



Negligent tax advice and disappointed beneficiaries:- The extent of *White V Jones* Liability

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INTRODUCTION

1. This talk concerns two scenarios which will be familiar to many practitioners:-
 - (a) A beneficiary wishes to claim against the testator's solicitor because the solicitor could have advised the testator to adopt a more effective inheritance tax planning strategy.
 - (b) A beneficiary of an *inter vivos* trust wishes to claim against the settlor's solicitor because the trust could have been established in a way that reduced or eliminated its tax liability.
2. Did the solicitor owe a duty of care to the disappointed beneficiary in these circumstances? Although *White v Jones* [1995] 2 AC 465 has been with us for almost two decades, the answer is not as simple as it might seem at first sight. In fact there is no binding authority to the effect that a duty of care exists in either of the scenarios.
3. This talk will consider the decision in *White v Jones* itself and then attempt to assess what claims and remedies are available in each of the scenarios outlined above.

WHITE v JONES AND ITS CONTEXT

4. While few would doubt that *White v Jones* had a just result on its own facts, the parameters of the principles the House of Lords used to reach that result are still

being worked out. Much of the difficulty stems from the fact that the decision was a radical departure from pre-existing principles. This can be seen if the decision is put (briefly) into its legal context before the details of the case itself are considered.

5. The issue in *White v Jones* is part of the wider problem of how to set the boundaries of liability for pure economic loss. Lord Oliver summed up the dilemma in *Murphy v Brentwood DC* [1991] 1 AC 398:

*'The critical question ... is... whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained ... The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen. Thus, the categorisation of damage as economic serves at least the useful purpose of indicating that **something more** is required ...'* (Emphasis added.)

6. Before *White v Jones* the 'something more' had to be supplied by the existence of a special relationship between the adviser and the claimant involving a voluntary assumption of responsibility by the former to the latter. Liability for negligent advice in these circumstances was first recognised in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, which concerned an over-optimistic financial reference provided by a company's bankers to a trade creditor. Over the next three decades the *Hedley Byrne* principle kept the higher courts very busy. Its reach was extended to many common circumstances where the careless professional was not caught by the terms of his contractual retainer and his victim would otherwise have been left without a remedy.
7. Although several distinct approaches for extending liability in new circumstances were identifiable in the House of Lords' decisions by the early 1990s, all of them had one feature in common: the claimant must have relied, reasonably and foreseeably, on the defendant's negligent act or statement and thereby suffered loss. Reliance would not be reasonable or foreseeable if the advice was qualified with a statement disclaiming liability (as was the case in *Hedley Byrne* itself); and thus the careless professional had an obvious means to protect himself (subject to statutory restrictions).
8. The need for reliance seemed to rule out any possible claim by a disappointed beneficiary against the testator's or settlor's negligent advisers. In *Ross v*

Caunters [1980] Ch 297 the Court of Appeal had held a solicitor liable to an intended beneficiary when a will had not been properly attested. But by the early 1990s this case was widely believed to have been wrongly decided or at least to have been implicitly overruled by the House of Lords. *White v Jones* turned such assumptions on their head.

9. **White v Jones [1995] 2 AC 207 (House of Lords)**

Facts: Following the resolution of a family feud, the testator instructed the defendant solicitor to draw up a new will naming his daughters as beneficiaries. He died around two months later. By this time the solicitor had negligently failed to act on his instructions and consequently the daughters were left empty-handed.

The daughters sued the solicitor in their capacity as intended beneficiaries. At first instance the claim was struck out on the basis that no duty of care was owed. The Court of Appeal allowed the daughters' appeal. The solicitor appealed to the House of Lords.

Held (3-2): Appeal dismissed. The simple *ratio* was that the solicitor did owe a duty of care to the daughters in the circumstances of the case. The three members of the majority reached this conclusion through differing routes.

- **Lord Goff** (leading speech):
 - The claim faced serious conceptual difficulties, five of which are listed in the speech.
 - Such difficulties were trumped by the need to do practical justice:

'In the forefront stands the extraordinary fact that, if [the claimed] duty is not recognised, the only persons who might have a valid claim (i.e. the testator and his estate) have suffered no loss, and the only person who has suffered a loss (i.e. the disappointed beneficiary) has no claim... therefore... if the solicitor owes no duty to the intended beneficiaries, there is a lacuna in the law which needs to be filled. This I regard as being a point of cardinal importance in the present case' (pp. 260-216).
 - Consequently, the *Hedley Byrne* principle should be extended so that in law the solicitor's assumption of responsibility towards his client gives the

intended beneficiary a remedy against the solicitor in circumstances where it is reasonably foreseeable that the intended beneficiary will be deprived of his intended legacy and neither the testator nor his estate will have a remedy against the solicitor (p. 268).

