Neutral Citation Number: [2024] EWHC 712 (KB)

Case No: QB-2021-004592

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2024

Before:

THE HONOURABLE MR JUSTICE MARTIN SPENCER

- -

Between :

(1) JAMES LONSDALE **(2) LAURA LONSDALE** **(3) JONATHAN GREIG** **(4) DANE HALLING** **(5) LEONORA LONSDALE** **(6) ROSANNA LONSDALE** **(7) ARTHUR LONSDALE** **(8) ESME LONSDALE**	**Claimants**
- and –	
(1) WEDLAKE BELL LLP **(2) CUMBERLAND ELLIS LLP** **(3) QBE UK LIMITED**	**Defendants**

Ms Sarah Haren KC (instructed by **Payne Hicks Beach, Solicitors**) for the **Claimants/Respondents**
Mr David Halpern KC (instructed by **RPC, Solicitors**) for the **Defendants/Applicants**

Hearing dates: 29th-31st January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

THE HONOURABLE MR JUSTICE MARTIN SPENCER

Mr Justice Martin Spencer:

Introduction

1. By their application dated 12th May 2023, the First and Third Defendants seek to strike out the claim, alternatively they apply for summary judgment.

2. The claim arises out of admitted negligence on the part of solicitors instructed principally by the First Claimant, Mr James Lonsdale, in relation to a settlement which had been made in 1987 creating a Discretionary Trust in favour of a number of beneficiaries including James Lonsdale's children. Mr Lonsdale's purpose was to benefit his own children, but with his nieces/nephews as backstop beneficiaries should the Trust in favour of his own children fail. However, the terms of the Trust, which gave the beneficiaries the right to income when they attained the age of 25, gave all the beneficiaries equal rights, whether his children or his nieces/nephews. The Trustees had the power to vary the Trust before the right of any beneficiary crystallised at age 25. However, shortly before the eldest beneficiary, Leonora, attained the age of twenty-five, in 2011, negligent advice was given whereby the Trustees lost the opportunity to vary the Trust so as to comply with the Settlor's wishes. That advice was not corrected until 2018, and in the interim, the rights of more beneficiaries crystallised by their attaining the age of 25.

3. The claim is brought by James Lonsdale, both in his individual capacity as Settlor and as a Trustee, the Trustees and James Lonsdale's four children (hereafter also referred to as "the Children") against the solicitors for professional negligence. Damages are sought based upon the loss and damage alleged to have been suffered by the Claimants, whether individually, in the case of Mr Lonsdale, or as Trustees in the case of all the first four Claimants, or as the intended beneficiaries in the case of the remaining Claimants, the Children. In the case of the Trustees, their loss and damage is claimed to be represented by their liability to account to some of the nieces/nephews for income to which they were entitled from age 25 but which has not been paid, together with interest thereon, sums paid by way of compensation to other nieces/nephews when the Trust was varied to their disadvantage, and the reduction in the value of the trust fund insofar as the trust fund represents the interests of Mr Lonsdale's children. There is also a claim in respect of loans made in reliance on the negligent advice. In the case of the Children, they claim their reduced entitlement to income and/or the reduction in the value of the trust fund which would, but for the negligence, have been held in trust for their benefit.

4. For the Defendants, this application is made on four grounds:

   (i) No loss was suffered by the Trustees;

   (ii) No duty of care was owed to the Children and they do not fall within the "*White v Jones*" exception;

   (iii) Although James Lonsdale, the Settlor, had an arguable claim, this became statute-barred; and

   (iv) The claim by the Trustees is also statute-barred.

The Parties

5. The first four Claimants are the Trustees of the Settlement Trust. The first claimant, James Lonsdale, is also the Settlor.

6. Claimants 5-8 are James Lonsdale's children:

- Leonora, born on 14 June 1986 who attained 25 on 14 June 2011;
- Rosanna, born on 14 January 1988, who attained 25 on 14 January 2013;
- Arthur, born on 29 April 1995, who attained 25 on 29 April 2020;
- Esme (Arthur's twin) also born on 29 April 1995 and who also attained 25 on 29 April 2020.

7. It is relevant to note that there are 5 nieces/nephews who are the children of James Lonsdale's sisters, Joanna and Emma. Their details are as follows:

- Suzannah Shipp who was born on 14 April 1988 and attained 25 on 14 April 2013;
- Alexander Shipp who was born on 11 February 1989 and attained 25 on 11 February 2014;
- Patrick Shipp who was born on 14 February 1993 and attained 25 on 14 February 2018;
- Karl-Alfred Primus who was born on 12 September 1995 and attained 25 on 12 September 2020; and
- Gulliver Sebag-Montefiore who was born on 31 August 2000 and will attain 25 on 31 August 2025.

8. Ms Ann Stanyer was the solicitor who was retained by James Lonsdale and the Trustees at all material times. In 2011, she was a partner in the firm of Cumberland Ellis, the Second Defendant, which was dissolved on 19 August 2020. Their business was taken over by Wedlake Bell, the First Defendant, where Ms Stanyer also became a partner. The Third Defendant is the professional liability insurer of the Second Defendant. The First Claimant issued proceedings on 24 June 2021 to reinstate the Second Defendant for the purposes of bringing this claim.

The Assumed Facts

9. At this stage, for the purposes of these applications, I assume the facts as the Claimants assert them to be but make no findings. The facts are generally in any event uncontroversial.

10. On 9 June 1987, the First Claimant, James Lonsdale, created a trust, known as "the Sparsholt Settlement" for the primary benefit of his children. A firm known as Cumberland Ellis Peirs, which was a predecessor of the First and Second Defendants,

acted for Mr Lonsdale in relation to the creation of the Sparsholt Settlement. At that time he had one child, Leonora who was almost one year old and no nieces or nephews.

The Sparsholt Settlement Trust

11. The Sparsholt Settlement Trust contained the following provisions:

(i) The Beneficiaries are defined in clause 2(1)(a) as meaning the Fifth Claimant, ie Leonora, and any other child or children born to James Lonsdale and any children born to James Lonsdale's sisters before the first beneficiary to do so attained the Specified Age (defined by clause 2(1)(c) as 25).

(ii) The Accumulation Period is defined in clause 2(1)(b) as 21 years from the date of the Deed. The Accumulation Period expired on 9 June 2008.

(iii) The Vesting Date is defined in clause 2(1)(d) as 80 years from 9 June 1987.

(iv) By clause 4, subject to any exercise of the powers contained in clause 10, the trust fund is held on trust for such of the Beneficiaries as attain 25 and if more than one in equal shares, but so that the share of each Beneficiary shall not vest in him or her absolutely but is held on trust.

(v) By clause 5 of the settlement, until a Beneficiary attains 25 the Trustees have power to accumulate the income of his or her presumptive share during the Accumulation Period and after the end of the Accumulation Period the Trustees shall apply the income to or for the maintenance education or benefit of such of the Beneficiaries who are then living and have not attained 25.

(vi) By clause 6 of the settlement after a Beneficiary has attained 25 the Trustees hold the share of that Beneficiary upon trust to pay the income to that Beneficiary for his or her life (i.e. he or she then acquires an interest in possession in his or her share) and subject to that for such of the children of that Beneficiary who attain 21, and if more than one equally.

(vii) Clause 10(1) of the settlement contains the following power to vary:

> "The Trustees shall have power exercisable by Deed o[r] Deeds revocable or irrevocable at any time prior to the vesting date to vary the shares in the Trust Fund to which any one or more of the beneficiaries will become entitled on attaining the specified age
>
> PROVIDED ALWAYS:
>
> (i) that no such variation shall operate so as to reduce the presumptive share of any beneficiary to an amount less than £100.
>
> (ii) no such variation shall be made or a previously made variation revoked after the vesting date
>
> (iii) no such variation shall be made or a previous variation revoked so as to affect (whether by increasing or decreasing) the interests of any person who has

at the date of such variation or revocation an interest in possession in the Trust Fund or any part thereof

(iv) no such variation or revocation shall be effected so as to invalidate any prior payment or application of the Trust Fund and the income thereof and any part or parts thereof respectively made under any power conferred by this Settlement or by law."

