Solicitors owed a duty to beneficiaries of an *inter vivos* trust: *Lonsdale and ors v Wedlake Bell and ors* [2024] EWHC 712 (KB)

Introduction

A firm of solicitors was instructed to act in relation to a trust of property, but negligently failed to give effect to the settlor's intentions with the result that the trust failed to confer the intended benefit on the settlor's children. Faced with a claim brought by the settlor, the trustees and the intended beneficiaries, the defendants[1] sought to argue that all the claims should be struck out, on the basis that nobody other than the settlor had standing to sue, and his claim was statute barred. Martin Spencer J permitted all the claims to proceed. Most strikingly, he held that in his judgment, the solicitors owed the intended beneficiaries a direct duty of care. Accordingly, the judgment amounts to an open invitation to the court, at any subsequent trial of this or a similar claim, to dispense with the complexity that bedevils this area of the law and adopt a relatively straightforward route to a remedy for disappointed beneficiaries of irrevocable *inter vivos* trusts.

Facts

In June 1987, C1 settled various assets into a trust for the intended benefit of his daughter Leonora, then a year old, and any future children. The class of beneficiaries included the children of C1, but also any children of either of his two sisters, born before the date when the oldest beneficiary (Leonora) reached the age of 25. At 25, each beneficiary would become entitled to income from his or her share of the trust, with a power in the trustees to transfer all or part of that beneficiary's share to them absolutely.

The trust contained a power to vary so that any beneficiary's share in the trust fund could be varied before that beneficiary reached the age of 25, subject to a minimum entitlement of £100. In other words, if (as turned out to be the case), C1 went on to have several children, the Trustees could remove his nieces and nephews as beneficiaries (save that they would each

[1] The application was in fact brought by D1, the successor practice to the negligent solicitors, and D3, the indemnity insurer; default judgment was obtained against D2, the defunct former firm.

remain entitled to £100) and share the bulk of the multi-million-pound trust fund between his own children alone.

C1 and his wife went on to have three more children, whilst his sisters between them had five. It was accepted that C1 intended any nieces or nephews to be "longstop beneficiaries", and for the trust to be shared equally between his children, and that this could have been achieved by the trustees exercising the power to vary before any of the beneficiaries reached the age of 25. Unfortunately, shortly before Leonora's 25th birthday, and having been asked by C1 to confirm the position, the solicitors wrongly advised that Leonora would become entitled to a ¼ share of the trust fund. Accordingly, no steps were taken to vary the trusts. It was accepted that, properly advised, the Trustees would before Leonora's 25th birthday have taken those steps.

The Trustees proceeded to act on this incorrect basis, making dispositions to C1's eldest children when they turned 25 on the basis that they were entitled to a ¼ share of the fund, and failing to make payments to the eldest three nieces and nephews when they turned 25. In 2018, the error was then realised and, following investigation, the interests of the remaining four potential beneficiaries varied. That decision followed a letter from the solicitors in January 2019 which concluded that this was the most that could be done to remedy the position.

The claim was issued on 16 December 2021[2]. It was brought by C1 in his capacity as Settlor and as one of the Trustees. C2-C4 were the remaining Trustees, and C5-C8 were C1's four children ("the Children").

The application

The Defendants sought to argue that all the claims should be struck out or summarily dismissed because, they argued:

i) No loss had been suffered by the Trustees;

ii) No duty of care was owed to the Children;

[2] An earlier claim, issued well within time, was struck out because Cs' solicitors failed to serve the claim form in time; the judge commented at [76] that the entire history reflected poorly on the legal profession.

iii) C1 had an arguable claim as Settlor, but that was statute barred because he had known of the error in 2018;

iv) The Trustees' claim was likewise statute barred because C1's knowledge was to be imputed to all the Trustees.

The law in relation to claims arising from inter vivos trusts

Where trust assets are diminished by negligence on the part of the legal advisers of the trust, the trustees are entitled to bring a claim on behalf of the beneficiaries to make good the loss to the trust. The position in those circumstances is that the duty is owed to the trustees, and the fruits of any action for breach of that duty belongs to the trust: the beneficiary cannot sue.[3]

Ds sought to argue that the trust estate as a whole was not diminished by the negligence, and remained held for the benefit of all of the beneficiaries. The fact that the class of beneficiaries was wider than the Settlor had intended was not a loss to the Trust itself. Accordingly, it was said that the party to whom the duty was owed had suffered no loss, whereas the party which had suffered loss (the Children) was not owed a duty. This is, of course, very similar to the argument rejected by the court in the seminal wills case of *White v Jones* [1995] 2 AC 207. The Defendant sought to get around that by arguing that there was no lacuna: C1 would have had a claim as Settlor, had that claim not been statute barred.