- Justice should not be denied in an 'ordinary' case with a small number of identifiable intended beneficiaries merely because in future there might be more difficult cases in which the adviser faced the risk of liability to an indeterminate class or persons unborn at the date of the testator's death. The boundaries of liability could be worked out when such cases came to be decided (p. 269).

- **Lord Browne-Wilkinson:**

- 'Negligent misstatement' cases following *Hedley Byrne* always involve reliance by the recipient of the advice as a matter of fact. That does not, however, mean that the special relationship necessary to give rise to liability for economic loss always has to involve such reliance as a matter of law (p. 272).
- The law already recognised two categories of special relationship giving rise to liability for economic loss, namely fiduciary relationships (*Nocton v Ashburton* [1914] AC 932) and reliance on a negligent misstatement (*Hedley Byrne*). The present claim did not fit either category as the intended beneficiary was owed no fiduciary duty by the solicitor and did not rely on his advice. Therefore the law should recognise an additional category of special relationship based on the solicitor's assumption of responsibility for the task in question and his knowledge that the beneficiary is wholly dependent upon his carrying out that task (p. 275).

- **Lord Nolan** gave a brief judgment concurring with Lords Goff and Browne-Wilkinson and adding various observations of his own.

10. Thus, although the two main speeches on behalf of the majority reached the same result, they did so on different bases:-

- (a) The '**lacuna basis**' propounded by Lord Goff: the beneficiary has a claim only where the negligent solicitor would otherwise pocket his ill-gotten fee

and escape liability. Presumably, such a claim will not be possible where the solicitor's own client, or the PRs in his shoes, could bring a claim (or possibly not even where such a claim could have been brought but is now time barred).

- (b) The **'special relationship'** basis propounded by Lord Brown-Wilkinson: like negligent misstatement and breach of fiduciary duty, the relationship between the solicitor and the beneficiary amounts to, or is part of, a free-standing category of special relationship giving rise to liability for economic loss. In principle, there is no obvious reason why a claim in this category should be limited to circumstances where there is a lacuna in the other categories.

11. While these differing approaches may give rise to an interesting academic debate as to how the law should develop in future, this talk is concerned with the law as it stands. One can speculate as to what direction the law will take when our highest judges are next consulted, but in the meantime we must grapple with what they left us in *White v Jones*. This is not an altogether straightforward task. Lord Browne-Wilkinson said little about how the limits of his third category of special relationship should be defined. Lord Goff said even less about how the limits of his preferred basis of liability should be worked out in future difficult cases. None of the majority even mentioned circumstances in which negligent tax advice has diminished the assets available to beneficiaries of a post-death estate or *inter vivos* trust. That has not, of course, deterred disappointed beneficiaries from trying to apply *White v Jones* in such circumstances.

POST-DEATH CLAIMS FOR NEGLIGENT TAX PLANNING

Potential Causes of Action

12. The possibility of applying *White v Jones* liability to negligent tax planning during the testator's lifetime has been canvassed in the three cases set out below. The courts' comments on this possibility will be set out in relation to each case under the heading **"Claim by disappointed beneficiary"**. Broadly speaking, three other heads of claim have also been considered:

- **PRs in own capacity:** Claim in tort by personal representatives in their capacity as such (also a *White v Jones* claim in that the PRs cannot have relied upon the negligent advice).
- **PRs in contract:** Claim in contract by PRs standing in the testator's shoes, i.e. the cause of action accrued during the testator's lifetime and was inherited by the PRs who now sue on behalf of the estate.
- **PRs in tort:** Claim in tort by the PRs standing in the testator's shoes, i.e. a conventional (pre-*White v Jones*) *Hedley Byrne* claim which accrued during the testator's lifetime and was inherited by the PRs who now sue on behalf of the estate.

13. It is necessary to consider the scope and viability of these alternative claims alongside the *White v Jones* claim. Depending on the circumstance, they might provide the claimant with useful additional or alternative weapons, or they might give the defendant an argument that *White v Jones* is not applicable as there is no lacuna to be filled.

14. It is one thing to canvass the theoretical viability of a particular kind of claim; it is quite another thing to issue a binding judgment holding that such a claim is definitely possible or not possible. Unfortunately, the courts have done much more of the former than the latter in the tax negligence cases since *White v Jones*.