(viii) By clause 10(2) the Trustees have a power to transfer the whole or any part of a Beneficiary's presumptive share to or for his or her benefit once he or she has attained 25.

12. I note that, under clause 2(1)(a), the class of beneficiaries includes all James Lonsdale's children (see paragraph 6 above) and all the nieces and nephews listed in paragraph 7 above, who were all born before Leonora attained 25 years of age. The class of beneficiaries closed when she did so, on 14 June 2011.

13. I further note that the power to vary could not be exercised so as to reduce or increase the share of a beneficiary after that beneficiary had attained the age of 25.

The Assumed Facts (ctd)

14. On 4 August 2008, James Lonsdale sent an email to Ms Stanyer saying that his nephews and nieces were always meant to be "longstop beneficiaries" and he asked whether any steps needed to be taken to achieve this (i.e. to limit the class of beneficiaries). On 6 August 2008, Ms Stanyer replied confirming that until the first beneficiary reaches the age of 25, the Trustees have the power to vary the terms of the settlement under clause 10. However, no further action was taken at that stage.

15. On 2 June 2011, 12 days before Leonora was due to attain the age of 25, James Lonsdale rang Ms Stanyer, ostensibly again to check the position and get her advice and left a message. This prompted the following email dated 2 June 2011 from Ms Stanyer:

" Jamie,

Thank you for your telephone message this morning. I have checked the Settlement Deed and confirm that the following arises when your daughter Leonora reaches 25 on 14th June 2011:

1. According to clause 6 (1) of the Settlement as at 14th June the fund is valued and Leonora's share of the trust fund is determined on that date

2. She is entitled to an equal share with her brother and sisters. Provided there have been no other children born before that date her trust fund will be a 1/4 share

3. She becomes entitled as of right to Income from that 1/4 share

4. The Trustees do have power after that date (under clause 10 (2)) to transfer the whole or part of the 1/4 share to Leonora.

> Accordingly I will instruct Smith & Williamson to prepare a valuation of the Settlement funds as at 14th June. Accounts will be required to that date. The Trustees thereafter will have to decide whether to continue the trust with Leonora's share remaining in trust for her life or whether to pay capital to her.
>
> Subject to any comments you may have I will ask Smith & Williamson to prepare the valuation. Accounts can then be prepared and the Trustees will then need to consider in the light of the accounts what steps they would like to take if any. I hope this answers your queries. I am away from Monday on holiday but I will put this all in place before I go."

16. It is the advice contained in this letter which is acknowledged to have been wrong and negligent. Inappropriately reassured by this letter, James Lonsdale took no further action at that stage and Leonora turned 25 without any steps to vary the settlement having been taken. It is accepted that, properly advised, urgent steps would have been taken by the Trustees before Leonora's birthday to vary the settlement so as to reduce the value of the interests of the nieces and nephews to the minimum allowed under the Trust - £100 each – effectively leaving James Lonsdale's four children with a quarter share each, as he always intended.

17. Relying on Ms Stanyer's incorrect advice, the Trustees made dispositions to Leonora, when she turned 25, and Rosanna, when she turned 25 in January 2013, upon the mistaken assumption that their interests had crystallised at one quarter each. Thus, in October 2011 Ms Stanyer acted on and advised in relation to the making of an interest-free loan to Leonora in the sum of £510,954 which was the amount thought to be "up to the value of her interest". In fact, since her share was one ninth of the Trust Fund and not one quarter, the loan exceeded the value of her interest. Similarly, in relation to Rosanna, an interest-free loan of £439,645 was made in 2013 upon the same flawed basis. Furthermore, their entitlement to the income from the Trust was assumed to be one quarter and paid out on that basis. No dispositions were made to Suzannah, Alexander or Patrick Shipp when they turned 25 in 2013, 2014 and 2018 respectively. Trust Accounts were prepared on the same flawed basis. Again, on the same basis, James Lonsdale was advised personally to discharge tax liabilities (including, for example, CGT liabilities in the tax year ending 5 April 2015) on the basis that these were liabilities which would otherwise diminish the shares in the trust fund to which Leonora and Rosanna were entitled.

18. On 25 July 2018, alerted by the accountants, Ms Stanyer wrote to James Lonsdale as follows:-

> "I am writing to you as to the terms of the Settlement which you doubtless remember you created in 1987 just after Leonora had been born.
>
> It has been drawn to our attention by the accountants that the class of beneficiaries is wider than has been previously realised ie as well as Leonora and any future born children to you the class of beneficiaries includes the children of JoAnn and Emma.

As you will know only your own children have received any benefits to date. All your children have had occasional/limited income distributions and Leonora and Rosanna have property loans of approximately £500,000 each. …

Counsel has suggested that the intention may have been – before Leonora attained the age of 25 – to exercise the Trustees' Powers of Appointment in favour of your four children and away from your sister's children. However, no one involved seems to have been aware of this at the relevant time – neither Settlor, Trustees nor advisers. …

Currently the nine beneficiaries are all entitled to a one ninth share of the Trust – five on having attained the age of 25 are now entitled to the income (or indeed the capital of their shares at the Trustees' discretion) and four on attaining the age of 25 in the future.

The Trustees have (limited) power to change the interests of the four latter though this would of course produce inequities between the nine children.

I suggest that we should meet with you and/or the Trustees to discuss the position and the way forward. Depending on the result of that discussion it may be that we will advise the Trustees to take independent advice.

The principal issues are:

…

3 If not in accordance with your wishes at the time to consider how/whether matters can be changed at this stage;

4 If not, to establish for whose benefit the assets are now held;

5 To consider what flexibility the Trustees have to adjust in particular the interests of the four younger children."

19. This prompted telephone calls between Mr Lonsdale and Ms Stanyer on 26 and 27 July 2018, referred to in paragraph 22 below and also reflected in Ms Stanyer's further letter of 31 July 2018 as follows:

"Dear Jamie

I write further to our telephone conversations last week. As I mentioned in those calls and in my letter to you dated 25th July the class of beneficiaries of the Settlement is wider than has been previously realised. The Settlement Deed provides that both your children and your two sisters' children are entitled to interests in the Settlement. You have told me that this is not what you had intended when you signed the Deed. I am unable to

> comment on the reasons why the Deed was drawn up in the way it was. You have told me that the Settlement is only for your children and that your sisters' children should not benefit from the funds.
>
> What we, therefore, need to do is inform the Trustees of the situation. I need to take their instructions on the next steps. Can you therefore confirm to me within the next seven days that I can do so and accordingly I will send them a copy of this letter and my earlier letter and ask them for their instructions."

20. Without apparently waiting for Mr Lonsdale's permission, Ms Stanyer purported to write to the other three Trustees on 9 August 2018. However, those letters were sent to the wrong addresses and the Trustees have filed statements confirming that the letters were not received. For the purposes of this application, I assume that this is correct.

21. In response to Ms Stanyer's letter of 31 July 2018, Mr Lonsdale sent her an email on 13 August 2018 which has assumed significant status on this application because of what it reveals about Mr Lonsdale's state of mind and knowledge. In that email, he wrote:

> "As legal adviser for many years to the Sparsholt Settlement, you were asked in 2011 to advise on what steps were necessary, before Leonora became 25 on 14 June 2011, to restrict the actual beneficiaries to my four children, in accordance with my original intent.
>
> Your advice was given in the below email on 2 June 2011. Your advice, you are now reporting, was totally wrong … at stake is my children's inheritance worth £2 million in shares, cash and loans plus many millions of £s in future receipts from several life insurance policies … I reserve the option to seek separate legal advice in a claim for both professional fees and damages on behalf of myself, my children and the Trustees of the Sparsholt Settlement.
>
> In the meantime, I urgently request that you clarify to me the actions that need to be taken, together with likely outcomes."