However, the judge accepted (at [79]) that the position of the Trustees was arguably analogous to the position of the executrix *in Chappell v Somers & Blake* [2003] EWHC 1644 (Ch). In that case the beneficiary had suffered loss of rental income on inherited property because of the solicitor's delay in obtaining probate: a claim by the executrix was allowed to proceed even though the loss was suffered by the beneficiary.

Furthermore, the Trustees should be permitted to run an argument (set out at [65]) that the trust estate should be regarded as sub-divided into a number of trusts, each representing a share of the particular beneficiary: on that analysis, the Trustees had indeed suffered loss *qua*

[3] See *Hayim v Citibank NA* [1987] AC 730; *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

trustee of each of the Children's shares of the trust estate, which had been diminished by the unintended widening of the class of beneficiaries.

In relation to the Children's claims, the judge (at [81]) framed the key issue as being whether C1 "because he has irrevocably divested himself of the trust estate and no variation is possible because some of the beneficiaries have attained 25, is in an analogous position to the testator in *White v Jones*" or whether, because he remained alive and able to sue the solicitor for damages, the case was not within that principle.

The judge referred to *Hughes v Richards* [2004] EWCA Civ 266, where a claim by the beneficiaries arising from a negligently-structured *inter vivos* family trust was allowed to proceed, but in circumstances where the loss arose not from a failure to make the original disposition but from the erosion of the fund by taxes and fees which it had been designed to avoid; and *Carr-Glynn v Frearsons* [1999] Ch. 326, where a testamentary gift failed not because of a defect in the will but because of the solicitor's prior failure to advise the testatrix to sever a joint tenancy in relation to the property she intended to bequeath to her niece. At [82] he held that it was arguable that "the law… now allows for recovery within the principles laid down by *Caparo Industries plc v Dickman* [1990] 2 AC 605" and hence "recognises a duty owed by the solicitors to the Children given that it was specifically their interests which [C1] was seeking to protect when he sought advice from [the solicitors] in June 2011 and this was known to [the solicitors]."

The judge also accepted that it was arguable that "where the donor has irrevocably divested himself of the estate…for the cause of action arising from negligence to lie with the Trustees is much neater and legally more satisfactory [than a claim by the Settlor], and much less likely to result in over-recovery or under-recovery."

Ultimately, the judge accepted that it was desirable for all the claims to be allowed to proceed, to avoid any possible lacuna in recovery, and bearing in mind that the court would be "astute to prevent double recovery."

Notably, however, he expressly "grasped the nettle" of deciding that D's arguments were wrong in law: "in my judgment the solicitors owed the children a direct duty of care in circumstances such as these, where the disposition was completed and where the effect of

the solicitor's negligence was to make the disposition irrevocable."[4] He accepted, in short, that the solicitors had a duty to protect the intended beneficiaries from the loss they would suffer if effect was not given to the intentions which the settlor had instructed them to put into effect.

In any event, as a matter of discretion, he refused the application on the basis that it would be wrong to strike out or summarily dismiss the claim in what is a developing area of the law (at [87]).

Limitation

The limitation arguments failed: C1, and therefore the other trustees, did not have sufficient knowledge of the extent of the damage until 2019, since until that point it had been suggested by the solicitors themselves that there might be a solution and that C1 should delay taking independent legal advice until their investigations were complete. The judge indicated that in his view the other Trustees were fixed with knowledge of relevant facts when those facts became known to C1, who was ostensibly acting on behalf of all of them, but he declined to strike out the Trustees' arguments to the contrary.

Conclusion

Whilst the judge only had to conclude that the Claimants' position was arguable, the judgment signals a rejection of overly complicated and technical attempts to defeat claims by the disappointed beneficiaries of *inter vivos* trusts, at least where they arise from an irrevocable settlement. It calls into question the need for a "lacuna" as a necessary feature of liability, and highlights the potential unfairness of leaving it to the settlor to remedy any loss to the beneficiary. It remains to be seen whether the case will now proceed to test these arguments

[4] See *also Hemmens v Wilson Browne* [1995] Ch 223 at 236C-F, where HHJ Moseley QC expressed the view *obiter* that in a case where an irrevocable gift has been made which confers a benefit on X rather than Y, Y should be able to claim.

at trial, and thus provide the authoritative decision that practitioners and potential litigants need.

Alice Nash, Hailsham Chambers

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Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.