Case Law

15. Daniels v Thompson [2004] All ER(D) 357 (Court of Appeal)

Facts: The defendant solicitor advised the testatrix to transfer her home to her son so as to take it outside her estate for IHT purposes. He neglected to mention that she needed either to move out of the property or to pay market rent for her continuing occupation. Consequently, the arrangement fell foul of the gift with reservation provisions and the IHT liability was £30,980 more than otherwise. The son was the sole executor and sole beneficiary.

The son sued the solicitor in his capacity as executor on behalf of the estate. At first instance, the solicitor succeeded in having the claim struck out on the ground that the cause of action had accrued when the testatrix acted upon the advice, which was more than six years before the claim was filed.

Held (Dyson, Carnwath LJ and Gray J): The Court of Appeal dismissed the son's appeal and also rejected a last-minute application to add a claim on behalf of the executor in his capacity as such.

- **Claim by disappointed beneficiary:** Dyson LJ remarked, *obiter*, that there was a 'reasonable analogy' between the facts of this case and the disappointed beneficiary cases of which *White v Jones* was the leading example. There is nothing in any of the judgments to suggest that their Lordships would have ruled against a claim by the testatrix's son in his capacity as a beneficiary. (Only he or his lawyers can explain why such a claim was not made.)

- **Claims by PRs:** These all failed.
 - **PRs in own capacity:** The PRs could not bring a claim because they had suffered no loss in their own right: although s. 200(1)(a) IHTA 1984 made them liable for the IHT, this was not a matter of any special significance because the IHT was payable by the estate a testamentary expense (s. 211) and they were liable only to the extent of the property received by them as PRs unless they were guilty of 'neglect or default' (s. 204(1)).

 - **PRs on behalf of estate (contract):** Such a claim would have been out of time on the facts of this case because the cause of action accrued at the time of the breach of contract, namely when the solicitor gave the negligent advice. However, Carnwath LJ referred to an earlier case of negligent advice during the testatrix's lifetime and remarked that her contractual cause of action against the adviser would have vested in the PRs upon her death as part of the estate.

 - **PRs on behalf of estate (tort):** Such a claim was impossible because of the rule that no cause of action in tort accrues until loss or damage is suffered. The testatrix suffered no loss during her lifetime because the unnecessary IHT did not become payable until after her death. This meant that there was no cause of action subsisting at the time of her death and thus no cause of action for the PRs to inherit. Alongside the ruling that the PRs could not sue *qua* PRs, this left a loophole through which the solicitor escaped liability.

16. Rind v Theodore Goddard (a firm) [2008] All ER (D) 134 (High Court)

Facts: Mr Rind was one of the residuary beneficiaries of the testatrix's estate under her last will, executed in 1989. The testatrix had been advised by the defendant solicitors in relation to the settlement of a large commercial property on family trusts in 1986. The solicitors also advised on a series of transactions between 1988 and 1992 that involved a loan to the testatrix being secured on an account balance derived from the sale of the property. She died in 2000. The Revenue took the view that these arrangements constituted a reservation of benefit in the property to the extent of the account balance, which resulted in an additional IHT liability of £690,798.

Mr Rind sued the solicitors in his capacity as a residuary beneficiary, alleging that they could have advised the testatrix to structure the transactions so as to avoid any reservation of benefit in the property. The solicitors applied for the claim to be struck out on the grounds that they were not instructed in relation to IHT planning and in any event they owed no duty of care to Mr Rind.

Held (Morgan J): The claim would not be struck out as it was arguable that the *White v Jones* duty should be extended to circumstances such as those of this case.

- **Claim by disappointed beneficiary:**

- Morgan J rejected the solicitors' argument that the *White v Jones* duty applied only to negligence in connection with wills. On the evidence it appeared that the firm had always been retained to advise the testatrix as to estate planning, in which case it was arguable that the *White v Jones* duty required them to consider the IHT consequences of the property and loan transactions.
- The firm also contended that they owed no duty to Mr Rind before he was named as a beneficiary in the 1989 will because the *White v Jones* duty could not be owed to an indefinite class of unascertainable beneficiaries. Morgan J appears to have accepted the general proposition as to the *White v Jones* duty. On the evidence, however, the testatrix always intended to benefit her children and grandchildren, in which case it was foreseeable that negligent IHT planning would cause loss to members of this class (who included Mr Rind as the testatrix's son).