22. In addition to this email, the Applicants also rely upon on two attendance notes reflecting Ms Stanyer's telephone calls with Mr Lonsdale on 26 and 27 July 2018. It is unfortunate that those attendance notes only came to light overnight between the second and third days of the hearing. In the first of those attendance notes, Mr Lonsdale is reported to have explained to Ms Stanyer his intentions with the Trust, namely for his children to enjoy the benefits exclusively, and the fact that his sisters didn't know anything about the Trust and it was "nothing to do with them". It was created using his money. In the second attendance note he is reported to have said, "We all know it had to be put in place before Leonora was 25".

23. On 21 September 2018, another partner in Wedlake Bell ("WB"), Mr Charles Hicks, wrote to James Lonsdale in the following terms:

> "We intend to do whatever we can to put matters on the correct footing. In order to do this we will inevitably need to involve both you and the Trustees. As you say, we have already taken advice from Counsel. This was at the expense of WB to advise generally as to the position so that we could better advise you and the Trustees.
>
> As we have to go back many years, I am afraid that it is inevitable that this will take some time and we will do all we can to progress matters. I have to agree that Ann's email of 2 June 2011 needs explanation. I am investigating further."

It is the Claimants' case that Mr Lonsdale was thereby led to believe that it might be possible for something to be done "to put matters on the correct footing" and that he was encouraged to wait until WB were able to "produce an analysis of where we are and the ways forward" before he considered taking independent advice. He therefore waited to hear further from WB.

24. The next significant date is a theoretical one. The claim form in this case was issued on 16 December 2021. It is accepted that any claim by James Lonsdale depends upon the claim form having been issued within three years of his "date of knowledge" for the purposes of Section 14A of the Limitation Act 1980. The theoretical date is therefore 16 December 2018: if his date of knowledge was before that date, then the claim was issued more than three years after his date of knowledge and is statute-barred. If after that date, however, the claim is in time.

25. Wedlake Bell next wrote to Mr Lonsdale on 24 January 2019, in the following terms:

> "I promised last year that I would write to you concerning the Settlement once I had carried out investigations and considered our next step. I apologise for the length of time that this has taken while we reconstructed the accounts on the "alternative basis".
>
> You may remember that in June 2011, just before Leonora reached her 25th birthday, you enquired as to whether there was any action required before that birthday. Unfortunately we gave you the wrong answer at that time and we could have taken action to exclude your sister's children subject to a payment of £100 to each of them.
>
> The intended beneficiaries of the settlement were your two daughters and the twins when they reached the age of 25 and your sister's children were only intended to be default beneficiaries. I can confirm, however, that we are able to exclude Emma's two children because they have not yet reached their 25th birthday.
>
> We have brought the accounts up to date on the traditional basis for your four children and we have also prepared a separate set of accounts on the adjusted legal basis for the remaining seven

children (that is your 4 children and Joanna's 3 children). I enclose a schedule setting out these two different bases.

The beneficiaries' entitlement to date shows that there have been limited income distributions during the lifetime of the Trust. Under the terms of the Settlement there is a power to accumulate income for a period of 21 years. As a result there are three different situations that arise as follows: Firstly, the Trustees had a discretion during those first 21 years as to whether to pay out income to the beneficiaries. Secondly, on the expiry of the 21 year period the Trustees had a discretion to pay out income to those beneficiaries who had reached 18 but were not yet 25 and thirdly, when the beneficiaries reached the age of 25 each beneficiary then was entitled to a share of income from their fixed share of the trust fund. I can confirm that Leonora and Rosanna's entitlement would have been minimal from when they had interest free loan investments.

The schedule also shows the beneficiaries' capital entitlement for each life tenant and the accrued income to date. You will find there are further details in the detailed accounts but for now I am just sending the summary. Properly speaking, the beneficiaries' income entitlements should be paid out now. I should also mention that the position also affects the life tenants' income tax position to date.

The Trust investments have fallen into three categories. Firstly, there are the interest free loans which have been made to Leonora and Rosanna which are in excess of their one-seventh share. Secondly, there are the equities and thirdly, there are the life policies. As to the life policies, it may be possible to re-write these for the benefit of the correct beneficiaries, and cease paying the premiums on the current policies. lt may be possible to persuade the insurers to re-write those for the correct beneficiaries but this may be too much of a novel approach. You should, however, be aware that you are under no obligation to maintain the premiums on the existing two policies and you are under no obligation to the Trustees or beneficiaries concerning those. Switching the premiums to new policies on the current trusts would not change the actuarial exposure of the insurers. lt may be possible to decide to surrender the current policies.

You may wish in due course to discuss with Joanna (and perhaps Emma) the position. We can, however, see no legal grounds on which Joanna's children could be persuaded or could be required to give up their interest in the Trust on the grounds of the error made.

It is well established that lawyers owe a duty of care to disappointed beneficiaries under Wills but the position as regards Trust beneficiaries is less clear. There may also be a

> limitation point as to the time that has expired since the error was made.
>
> Perhaps when you have had time to digest the above details we could meet with you and/or your new advisers as to the way forward.
>
> I am sorry to have to write to you about this and we will do all that we can to put the matter right for you. …"

26. In advance of Karl-Alfred Primus and Gulliver Sebag-Montefiore turning 25 years old, the Trustees signed a Deed of Variation (dated 10 February 2020) to exclude them from the Settlement and to provide them each with a lump sum of £10,000. This was done in order to mitigate any further loss to the Intended Beneficiaries. The resulting situation was that, save for that £20,000, the Settlement became divisible among the 7 beneficiaries who had turned 25 before the error was realised (rather than the intended 4 beneficiaries).

27. Finally, so far as the events are concerned, there was a meeting on 1 March 2019 attended by Mr Lonsdale, his new solicitor (David Archer) and Mr Hicks and Ms Stanyer from Wedlake Bell, when the situation was reviewed in detail. It was agreed that the other Trustees should be "brought up to speed".

The Legal Proceedings

28. Messrs BDB Pitmans were instructed on behalf of the Settlor, the Trustees and the Children and on 10 October 2020, wrote to Mr Hicks at Wedlake Bell setting out the details of the claim. The claim was expressed to be brought "on behalf of Mr Lonsdale in his own capacity, the Trustees, Mr Lonsdale's four children and their issue and those issue yet to be born." The assets of the settlement included:

    - 3 life insurance policies comprising: one joint whole of life policy written on the lives of James Lonsdale and his ex-wife in the sum of £1m; one whole of life policy written on James Lonsdale's life in the sum of £1m; and a level term assurance policy written on James Lonsdale's life in the sum of £2m;
    - A portfolio of investments, worth about £950,000 at the time of the letter of October 2020;
    - The past entitlement to income payable to Joanna's children, ie the 3 nieces/nephews who attained 25 before the error was discovered; and
    - Professional and legal fees.

29. Reynolds Porter Chamberlain (RPC) replied on behalf of the Defendants and a Pre-Action Protocol Letter of Claim was sent by BDB Pitmans on 11 November 2020.

30. Before a PAP Letter of Response was received, new solicitors, Archer, Evrard and Sigurdsson (AES, to where David Archer had moved) were instructed in May 2021. By an email dated 7 June 2021, Mr Archer wrote:

> "The way forward
>
> The fact that we consider it prudent to issue proceedings to preserve limitation does not of course mean that our clients are not open to sensible discussion about how to resolve these claims."

31. On 12 July 2021, a Claim Form was issued in Claim No QB-2021-002695 ("2695") which was sent by AES to RPC under cover of an email dated 20 July 2021 together with Particulars of Claim. It is, of course, no coincidence that those proceedings were issued before the third anniversary of Ms Stanyer's letter of 25 July 2018. This did not, however, constitute service of the proceedings and an extension of time was agreed for service to 1 December 2021. Unfortunately, this deadline was allowed to pass without service of the proceedings and without any further extension of time being agreed or sought. AES purported to serve the proceedings out of time on 19 January 2022, but, in the meantime, had issued new, almost identical proceedings on 16 December 2021 in Claim no QB-2021-004592 ("4592").

