself suffered a loss because she has lost the income that she would have received if probate had been obtained and the assets had been administered promptly. Therefore, the proper claimant was the Executrix, not the residuary beneficiary (albeit that the residuary beneficiary should be joined so as to prevent double-recovery).

Claims by PRs for post-death loss to estate: breach during deceased's lifetime

It is a much more difficult question as to whether personal representatives can recover from solicitors losses suffered by the estate after the death of the client, as a

result of negligent advice given by solicitors to their client during the client's lifetime. In particular, it is not clear whether personal representatives can sue for IHT payable out of the residuary estate which would not have been payable but for negligent IHT-planning advice given to the client during his lifetime. Alternatively, can such a claim be brought by the residuary beneficiaries?

The difficulty facing a claim by personal representatives is that: (a) the client has suffered no loss during their lifetime which can be transmitted to their personal representatives on their death (*Daniels v Thompson* [2004] EWCA Civ 307); (b) it is questionable whether a duty of care in tort can be owed directly the personal representatives in their own right, given that they may not even have been appointed when the tax advice was given, so that there is insufficient proximity; and/or (c) the personal representatives will not have suffered any personal loss if they can recover the tax out of the estate.

If the personal representatives do not have any cause of action, it may be that the residuary beneficiaries have a *White v Jones* claim, otherwise the only persons who have suffered loss will have no remedy. However, if the personal representatives have a claim, there is no lacuna justifying a *White v Jones* claim. An alternative argument is that the residuary beneficiaries may have a claim based on their reliance upon the defective tax advice if the adviser knew or ought to have known that the beneficiaries were relying on such advice being effective.

There have been two strike-out cases in England which have explored these issues, where it has been accepted as arguable that the personal representatives and/or the residuary beneficiaries may have a claim to recover overpaid IHT on the death of the deceased (*Rind v Theodore Goddard* [2008] PNLR 459 and *Vinton v Fladgate Fielder* [2010] EWHC (Ch) 904). There is also a Scottish case (*Steven v Hewats* [2013] CSOH 60) where it was acknowledged that there may be a claim by residuary beneficiaries, but not by the personal representatives. However, there have been no recent reported cases.

Mistake

It may be possible to avoid a negligence claim by the client, or after their death, their personal representatives bringing a claim that the gift or transfer giving rise to the unanticipated tax liability should be set aside on the grounds of mistake (see *Pitt v Holt* [2013] 2 AC 108).

In *Smith v Stanley* [2019] EWHC 2168 (Ch) the law was summarised as follows:

1. A donor can rescind a gift by showing there has been some mistake of so serious a character as to render it unjust on the part of the donor to retain the gift and that is *Pitt v Holt* para.101 quoting *Ogilvie v Littleboy [1997] 13 TLR 399* , 400. This principle also applies to voluntarily dispositions by trustees as well.
2. A mistake is to be distinguished from mere inadvertence on this prediction. *Pitt* , para.104.
3. Forgetfulness, inadvertence or ignorance are not, as such, a mistake but can lead to a false belief or assumption which the law will recognise as a mistake. *Pitt* para.105.
4. It does not matter that the mistake was due to carelessness on the part of the person making the voluntary disposition unless the circumstances are such as to show that he deliberately ran the risk or must be taken to have run the risk of being wrong. *Pitt* para.114.
5. Equity requires the gravity of a mistake be assessed in terms of injustice or unconscionability. *Pitt* para.124.
6. The evaluation of unconscionability is objective. *Pitt* para.125.
7. The gravity of the mistake must be assessed by a close examination of the facts which include the circumstances of the mistake and its consequence for the party making the mistake in disposition. *Pitt* para.126.
8. The court needs to focus intensely on the facts of the particular case. *Pitt* para.126.
9. A mistake about the tax consequences of the transaction can be a relevant mistake. *Pitt* para.129 to 132.
10. Where the relevant mistake is a mistake about the tax consequence of the transaction, then to quote Walker L in *Pitt* at para.135:

”*In some cases of artificial tax avoidance, the court might think it right to refuse relief either on grounds that such claimants acting on supposedly expert advice must be taken to have accepted the risk that the scheme will prove ineffective or on the ground that discretionary relief should be refused on grounds of public policy*.”

11. It is not pointless, nor is it acting in vain to set aside a transaction and to remove a liability to pay tax, even where that is the principle or the only effect of the setting aside. *Pitt* paras.136-141.

Limitation

The disappointed beneficiary’s cause of action accrues on the death of the testator. That is no doubt the case where the Will has not been prepared by the date of the client’s death due to negligent delay (*Bacon v Howard Kennedy* [2001] WTLR 169).

It is probably also the case where a Will has been defectively executed, on the basis that the defect could have been remedied at any date up until death, and that a Will is ambulatory until death (see *Nouri v Marvi* [2010] PNLR 7).

A claim by personal representatives or residuary beneficiaries to recover IHT payable by the estate as a result of defective tax-planning advice should be accrue on death.

However, the claim will be subject to the 15-year long-stop in s. 14B Limitation Act 1980.

CHARLES HOLBECH,

RADCLIFFE CHAMBERS.

30 OCTOBER 2019.