- The six-year limitation period for a claim in tort began upon the testatrix's death, which was when the damage in question, namely the unnecessary IHT liability, was suffered (*Daniels* applied).
- **Claims by PRs:** Although none of the possible claims by PRs was pleaded in this case, they were discussed at various points in the judgment. Amongst other things, Morgan J rejected the argument that the defendants were at risk of double recovery because they faced a viable claim from the PRs.
 - **PRs in own capacity:** Not discussed in detail; *Daniels* followed.
 - **PRs on behalf of estate (contract):** Morgan J remarked that such a claim would have been possible but for the Limitation Act 1980. The cause of action would have accrued at the time of the negligent advice and would have vested in the PRs upon the testatrix's death. But as time started to run for limitation purposes when the cause of action accrued, the six-year period had long since expired. Morgan J commented that this was likely to be a common problem in such cases, as there would often be more than six years between the adviser's negligence and the testator's death.
 - **PRs on behalf of estate (tort):** Morgan J referred to various earlier authorities that cast doubt on *Daniels* but held that the court at first instance was bound to follow it.

17. *Vinton v Fladgate Fielder* [2010] STC 1868 (High Court)

Facts: The defendant solicitors were engaged to advise on a reorganisation of the share capital of a family company so that the estate of the testatrix, who was terminally ill at the time of the advice, would benefit from as much business property relief as possible. On the solicitors' advice, the testatrix, who already owned a substantial part of the company's equity, subscribed for an additional £1 million-worth of newly issued shares. She died two days later. HMRC took the view that the scheme failed because she had not owned the new shares for the required period of two years (s. 106 IHTA 1984), and consequently additional IHT of £359,344 was payable. The Special Commissioners agreed: *Vinton v CRC* [2008] STC (SCD) 592.

As a result of the tax appeal, it was clear that the two-year rule could have been avoided if the scheme had been effected by means of a rights issue rather than a simple purchase of new shares, for then the testatrix's reorganised share-holding would have been identified with her pre-existing share-holding (s. 107(4) IHTA 1984). This became the executors' and residuary beneficiaries' basic allegation of negligence when they claimed against the solicitors.

Held: Norris J refused the solicitors' strike-out application, holding that the executors and beneficiaries had reasonably arguable claims on the following bases, amongst others:-

- **Claim by disappointed beneficiary:** The general principle was applicable in this case. Norris J rejected two defences raised on behalf of the solicitors:
 - **Will making:** The solicitors' counsel contended that will-making was the only basis for a *White v Jones* claim. This was clearly not correct, as the principle had already been extended to other contexts, such as insurance policies (*Gorham v BT plc* [2000] 4 All ER 867) and *inter vivos* trusts (*Hughes*: see below).
 - **Conflict of interest:** Norris J accepted the general principle that the adviser's duty to the testator could not extend to the beneficiaries where the beneficiaries' interests conflicted with those of the testator. The solicitors' counsel said that there was such a conflict in this case because the testatrix was an investor in the company and some of the beneficiaries were directors. It was arguable, however, that there was no conflict in relation to the subject matter of the advice because the testatrix and directors all shared the aim of allowing the testatrix to invest in the company in the most 'tax-efficient' manner possible.

- **Claims by PRs:-**
 - **PRs on own behalf:** It was arguable that PRs could properly bring a claim in respect of a negligent failure to protect the estate from an unnecessary charge to tax. Norris J thought that *Daniels* was inconsistent with the decision of a differently constituted Court of Appeal in *Carr-Glynn v Frearsons* [1999] Ch 326. He also acknowledged the difficulty of treating advisers as owing a duty to the future PRs when the future PRs' identity may be unascertained at the time of the advice or may subsequently

change. He held that this did not prevent the claim from being arguable, however.

- **PRs on behalf of estate (contract):** The solicitors owed the testatrix a duty of care in contract based on their retainer; the executors, standing in her shoes, could claim for breach of contract even though her estate did not suffer any substantial loss until her death (at which point the IHT liability was incurred). The Court of Appeal's decision in *Otter v Church, Adams and Tatham* [1953] 1 All ER 168 was a precedent for such a claim.
- **PRs on behalf of estate (tort):** Norris J expressed doubt as to whether there could be any legal distinction between damage suffered by the testatrix in her lifetime and damage suffered by her estate upon her death. He thought the claim was arguable on the basis that the Court of Appeal could be persuaded to 'reconsider' *Daniels* as it was inconsistent with the decisions in *Otter* and *Carr-Glynn v Frearsons* [1998] 4 All ER 225.