32. On 11 February 2022, the Defendants in 2695 (in fact the same Defendants as in 4592) made an application for a declaration that the court did not have jurisdiction to hear 2695 and/or that the Claim Form and/or service of the Claim Form be set aside. On 23 March 2023, the Claimants in 2695 made a cross-application for a declaration that the Claim Form had been served in time, alternatively for an order that service of the Claim Form had been effected by the email dated 20 July 2021, or that service be dispensed with or that the date for service be retrospectively extended to 19 January 2022. Those applications came before John Kimbell QC sitting as a Deputy High Court Judge on 29 June 2022 and he allowed the Defendants' application and dismissed the Claimants' cross-application whereby Service of the Claim Form was set aside, and a declaration made that the court had no jurisdiction to hear 2695. That leaves only the present proceedings, action 4592, as live.

<u>The Defendants' Application</u>

33. By their application, the First and Third Defendants seek to strike out the claim, alternatively they apply for summary judgment in their favour. The application is supported by a statement from Ms Karen Morrish. She explains that although the Claimants have obtained default judgment against Cumberland Ellis, that is not a matter which the court needs to address because it is still open to a liability insurer (in this case the Third Defendant) to challenge the existence, basis and quantum of any judgment or settlement establishing the insured's liability: as she puts it, a judgment is a necessary but not a sufficient condition for a valid claim under a liability insurance policy.

34. In her statement, Ms Morrish explains that there are three grounds for the Defendants' application: first, no loss was suffered by the Trustees; secondly no duty of care was owed to the Children (the collective noun for the 5th to 8th Claimants, James Lonsdale's children); and thirdly, the claims by the Settlor and Trustees are statute-barred. These are all matters fully addressed and dealt with in Counsel's submissions. So far as limitation is concerned, she refers to the Claimants' reliance on section 14A of the Limitation Act 1980 to extend time but asserts that section 14A is of no avail because

> "the Settlor and the Trustees were all told on or before 9 August 2018 that the class of beneficiaries was not limited to the Settlor's Children but also included his nephews and nieces. The Claimants' previous solicitors (BDP Pitmans and AES), presumably with the approval of the Settlor, appeared to have identified 25 July 2018 as the date when the Settlor acquired the relevant knowledge for the purposes of section 14A in the Letters of Claim and had that date in mind when they issued the Claim Form on 12 July 2021. Further, the Settlor's email of 13 August 2018 shows that he had clearly understood that an error had been made. Either way, the Claimants acquired the relevant knowledge more than three years before the current proceedings were issued and are not entitled to rely on section 14A."

35. The only evidence served on behalf of the Claimants has been statements by each of the Second, Third and Fourth Claimants, the Trustees other than James Lonsdale, in which they deny receipt of the letter of 9 August 2018. In a further witness statement dated 24 January 2024, Ms Morrish accepts on behalf of the Defendants that the date when the Trustees personally acquired the relevant knowledge for the purposes of section 14A is not a matter that can be resolved on a summary basis, but she states that this does not affect the Defendants' case that knowledge of the First Claimant is to be imputed to the Second, Third and Fourth Claimants.

<u>The Submissions for the Defendants/Applicants</u>

36. On behalf of the Defendants, Mr Halpern KC explained that the basis of the application is fourfold:

    (i) No loss was suffered by the Trustees (C1-C4);

    (ii) No duty of care was owed to the Children (C5-C8);

    (iii) It is accepted that the Settlor (C1) had an arguable claim, but his claim became statute-barred before the issue of the current Claim Form; and

    (iv) The claim by the Trustees (C1-C4) is also statute-barred.

37. As stated, Mr Halpern submitted that it is accepted on behalf of the Defendants that James Lonsdale, both in his personal capacity and on behalf of the Trustees, retained the First and Second Defendants as his solicitors and he personally suffered a loss as a result of the admitted negligence in June 2011: he had a valid claim based on his intention both in setting up the Settlement (intended to be in favour of his own children to the exclusion of his nieces and nephews) and in seeking Ms Stanyer's advice in June 2011. By positively asserting that James Lonsdale had a valid claim in his personal capacity, Mr Halpern thereby submitted that a claim by the intended beneficiaries, the 5th to 8th Claimants, was excluded because they did not qualify within the *lacuna* and exception to the usual rule identified in *White v Jones* [1995] 2 AC 207.

<u>(i) No loss was suffered by the Trustees</u>

38. Addressing his first submission, that the Trustees suffered no loss, Mr Halpern gave three reasons: first, under the Trust, the class of Beneficiaries was not limited to the Settlor's own children but included his nephews and nieces: on the face of the Settlement Deed there is nothing to indicate that the Children were to be treated more favourably than the other Beneficiaries. In their position as Trustees, they owed fiduciary duties to all the Beneficiaries, not just to the Children, and owed no fiduciary obligation to exercise their power of appointment to benefit some Beneficiaries and disadvantage others. Whilst the failure of the Trustees to exercise the power of appointment because of Ms Stanyer's negligence meant that they were unable to comply with James Lonsdale's wishes as Settlor, that is a loss to the Settlor, not the Trustees. Secondly, the Trust estate has not been diminished or misapplied as a result of the negligence: it remains exactly the same size and remains held for the benefit of the Beneficiaries, all of whom are within the designated class. Thirdly, insofar as it may be argued that the Trustees are exposed to any claim by any of the Beneficiaries, they have the benefit of a wide and effective exculpation clause contained at clause 17 of the Settlement Deed.

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

39. In relation to his second submission, Mr Halpern first referred to the fact that the retainer of the solicitors was by the Settlor and Trustees, not the Children. To succeed in their claim, therefore, the Children need to establish a duty of care. Although it is well established that solicitors may owe a duty of care to beneficiaries, for example under a will which has been negligently drafted, the scope of such a duty of care is limited to where, otherwise, there would be a *lacuna*, as explained by Lord Goff in *White v Jones* who referred to the "impulse to do practical justice". He said at 262F:

> "the real reason for concern in cases such as the present lies in the extraordinary fact that, if a duty owed by the testator's solicitor to the disappointed beneficiary is not recognised, the only person who may have a valid claim has suffered no loss, and the only person who has suffered a loss has no claim."

Lord Goff achieved "*practical justice*" by concluding that the courts:

> "should in cases such as these extend to the intended beneficiary a remedy under the Hedley Byrne principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor" (268D).

40. Mr Halpern then considered the subsequent authorities and accepted that there had been narrow extensions of the principle, but not such that they would allow the beneficiaries to recover in the present case. He referred in particular to the judgment of Chadwick LJ in *Carr-Glynn v Frearsons* [1999] Ch. 326 where the testatrix had executed a Will, drawn up by the defendant solicitors, in which she left the plaintiff, her niece, her share in a property which she jointly owned with her nephew. The defendants failed to advise the testatrix to sever the joint tenancy with the result that upon her death her share in

the property automatically vested in her nephew as the surviving tenant and the gift in her will to the plaintiff was ineffective. The Court of Appeal held that the disappointed intended beneficiary could recover. Referring to the decision of the House of Lords in *Caparo Industries PLC v Dickman* [1990] 2 A.C. 605, Chadwick LJ identified the key as being to recognise that, in a case of this nature, the duties owed by the solicitors are limited by reference to the kind of loss from which they must take care to save harmless the persons to whom those duties are owed. Thus, in the case of that particular plaintiff, "the loss from which the specific legatee is to be saved harmless is the loss which he will suffer if effect is not given to the testator's testamentary intentions. That is the loss of the interest which he would have had as a beneficiary in an estate comprising the relevant property." Chadwick LJ noted that the duties owed by the solicitors to the testator and to the specific legatee were not inconsistent but were complementary. Thus:

> "To the extent that the duty to the specific legatee is fulfilled, the duty to the testator is cut down. If and to the extent that the relevant property would have been distributed to the specific legatee in the ordinary course of administration, the other persons interested in the estate can suffer no loss. Insofar as the relevant property or any part of it would have been applied in the ordinary course of administration to discharge liabilities of the estate, the specific legatee can suffer no loss. To impose duties on the solicitors which enabled both the personal representatives and the specific legatee to recover for the loss of the relevant property would involve both double recovery and double liability. The duties would not be commensurate with the loss against which the persons to whom they were owed were to be saved harmless. But there is no reason in principle, as it seems to me, why, in cases of this nature, the law should not impose complementary duties; so that for breach of the one the specific legatee is enabled to recover the loss which he has suffered and for breach of the other the personal representatives are enabled to recover, and recover only, the loss suffered by the other persons interested in the estate. Justice will be done to each of the three interests concerned – the specific legatee, the estate and the solicitors – if solicitors who, in the course of carrying out the testator's testamentary instructions, have failed to take care to ensure that the relevant property forms part of the estate are liable to compensate specific legatee for the loss which he has suffered as a result of the breach of duty owed to him; and are liable to compensate the estate for the loss (if any) suffered by the other persons interested in the estate for breach of the duty owed to the testator."