18. *Steven v Hewats* [2013] CSOH 61; *Steven and Steven v Hewats* [2013] CSOH 60 (Court of Session, Outer House)

Facts: The deceased instructed the defendant solicitors that she wished to continue living in the family home and yet make a gift of it to her daughter with a view to reducing the value of her estate for IHT purposes. On the defendants' advice, she transferred the house to the daughter and the daughter executed a separate undertaking allowing her to remain there for the rest of her life. In 2006, they discovered that this arrangement fell foul of the gift with reservation provisions, so they executed a lease with the deceased paying market rent. Unfortunately, the deceased died a little over a year later, so the gift still fell to be treated as a chargeable lifetime transfer for IHT purposes. Part of this IHT liability fell upon the daughter personally as the recipient of the gift; the rest fell upon the estate.

The daughter and the PRs brought concurrent claims in the Outer House of the Court of Session. The defendants applied for the claims to be struck out on the grounds that the *White v Jones* principle did not extend to *inter vivos* gifts, there was no lacuna requiring a remedy, and there had been a conflict of interest between the deceased and the daughter.

Held: There was an arguable case that should proceed to trial on behalf of the daughter but not the PRs. The daughter could claim both in her ordinary personal capacity, in respect of the share of the IHT for which she was directly liable, and in her capacity as the sole beneficiary, in respect of the estate's share of the IHT.

- **Claim by disappointed donee / beneficiary:** The *White v Jones* duty arises where the solicitor has assumed responsibility to the beneficiary. Such an assumption of responsibility may happen where it is reasonably foreseeable that negligence on the solicitor's part would deprive the beneficiary of the benefit intended by his client and where no cause of action is available to the client or his estate. The purpose is to ensure, on the one hand, that there is no lacuna in which a loss sustained as a result of the solicitor's negligence cannot be recovered by anyone and, on the other hand, that the same loss cannot not be recovered twice.
 - **Inter vivos gift:** A disposition was not taken outside the scope of these principles merely because it was not testamentary. It fell within them as long as the consequences of the solicitor's negligent act were not capable of being remedied by his client (in this case, the deceased).
 - **Lacuna:** The only real argument here on the defendant's behalf was that the deceased had a cause of action in her lifetime in that she could have claimed for the cost of the additional legal work required in 2006 when the error was discovered. This did not fill the lacuna because it was a different loss from that suffered by the daughter, namely the unnecessary IHT liability.
 - **Conflict of interest:** Although there might be cases where the transactional element of a lifetime gift took it outside the *White v Jones* principle, that was not the case here. Applying *Vinton*, any conflict had to be more than theoretical. There was no real conflict where the transaction took place in a family context and the sole or principal purpose was to benefit the donee at the expense of the solicitor's client.
- **Claims by PRs:** The PRs claimed in tort on behalf of the estate. The judge analysed the English authorities and chose to follow *Daniels*, i.e. there was no claim against the solicitor because the deceased had not suffered any

damage during his lifetime and therefore the PRs had not inherited any cause of action upon his death.

Conclusion and Practical Considerations

19. The current position in respect of the potential claims canvassed in these four cases can be summed up as follows:-

- **Claim by disappointed beneficiary:** Frustratingly, there is still no binding authority on this point, as no *White v Jones* claim was pleaded in *Daniels* and the three strike-out application cases, where the point was pleaded, are authority only for the proposition that it is reasonably arguable. Nonetheless, the courts' judgments in all four cases are strongly favourable to the application of *White v Jones* in cases where beneficiaries have suffered loss through the negligence of the testator's tax advisers. Nor does there appear to be any good reason of principle or policy why negligent tax advisers should escape liability where negligent will-writers do not. It thus seems tolerably clear that *White v Jones* can apply to tax advisers in certain circumstances. However, the limits to those circumstances have not yet been fully worked through: see 'possible defences', below.
- **Claims by PRs:**
 - **PRs in own capacity:** Although such a claim was held to be arguable in *Vinton*, this was only on the basis that the Court of Appeal or Supreme Court could be persuaded that *Daniels* was wrongly decided. It will be a brave and well-funded claimant who undertakes this task.
 - **PRs on behalf of estate (contract):** Such claims appear to be open to the PRs as a matter of principle. But since the limitation period starts to run at the time of the breach of contract (i.e. the negligent advice itself), they will often be of no practical use.
 - **PRs on behalf of estate (tort):** Such a claim will not be viable unless and until *Daniels* is overruled.

20. **Possible defences:** A *White v Jones* duty will not be held to exist in every situation where better tax planning could have increased the value of the assets available for distribution to beneficiaries. The following are some of the defences that may prevent such a duty from arising on the facts of the particular case:-

- **Double recovery / no lacuna:** If the same alleged facts give rise to viable concurrent claims on behalf of the PRs and a disappointed beneficiary (e.g. because the PRs have a contractual claim), the defendant can assert (a) that the *White v Jones* duty ought not to apply because there is no lacuna to be filled; (b) alternatively, if *White v Jones* does apply, the court should exercise its discretion to avoid double recovery in any event. In such circumstances the beneficiary and PRs would be wise to cooperate with each other so as to put any viable concurrent claims in the alternative.
- **Scope of retainer:** As a general principle, the adviser's duty to the beneficiary cannot be wider than his duty to his client (the testator). Hence the adviser does not owe the beneficiary any duty in relation to IHT liabilities unless he had been engaged to advise the testator on estate planning with a view to minimising the IHT payable upon the testator's death. Whether such advice falls within the scope of the retainer is highly fact-sensitive:
 - In *Rind* the defendant solicitors contended that they did not owe a duty to future beneficiaries merely because they were instructed to advise on commercial transactions that might be capable of prejudicing such beneficiaries' interests. This was correct as a matter of law, but on the facts their retainer arguably extended to estate planning for the future beneficiaries' benefit.
 - In *Swain Mason v Mills & Reeve (a firm)* [2012] STC 1760, by contrast, the defendant solicitors were found not to have been engaged to advise on the IHT consequences of a large commercial transaction they were handling for the deceased. The deceased died during a major heart operation shortly after the completion of the transaction. A large IHT liability could have been avoided if completion had been delayed until after the operation. The fact that the solicitors had been told about the operation in advance, in an email copied to them by a family member, was not enough to require them to advise as to the IHT risk involved in proceeding with the operation before the completion date.

- In *Cancer Research Campaign v Ernest Brown & Co (a firm)* [1997] STC 1425, a testatrix was the main beneficiary under the will of her recently deceased brother. She, in turn, engaged the defendant solicitors to draw up and execute a will leaving her residuary estate to seven charities. She could have increased the amount available to the charities by around £200,000 if she had executed a deed of variation in respect of her late brother's estate. The defendants were found not to have been under any duty to advise her to this effect. They were retained to draw up and execute her will; and by virtue of *White v Jones* this duty extended to considering the IHT consequences of the dispositions for which they were given instructions. But they were not also under a duty to review all recent estates under which their client did or could have benefited (at 1433-1434).
- **Causation / reliance:** The disappointed beneficiary must prove that the solicitor's failure to advise on tax planning resulted in his losing a chance of some definite value. This requirement will not be met where it appears unlikely that the deceased would have accepted the putative advice. In *Cancer Research Campaign*, for instance, an alternative ground for dismissing the claim was that, on the limited material available, it was improbable that the testatrix would have executed a deed of variation in respect of her brother's estate. It was more likely that she would have kept the money in her own hands in case she came to require expensive residential care; nor had it been established that she was the kind of person who would have looked favourably on tax avoidance schemes.
- **Identity of beneficiaries:** The extent to which the identity of the beneficiaries must be ascertained or ascertainable was expressly left open by Lord Goff (see above). In a subsequent case it was held that a duty to an unidentified beneficiary arose only if the adviser knew of the benefit the testator intended to confer and the class of persons on whom he intended to confer it (*Gibbon v Nelsons* [2000] PNLR). In *Vinton* it was held to be arguable that a known intention to manage the estate so as to maximise the inheritance of the testator's children and grandchildren, even though none of them had been named in a will, was enough to trigger the duty.
- **Conflict of interest:** As a matter of principle, there can be no duty to beneficiaries if their interests conflict with that of the adviser's own client. Where, for instance, the beneficiaries of the testator's original will claimed

that he lacked capacity to execute a new will disinheriting them, they were owed no duty by the testator's solicitor as the solicitor's primary duty was to carry out his client's instructions with regard to the new will (*Knox v Till* [2000] PNLR 67). However, the court will need to be satisfied that this conflict is real and substantial rather than formal and theoretical: see *Vinton*, in which the mere fact that the testatrix was a shareholder in a company of which some of the beneficiaries were directors did not negate the fact that all the parties shared the aim of enabling the testatrix to invest in the company whilst incurring the minimum possible IHT liability.