Mr Halpern submitted that this case extended *White v Jones* only in two narrow respects: first, although it concerned a deceased estate, the negligence was not directly in drafting or failing to draft a will but in failing to advise on severance of the joint tenancy which shows that the principle is not limited to Wills. Otherwise, though, it does not offer support for anything more than a very narrow extension. Secondly, in contradistinction to the present case, the estate there was smaller as a result of the failure to sever the joint tenancy which meant that the executors had a valid claim of their own.

However, if the executors had successfully sued, the damages would have fallen into residue and would not have been payable to the particular legatee, the plaintiff, who was the intended beneficiary of the testatrix' share in the house. Thus, the plaintiff recovered because of the *lacuna* arising from the shortfall between his intended interest under the will, and his actual interest in the residue of the estate.

41. Mr Halpern submitted that the effect of decisions subsequent to *White v Jones* is that the courts will not extend the principle arising from that case beyond very narrow limits. He relied, in particular, on the decision of the Privy Council in *JP SPC 4 v Royal Bank of Scotland International plc* [2023] AC 495, where it was held that the so-called *Quincecare* duty of care said to be owed by a bank (not to execute the customer's orders without taking reasonable care to ensure that there was no fraud on the customer) does not extend to beneficiaries of the bank account. Although the Supreme Court has subsequently held in *Philipp v Barclays Bank UK plc* that there is no such thing as a *Quincecare* duty of care, that does not affect the present issue, which is the Privy Council's treatment of the question whether the bank owed a duty of care to third parties. The Privy Council referred to *Gorham v British Telecommunications plc* [2000] 1 WLR 2129, *Dean v Allin & Watts* [2001] PNLR 921 and *Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas* [2018] Bus LR 816. In relation to the latter two cases, the Privy Council observed:

> "It can be seen from the last two cases that, even without a legal *lacuna*, it is possible, exceptionally, for a duty of care to be owed by a professional or a bank to someone who is not a client or customer as regards pure economic loss. However, in both those cases the purpose of the service was to benefit the third party; and in Golden Belt v BNP Paribas the third party was relying directly on the defendant bank to have drawn up a valid promissory note, as the bank knew or ought to have known."

Mr Halpern argued that, in saying that there was no *lacuna* in those two cases, the PC was making the point that the victim in each case was not without any remedy: he still had his personal claim against the borrower. What he had lost was the added protection of having valid security in case the borrower defaulted; this was obviously not a loss that could have been suffered by the borrower. In that sense, he argued that there is a *lacuna*, at least in terms of there being no remedy against the tortfeasor. The lender/investors were on the opposite side of the transaction from the borrower, but there was no conflict of interests because the borrower had expressly asked for an effective security to be created for the benefit of the lender/investors. In the present case there is no problem about conflict of interests, but the insuperable hurdle is that the loss suffered by the Children is exactly the same as the loss suffered by the Settlor; hence there is no *lacuna* of any sort.

42. Mr Halpern relied in particular upon the following passage in the judgment of the Privy Council at [80]:

> "Without a close analogy in terms of purpose and reliance, and without any legal *lacuna* of the type found in *White v Jones* [1995] 2 AC 207, it would, on the pleaded (and assumed) facts of this case, not be fair, just and reasonable to impose a duty of care on the Bank to the Fund. This would place an unacceptable

> burden on banks going outside their contractual relationship with their customers. In other words, the Board sees no good reason in this case for incrementally developing the tort of negligence, beyond the well- established Quincecare duty of care, so as to impose on a bank an equivalent duty of care to a third party who is not a customer of the bank."

43. Mr Halpern submitted that the acceptance on behalf of the Defendants that the Settlor, James Lonsdale, had an arguable claim was all-important. He remained alive and in a position to take steps to fulfil his intentions with the assistance of any damages recovered from the Defendants. His intention to ensure that the benefit of the Settlement was appointed solely to his Children had been thwarted by the negligence. However, unlike the cases involving testators who had died, James Lonsdale remained alive and suffered loss in that his wishes had not been complied with. If he had changed his mind and decided he no longer wished to benefit his children, the Children clearly would have had no claim because there would have been a conflict between his interests and theirs. However, he had not changed his mind but, on the contrary, had already taken steps to restore the position as reflected in the Particulars of Claim which state:

> "The First Claimant has personally paid taxes on behalf of the [Settlement] which he otherwise would not have paid. Further he is taking out insurance cover to ameliorate the position having regard to the fact that his children's shares of the trust fund are less valuable than they would have been but for the First to Third and/or Second Defendants' negligence. This is a cost which he would not have incurred but for the negligence and is a loss for which the Defendants are liable."

Mr Halpern submitted that the loss claimed by the Children is merely reflective of the loss suffered by the Settlor. The Settlor had an arguable claim against the Defendants which was struck out solely because AES failed to serve it in time. Accordingly the only reason for any *lacuna* in the present case is because of a mistake on the part of the First Claimant's own agents, for which the court had held that the Defendants had no responsibility. The special remedy fashioned in *White v Jones* does not extend to cover a self-inflicted *lacuna*.

<u>(iii) The Settlor's claim is statute-barred</u>

44. In relation to limitation, Mr Halpern had two basic arguments: first, there was no ongoing duty on the part of the solicitors such as to extend primary limitation beyond 6 years from the negligent advice on 2 June 2011; secondly, James Lonsdale acquired sufficient knowledge for the purposes of section 14A when he received Ms Stanyer's letter of 25 July 2018 so that the extended limitation period of three years under that provision expired on 25 July 2021.

45. In relation to the first argument, Mr Halpern submitted that the limitation period starts to run from when appreciable loss <u>is first caused</u> and that would have been when Leonora attained the age of 25 on 14 June 2011. On that date, her interest vested in one-ninth of the settlement fund rather than in a quarter as intended by Mr Lonsdale. Any later instances of negligence are only relevant if they give rise to a <u>fresh</u> claim for <u>subsequent</u> loss. The additional loss caused when further beneficiaries attained twenty-

five was simply further loss occasioned by the original negligence in 2011. He submitted that there was no further duty on the solicitors to revisit the earlier advice.

46. So far as the second argument is concerned, Mr Halpern referred to the wording of section 14A:

> "(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
>
> (6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—
>
> (a) of the material facts about the damage in respect of which damages are claimed; and
>
> (b) of the other facts relevant to the current action mentioned in subsection (8) below.
>
> (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (8) The other facts referred to in subsection (6)(b) above are—
>
> (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
>
> (b) the identity of the defendant;"

Mr Halpern submitted that not only did Ms Stanyer's letters of 25 and 31 July 2018 provide sufficient information to start time running, but James Lonsdale's letter of 13 August 2018 made it clear that he had such knowledge, namely that he had been given the wrong advice in 2011 and that this had resulted in loss to himself, the Trustees and the Children.