CLAIMS BY BENEFICIARIES OF *INTER VIVOS* TRUSTS

Potential Causes of Action

21. Where an adviser's negligence results in the beneficiary of an *inter vivos* trust receiving no benefit or a reduced benefit from the trust (e.g. because the trust bears unnecessary tax liabilities), what causes of action are available and to whom? The possibilities are as follows:-

- The disappointed beneficiary in tort (by extension of the *White v Jones* principles).
- Other potential claims (depending on the circumstances):
 - the settlor in contract,
 - the settlor in tort,
 - the trustee in contract and tort (concurrent duties).

22. In this area there is even less judicial authority, and hence even more uncertainty, than in respect of post-death claims. Nonetheless, the authorities do at least allow us to sketch out the parameters of what is reasonably arguable.

Case Law

23. White v Jones

Their Lordships did not directly mention the position of the disappointed beneficiary of an *inter vivos* trust. However, two members of the majority did discuss negligence concerning *inter vivos* transactions generally:-

- **Lord Goff** considered whether the intended donee of an *inter vivos* gift has any cause of action in the following scenarios:-
 - **Imperfect gift (p. 262):** The mistake comes to light during the donor's lifetime and he refuses to perfect the gift, leaving the intended donee empty-handed. The donee would not have any claim against the negligent adviser as it is enough that the donor can do what he wishes to put matters right. Like equity, tort will not perfect an imperfect gift. (The lack of an equitable analogy was no barrier to Mrs White's own claim, however.)
 - **Gift to wrong person (p. 265):** The adviser negligently directs the gift to a person other than the intended donee and the mistake comes to light during the donor's lifetime. The intended donee would have no claim because the donor would have been able to recover the gift from the recipient or, failing that, he could have recovered the value of the gift from the solicitor as damages for breach of contract.
- **Lord Browne-Wilkinson (p. 276):** *Inter vivos* transactions take immediate effect and the consequences of the adviser's negligence are immediately apparent. Hence such mistakes can either be rectified by the parties or damages can be recovered by the client. In the case of a negligently drafted will, by contrast, the mistake will normally like hidden until it takes effect on the death of the testator, which is the very point in time when normally the error will become incapable of remedy.

24. Hemmens v Wilson Browne (a Firm) [1995] Ch. 223 (High Court)

Facts: A settlor instructed his solicitor to draft a document giving Mrs Hemmens an immediately enforceable right to call for him to pay her £110,000. It was later discovered that the document gave her no enforceable right. The settlor refused to perfect the document or otherwise make the gift. Mrs Hemmens claimed damages against the solicitor.

Held: Mrs Hemmens' claim failed.

- **Claim by disappointed beneficiary:** The existence of a duty would be determined in accordance with the three-stage test promulgated by the House of Lords in negligent misstatement cases. Mrs Hemmens passed stages one and two because it was foreseeable that she would suffer loss if the document gave her no enforceable right and the settlor later changed his mind; and there was sufficient proximity because the solicitor always knew that the document was intended for her benefit. Her claim failed at the third stage as it was not just and reasonable to impose a duty on the solicitor:
 - It was within the settlor's power to rectify the situation if he saw fit. He was not dead, insane, insolvent or bankrupt; no third parties had acquired interests in the subject matter of the gift; no unnecessary tax liabilities had been incurred.
 - This is not a situation where the solicitor would otherwise go scot-free, as the settlor had an action against the solicitor for breach of contract (albeit he had chosen not to use it).
- The judge emphasised that it was not his task to decide whether a duty of care to disappointed beneficiaries arose in the context of *inter vivos* transactions generally. Speaking *obiter*, he gave two examples of situations in which such a duty would arise:-
 - A settlor intends to execute an irrevocable deed of settlement in favour of Y but the solicitor negligently drafts the deed in favour of X. Leaving aside the possibility of rectification (which would not necessarily be an effective remedy), it will be beyond the power of the settlor to put matters right and Y will be able to prove an identifiable loss.
 - An employer retains a solicitor to draft an effective tax avoidance scheme for the benefit of an employee. If the scheme fails on account of the solicitor's negligence, the tax will be payable by the employee and the employer will be unable to put matters right.
- **Other potential claims:** The settlor would have had a claim in contract, as mentioned above. No other potential causes of action were discussed.

25. Hughes v Richards [2004] All ER (D) 172 (Mar) (Court of Appeal)

Facts: In 1990 the defendant chartered accountant was retained by the parents of three children to establish a trust to fund the children's education. Acting on his advice, the parents entered into a complicated set of arrangements involving the establishment of a trust and two companies in Switzerland. They then retained him as their adviser and agent in relation to the continuing management of the trust and companies.

Most of the funding for the trust consisted of royalty payments made by a company previously owned by the parents. The tax deducted from these payments was irrecoverable under the terms of the relevant double taxation treaty. The rest of the trust's resources were consumed by professional fees and other expenses. By 1999 the trust's funds were exhausted and the children had not received any benefit.

The children brought a claim in tort for the likely present value of the fund had it been prudently invested, alternatively for the original value of the payments made to the trust. The defendant applied for a strike-out on the basis that he owed the children no duty of care. The parents also brought a claim in tort, seeking the same remedies as the children or alternatively the school fees they had paid in the absence of distributions from the trust.

Held (Peter Gibson and Jacob LJJ and Sir William Aldous):

- **Claim by disappointed beneficiaries:** There was an arguable claim against the defendant in respect of the establishment and continuing management of the trust. The decision in *Hemmens* and the *obiter dicta* from *White v Jones* (quoted above) were distinguishable because they all concerned situations in which the consequences of the adviser's negligence were immediately obvious and could be remedied by the donor if he saw fit. In this case, by contrast, the consequences of the defendant's negligence were irremediable and did not become apparent until several years after the establishment of the trust.
- **Other claims:** The pleadings were amended so that the children's and parents' claims were brought in the alternative (presumably so as to avoid any possibility of double recovery).

- **Settlor in tort:** It was not disputed that the parents had a claim in tort. Such a claim may have been subject to limitation difficulties that did not apply to the children's claim (presumably because the three-years extension period would have started running later).
- **Settlor in contract:** Such a claim would have faced serious limitation problems. A claim in respect of the establishment of the trust would have been impossible. Less than half the subsequent period of management would have been in time.
- **Claims by trustees:** No such claim was brought. As the trustees were professionals and the trust's funds were exhausted, it is unlikely that they would have been willing to act.

Conclusion and Practical Implications

26. *Inter vivos* claims by disappointed beneficiaries will often be vulnerable to the argument that there is no lacuna that can be filled only by giving the beneficiary a claim in tort. For this purpose they can be divided into five categories:

- (a) The settlor has the means to put matters right without resorting to litigation but simply chooses not to do so. The imperfect gift cases, such as *Hemmens*, fall into this category.
- (b) The settlor has the means to put matters right by suing the advisor and/or a third party but chooses not to do so. This category is illustrated by Lord Goff's example of a misdirected gift: the donor, if he chooses, can recover it from the recipient or, if that is not possible, he can recover the full amount from the negligent solicitor as damages (*White v Jones*, p. 265).
- (c) The settlor previously had the means to put matters right by suing the advisor in contract and/or tort but failed to do so within the applicable limitation period. These were the assumed facts of *Hughes*, at least with regard to some of the parents' potential claims.
- (d) The settlor, through death, incapacity or some other factor beyond his control, is unable to put matters right either by his own actions or by suing the adviser. The Court of Appeal in *Hughes* distinguished such a situation

from the *inter vivos* transactions contemplated by Lords Goff and Browne-Wilkinson as not giving rise to any duty.

- (e) The facts are as (d) and the factor preventing the settlor from acting arose before the expiry of the limitation period; alternatively, there was no lack of diligence with regard to the limitation period because the loss was not discovered before the end of that period.

27. On one view all of the categories should give rise to a duty because loss to the disappointed beneficiary is foreseeable and he is sufficiently proximate to the adviser. But such a view would ignore the *dicta* in *White v Jones* concerning *inter vivos* claims and the *dicta* of Lord Goff, in particular, as to the need for there to be a lacuna in the other potential bases of liability. Viewed in this light, claims in categories (a) are not wholly ruled out but are quite likely to fail; those in category (b) also face formidable difficulties; those in category (c) are reasonably arguable (applying *Hughes*) but face strong counter-arguments; and those in categories (d) and (e) have a fairly good chance of success (the latter more so than the former).

28. Much will depend upon whether, in future, the courts confine the *White v Jones* principle to the circumstances suggested by Lord Goff. A broader approach would result from applying Lord Brown-Wilkinson's reasoning that *White v Jones* is a new category of special relationship which sits alongside those recognised in *Nocton* and *Hedley Byrne*. It would then be much easier to allow *White v Jones* claims to exist alongside other potential causes of action. It would take a bold claimant to make such arguments, for so far the courts have largely taken Lord Goff's approach, albeit with varying degrees of strictness.

29. **Possible defences:** The grounds for denying the existence of a duty in post-death cases apply, *mutatis mutandis*, to claims brought by disappointed beneficiaries of *inter vivos* trusts.

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