47. Responding to an argument in Ms Haren's skeleton argument that, given that Mr Hicks' letter of 21 September 2018 (see paragraph 23 above) encouraged Mr Lonsdale to wait before taking independent advice, "it is both deeply unattractive and wrong as a matter of principle for [the Defendants] now to argue that time started to run against Mr Lonsdale before he had done so", Mr Halpern submitted:

(i) If, as on the Defendants' case, time started running in July, a letter written in September cannot retrospectively cancel the running of time. Although it might be argued that it creates a suspensory estoppel, this would have to be pleaded, with the

pleading identifying both the relevant facts and their legal effect: there has been no such pleading.

(ii) In any event, given that it is conceded that time started running by 24 January 2019, the period of "suspension" of the running of the limitation period would be from 21 September 2018 to 24 January 2019, a period of 125 days. Whether one takes the starting date of 3 years from the date of knowledge as 25 July 2018 or 31 July 2018, 125 days takes you to 29 November 2018 or 5 December 2018, both more than three years before the issue of the proceedings on 16 December 2021.

(iv) Limitation and the Trustees' claim

48. On the premise that James Lonsdale acquired the necessary knowledge for the purposes of section 14A more than three years before the issue of the proceedings, he being a Trustee as well as the Settlor, the question is whether Mr Lonsdale's knowledge is to be imputed to his fellow Trustees so that their claim is also statute-barred. Mr Halpern submits either that Mr Lonsdale was acting as the agent of the other Trustees or that Mr Lonsdale's position was akin to that of an agent whereby it was his duty, as a Trustee, to consider whether or not a claim should be brought within three years and to discuss it with his fellow Trustees. As a body, therefore, the Trustees received the necessary information in July 2018. It is not necessary for the Defendants to establish that the Second, Third and Fourth Claimants had personal knowledge of the relevant facts before 16 December 2018. Mr Halpern draws attention to Mr Lonsdale's reference, in his letter of 13 August 2018, to Wedlake Bell having sought legal advice from counsel "unbeknown to the Trustees" and his warning that he might bring a claim for professional negligence "damages on behalf of myself, my children and the Trustees". Clearly, says Mr Halpern, Mr Lonsdale was purporting to speak on behalf of all the Trustees and was holding himself out as their agent. Given Mr Lonsdale's position as Settlor and Trustee, Mr Halpern submitted that he clearly had ostensible authority to act on behalf of the other Trustees, and his knowledge is accordingly their knowledge.

49. In support of his submission that a principal is to be imbued with the knowledge of his agent, Mr Halpern referred to *Graham v Entec* [2003] 4 All ER 1345 where Potter LJ said at [38]:

> "I would also hold that the knowledge of a loss adjuster investigating and advising on a claim on behalf of insurers for the purpose of pursuing a subrogated claim by those insurers is to be treated as the knowledge of the insurers for the purposes of s 14A(5). In the course of argument, [counsel] acknowledged that it is the custom of many insurers to investigate claims through their own 'in-house' loss-adjusting department. He was unable to suggest any logical reason for distinguishing between the position of such an insurer, who plainly would be fixed with the knowledge of his employee, and the position of an insurer who, for purposes of economy or business efficiency, delegates the task to an independent loss adjuster such as Mr Handford."

50. In response to Ms Haren's submissions in her skeleton argument, Mr Halpern submitted:

(i) The fact that Trustees must act unanimously is true but irrelevant: the question concerns the knowledge of the Trustees, not their actions;

(ii) There is no inconsistency between the argument that one Trustee's knowledge is to be attributed to another with the right of Trustees to sue one another for breach of duty.

(iii) Any analogy with the corporate context, where the question of whose knowledge can be attributed to the company in a limitation context is fraught with difficulty, is false: in *Julien v Eteck* [2018] UKPC 2, the court refused to extend knowledge of the company to its shareholders because that would have breached the rule in *Salomon v Salomon* about separate corporate identity. There is no such inhibition in relation to Trustees.

The Submissions for the Claimants/Respondents

51. For the Claimants/Respondents, Ms Haren KC submitted that the basic claim is that the Children have an interest which is less valuable than it should have been by reason of the solicitors' negligence. She referred to the fact that it is accepted that the Trustees would have exercised their powers under Clause 10(1) of the Settlement but for the negligence. Although the Trust as a whole is not diminished, the shares of the Children are: Leonora and Rosanna have a one-ninth share instead of a quarter share and the shares of the younger siblings, Arthur and Esme, are two-sevenths each instead of a quarter (the reason for the difference being that it remained possible to vary the shares of the younger cousins, the children of Emma, before they attained the age of 25). Thus the ability to vary the Trust was lost in stages.

52. Ms Haren made her submissions by reference to six issues:

(i) The nature of the Settlor's claim;

(ii) There is a real prospect of establishing that the Children were owed a duty of care;

(iii) The loss to the Trustees;

(iv) The knowledge of James Lonsdale;

(v) Attribution of James Lonsdale's knowledge to the other Trustees;

(vi) When primary limitation expired.

(1) The Nature of the Settlor's Claim

53. Ms Haren referred to the fact that the Defendants' application is premised on the Settlor (James Lonsdale) having a claim which could put the Children in the position they would have been in if there had been no negligence. She challenged this proposition submitting that either the Trustees have a claim to recover on behalf of the Children or the Children have a claim, so as to fill what would otherwise be a *lacuna*. She submitted that the Defendants' argument that the Settlor has a claim is wrong in law and is not the way it is pleaded. By their argument, what the Defendants are trying to do is to inflate the Settlor's claim so as to mask the correct position. She submitted that the true position is revealed by considering three stages:

a) What losses are claimed

b) What is the Settlor's position

c) What the Defendants are saying about the Settlor's claim.

54. In relation to (a) and the losses claimed, Ms Haren referred to paragraphs 42-44 of the Amended Particulars of Claim (the claim of the Trustees), paragraphs 47-48 (the Children's claims) and paragraph 49 (the Settlor's claim) and she submitted that these are quite different. There is no claim by the Settlor for diminution in value of the Children's shares. In relation to (b), Ms Haren submitted that this is not a case where the gift made by the donor is ineffective or which he can set aside or rectify. Once the property is transferred to the Trustees, it is outside his power or control *qua* Settlor. The power to vary is that of the Trustees, not the Settlor and it is the Trustees who would have varied the Trust if properly advised. It is true that, in exercising their powers, the Trustees must take account of the Settlor's wishes, but it nevertheless remains their power. The loss and damage results from the loss of the Trustees' ability to exercise their power to vary in stages for the benefit of the Settlor's children in accordance with the Settlor's wishes. The loss, which is recognised in law, is the loss of that power to vary on the part of the Trustees. Thus Ms Haren submitted that James Lonsdale's position as Settlor is analogous to the Testator in *White -v- Jones*: his dispositions are irrevocable and his estate suffers no diminution in value as a result of the Settlor's wishes being frustrated.

55. Ms Haren suggested that the Defendants' argument was being put in a variety of inconsistent ways. First it is argued for the Defendants that there is loss to the Settlor because James Lonsdale's wishes were frustrated but she submitted that it is well established that frustration of a person's wishes is not a claim for which damages lie in professional negligence (this is not a claim for "disappointment damages" as in *Farley -v- Skinner*). If the Settlor could claim, she submitted that the *lacuna* in *White -v- Jones* would not have arisen, referring to the Judgment at page 79H. She also referred to the Judgment of the Court of Appeal in *Daniels -v- Thompson* at paragraphs 36-38. Ms Haren was unaware of any such previous claim by the Settlor. For present purposes, she did not invite the court to determine this question: she submitted it is enough for the court to decide that there is a possible *lacuna* to justify the matter going to trial. One factor in deciding whether the Settlor has a claim may be whether the Children have a claim.

56. The second argument on behalf of the Defendants to which she referred was that the Settlor has the <u>same</u> loss as the Children but she submitted that that cannot be right: the Settlor has no interest in the assets of the fund. Declining to perfect an instrument is different: the Claimants cannot now choose what becomes of the property.

57. A further argument for the Defendants is that the Children's loss is reflective of the Settlor's loss, drawing an analogy with company law but Ms Haren submitted that this analogy falls down when it is admitted that there is no diminution in the Settlor's economic interest: it is the Children or Trustees who are prejudiced.

58. Ms Haren referred to three unsatisfactory consequences if the Defendants' argument is right:

(i) The Settlor is not a policeman for the Trust: having disposed of his interest in the Trust property, he is not obliged to have any further involvement.

(ii) A Settlor may not be in a position to remedy the situation, eg if the Settlor is now a bankrupt or has a disability. She submitted that the ability to recover should not be governed by those situations which leave the Children in a position of uncertainty.

(iii) If, as suggested by the Defendants, the Settlor is entitled to recover damages, he cannot be forced to apply those damages for the benefit of the Children. She submitted that the approach of the Defendants looks at the situation "from the wrong end of the telescope".

59. Ms Haren submitted that the fact that the Settlor may have a claim for a <u>different</u> loss does not affect the Children's claim as long as there is no overlap, referring to *Carr-Glynn -v- Frearsons* at 337H-338A. There both the estate and the legatee suffered loss. See also *Stephen -v- Hewats* at paragraphs 12 and 17.

60. Ms Haren also referred to the fact that the Defendants do not admit in their defence that the Settlor has a claim and the argument that the Settlor's claim is for the loss of a chance. She submitted that there is a real prospect of a *lacuna* such that the claims of the Trustees/Children should not be struck out.

(ii) <u>Whether there is a real prospect of the Claimants establishing that the Children were owed a Duty of Care</u>

61. Ms Haren submitted that the alleged Duty of Care to James Lonsdale's children has two strands: first, pursuant to *White -v- Jones* which provides for a remedy where there is a mismatch between the person to whom the primary duty is owed and the person who suffers the loss; secondly, a duty owed by reason of the nature of the service provided by the solicitor and the solicitor's knowledge of reliance by the beneficiaries. Ms Haren submitted that it is arguable that the Children fall within both strands in this case. She referred to *Hemmens -v- Wilson-Brown* at page 22 D-E and *Gorham -v- BT* which referred to dicta in *White -v- Jones* suggesting that the rule that there is no claim in the case of transactions *inter vivos* is directed to causation because the donor can do something to give effect to his intention and to remedy the position. She referred to *Richards -v- Hughes* as an *inter vivos* case where the claim was arguable, relying on the judgment of Peter Gibson LJ at paragraphs 27-28 in particular. See paragraph 84 below for my detailed consideration of this authority. She further referred to *Rind -v- Theodore Goddard* [2008] PNLR 24 per Morgan J at paragraphs 36-38.

62. As to the second strand, Ms Haren submitted that a duty may be owed even without a *White -v- Jones lacuna*, relying on *Yudt v Leonard Ross & Craig* (1998/99) 1 ITELR 531 at page 576 where Ferris J said:

> "In my judgment there is an important difference between the position of existing beneficiaries under a disposition already made and disappointed beneficiaries under a disposition which was not made at all because of the negligence of solicitors. Beneficiaries under a disposition by way of trust which has already been made before the negligent acts were committed

> have, like the Trustees, a proprietary interest in the trust property, if solicitors instructed by the Trustees carry out their work negligently, thereby causing loss to the trust property or putting that property or the interests of beneficiaries in peril, the loss resulting from such negligence will ultimately fall on the beneficiaries, even if it is the Trustees who incur it in the form of a diminution of the trust property held by them or in the need to expend money in order to protect the trust. By accepting instructions to act for the Trustees the solicitors are of necessity assuming to act, to the extent of the matters which they are instructed to deal with, in the affairs of the beneficiaries as well. It seems to me that solicitors who act in these circumstances must be regarded as owing to the beneficiaries the same duties of care in tort as they owe to their clients, the Trustees, in both contract and tort.
>
> The position may be different where the plaintiff is a person who has never become a beneficiary in any true sense. An example might be where the plaintiff is a person who is merely an object of a fiduciary power vested in the Trustees which the Trustees wish to exercise in this favour but fail to exercise because of the negligence of solicitors instructed by them to draw the requisite instrument. The position of such a plaintiff would be much closer to that of the disappointed testamentary beneficiary considered in *White v Jones* and it may well be that he could only succeed by showing that the relationship between him and the solicitor was of the special nature recognised in that case."

63. Ms Haren referred to the decision in *Allianz Global Investors GmBH v Barclays Bank* [2022] EWCA Civ 353 and submitted that this represented a mistaken understanding of the decision in *Yudt* which only allowed the claim for the beneficiaries' personal outlay, not any claim by the beneficiaries for loss to the trust fund. She submitted that if the trust fund has not suffered loss, then we are in the same territory.

64. Ms Haren referred to *JP SPC 4 v RBS* [2023] AC 461 which makes clear that a duty of care may be imposed between beneficiaries and service providers. At paragraph 64 in the judgment of Lords Hamblen and Burrows, it was stated:

> 64. An examination of the case law indicates (see Clerk & Lindsell on Torts, 23rd ed, paras 7—113 to 7—137) that the factors which have been of particular relevance in determining whether there is an assumption of responsibility in relation to a task or service undertaken include: (i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and (iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care."

Here, Ms Haren submitted, the solicitors knew that James Lonsdale's children were the intended beneficiaries. Ms Haren suggested that the Children's claim will depend on a close examination of the facts and this is a matter for trial. She further referred to the decision of Norris J at paragraph 26 in *Vinton -v- Fladgate Fielder* [2010] PNLR 26

(iii) Loss to the Trustees

65. Ms Haren accepted that the Trust Fund has not been diminished as a result of the negligence. She distinguished the trust of each share. She submitted that, on a true analysis, there were defined trusts for each child given the entitlement to income from age 25 and the fund then being held in trust for the children. Thus it would be possible for particular shares to have their own Trustees or particular earmarked funds. She submitted that each share can be viewed as a separate trust and this is reflected in the accounts of the Trust for 2013 which shows separate investments for Leonora and Rosanna. Thus it is conceptually possible for the shares to be considered as a separate part of the trust assets which has lost out as a result of the negligence. This, she submitted, is consistent with the Trustees being owed a direct duty of care by the solicitor as part of the retainer. In her written skeleton argument, she put it this way:

> "It is important to appreciate that the Trustees' claim to recover the loss of value to the Children's Shares (i.e. which flow from those shares of the fund being smaller than they should have been) is made by them as Trustees of those shares (i.e. parts) of the settlement held for the Children. Put another way, this part of the chose in action (the claim in negligence) or its proceeds belongs to the trusts of those particular funds, rather than to the trusts as a whole. Viewed in that way the Trustees (*qua* Trustees of those funds) have suffered loss by reason of the negligence."

Ms Haren referred to three considerations to be borne in mind:

(a) Although the Trustees owe fiduciary duties to all the beneficiaries, they are not obliged, when it comes to exercising discretionary powers, to treat the beneficiaries equally. They are obliged to have regard to the Settlor's intentions and the purposes for which the Settlement was created.

(b) where a fund is held for certain beneficiaries in specified proportions it does not follow that all the assets of the fund will be held in those same proportions. Particular assets may belong to particular shares or sub-funds of the trust.

(c) it is possible to appoint separate Trustees of different sub-funds who are different in identity from the head Trustees. That conceptual possibility shows that it is fallacious to suggest that no claim can lie, for the benefit of the Children's shares, simply because the Trustees also owe duties and hold assets for the other beneficiaries on the trusts of their (different) shares.

66. In support of her argument, Ms Haren cited *Chappell v Somers & Blake* [2004] Ch. 19 where it was accepted that a representative party may recover damages for negligence which are the "loss" not of that representative, but of a beneficiary to whom the

representative owes a duty. In the course of his judgment, Neuberger J (as he then was) said:

> "… there are two main points. The first is that it would be wrong if the solicitors escaped any liability for damages in a case such as this, merely because they could identify a dichotomy between the person who can claim for a breach of duty... and the person who has suffered the damage...
>
> Given that any damages would ultimately come to the beneficiary irrespective of who has the right to sue the question of whether it is the executrix or the beneficiary who can bring the proceedings is not of great significance."

67. Ms Haren drew a parallel between the position in that case, and the position here. She submitted that as the executrix was allowed to recover in that case, the Trustees here are in an analogous position and "may recover on behalf of the beneficiaries of the shares which have "lost out" and are liable to account to those shares for the proceeds of any claim. This part of the claim is held for the benefit of the Children's Shares because it is their shares which have suffered loss as a result of the negligence." There is no conceptual problem so long as the Claimants (and the court) are astute not to claim (or allow) double recovery if the beneficiaries can also claim.

(iv) James Lonsdale's Knowledge

68. Ms Haren suggested that, to trigger knowledge for the purposes of the Limitation Act, James Lonsdale needed to know three things:

(i) That some actionable damage had been incurred - here the loss of the ability to alter the settlement in favour of his children;

(ii) The nature and extent of the damage known needs to be known as sufficient to sue a submissive and solvent defendant;

(iii) The damages attributable to the solicitor's failure.

69. Ms Haren referred to paragraph 34 of the Amended Particulars of Claim and paragraph 21.2 of the Reply, responding to paragraph 73 of the defence. It is accepted by the Defendants that James Lonsdale was uncertain what could be done to mitigate the loss and Ms Haren submitted that this uncertainty is a sufficient gap in his knowledge as to the damage suffered and its extent. She referred to *Speechly Bircham v Etroy* [2024] PNLR 1 where, at paragraph 42 of the judgment, there is the email which the defendant relied on as starting time (see paragraph 63 of the judgment). Here the essence of the complaint is the loss of the ability to alter the Settlement. She submitted that James Lonsdale knew, before January 2019, that the advice of June 2011 was inconsistent in relation to the effect of the Settlement but even if he knew that advice was wrong, he did not know that the ability to achieve a different division had largely been lost, as illustrated by his email of 13 August 2018. He knew that large amounts of money were involved but not that it was irretrievably lost. It was only following the letter of 24 January 2019 that Mr Lonsdale instructed new solicitors. Ms Haren submitted that the letter of 24 January 2019 is the first clear statement that the position of Joanna's

children could not be altered and that the advice of June 2011 had been wrong in failing to advise the exercise of the power to vary. What Mr Lonsdale didn't know was that the Terms of the Settlement could not be changed: he only knew that the Terms of the Settlement had been wrongly explained in June 2011. Thus he knew there was an issue to be investigated and, in that sense, was in the same position as in *Etroy*.

70. Ms Haren referred to the letter of 21 September 2018 (see paragraph 23 above) where Mr Hicks wrote

> We fully recognise your entitlement to take independent advice as to the position the Family find themselves in and indeed mentioned this in our original letter .We would of course work with them and you to produce a solution .While it is of course a matter for you it may be that this is best done once we have been able to produce an analysis of where we are and the ways forward."

This, she submitted, indicated that WB regarded it as reasonable for them to investigate and James Lonsdale was waiting to see if any damage had been incurred at all. She described it as an unattractive position for solicitors to encourage the claimant to wait and then rely on limitation. In this regard she referred to the judgment of HHJ David Cooke in *Hellard v Irwin Mitchell* [2013] EWHC 3008 where he said:

> "73. ... Mr Shore plainly knew well before October 2002 (and so more than 3 years before issue) that his ability to draw income was restricted by the GAD rate and that this restriction was, or was very likely to become, significant. He also knew that annuity rates had fallen so he had lost the opportunity to acquire an annuity at the former rates, which might or might not recur depending on whether rates recovered. He had complained about this restriction to SFS, and on his evidence had been persuaded not to make a complaint and reassured that his fund value was doing well and that the restriction on income would be corrected over time. He knew that he had suffered some loss in the sense of a restriction on his income, but was it such as "would lead a reasonable person… to consider it sufficiently serious to justify instituting proceedings…" (s14A(7))? Potentially, the restriction was temporary and reversible. I agree with Mr Flenley that it is at least arguable that the reassurances given are relevant to that consideration and might have led a court to conclude that the loss was not "sufficiently serious". As I said above it would be profoundly unattractive for a defendant who had talked a claimant into waiting to see if his position was corrected thereafter to rely on limitation to bar his claim."

WB clearly didn't feel conflicted at that stage. Ms Haren raised the possibility that the letter of 21 September 2018 could give rise to an estoppel whereby there is an implication in that letter that they would not hold against the Claimants the time from writing that letter to when the final advice is given.

(v) <u>Attribution of James Lonsdale's knowledge to the other Trustees</u>

71. Ms Haren said that it is necessary to distinguish between the knowledge of James Lonsdale on the one hand and the other Trustees on the other hand. It is the knowledge of the last Trustee that counts. There is no authority that one trustee is fixed with the knowledge of the others. Thus, as a matter of principle:

(i) Trustees are individuals. Trustees must act unanimously (save where the settlement specifically provides) and a Trustee has no authority to bind his co- Trustees. Nor is a trustee liable for his co-Trustees' acts or omissions.

(ii) The suggestion that one Trustee's knowledge may be treated as the knowledge of others is also inconsistent with the right of Trustees to sue each other for breach of duty. It would create insuperable problems for the application of section 32 of the Limitation Act 1980 in that scenario.

(iii) Even in a corporate context, where the concept of attribution of knowledge is recognised, the question of whose knowledge can be attributed to the company in a limitation context is fraught with difficulty: see for example *Julien v Eteck* [2018] UKPC 2 where it was held that shareholders' knowledge is not attributed to the company even, in that case, where there is a sole shareholder).

(iv) In any event section 14A of the Limitation Act 1980 does not contain a concept of "imputed" knowledge: the knowledge is either actual (section 14A(5)) or, although it is not alleged here, constructive (section 14A(10)).

72. The email of 13 August 2018 is not a statement that he is acting for the Trustees. Even if it was, a person does not become an agent simply by holding themselves out as such. The other Trustees had done nothing to suggest Mr Lonsdale was their agent. Indeed WB knew quite well that the other Trustees needed to be personally informed and involved, and they told Mr Lonsdale that they would do so. Nor, given that their correspondence with him was headed "strictly private and confidential: addressee only" can they have expected him to discuss it with his co-Trustees first.

(vi) Primary Limitation

73. Ms Haren referred to the fact that WB continued to act for Mr Lonsdale after August 2011 and to the allegation at paragraph 25 of the Amended Particulars of Claim that they failed to advise that income became payable to the Secondary Beneficiaries on their attaining 25, referring to the positive advice given after August 2011 in October 2011 (acting on and advising in relation to the Trustees' making an interest-free loan to Leonora), in 2013 (acting on and advising in relation to the Trustees' making an interest-free loan to Rosanna), preparing the Trust accounts on the false basis that Leonora and Rosanna had acquired an entitlement to a quarter of the Trust income and advising James Lonsdale personally to discharge tax liabilities (including by way of example CGT liabilities in the tax year ending 5 April 2015) on the basis that these were liabilities which would otherwise diminish the shares of the trust fund to which Leonora and Rosanna were entitled. Paragraph 25 is admitted in paragraph 30 of the Defence save that it is denied there was a duty to explain to the Trustees the preamble to the accounts as alleged in subparagraph 25.4 of the Amended Particulars of Claim. Ms Haren submitted that it is at least arguable that these allegations constituted fresh breaches of duty which re-started the limitation period in respect of them, making this inappropriate for Strike Out.

74. Mr Halpern's responses to Ms Haren's submissions are either considered above or in the discussion paragraphs below.

Discussion and Decision

75. This application has been brought both under the strike-out provisions contained in CPR 3.4, whereby the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing the claim, and as a claim for summary judgment pursuant to CPR 24.3 whereby the court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if it considers that the party has no real prospect of succeeding on the claim and there is no other compelling reason why the case or issue should be disposed of at a trial. Mr Halpern relies on these provisions both cumulatively and in the alternative.

76. Whilst, on the face of it, such an application might appear bold in circumstances where there has been admitted professional negligence by the solicitors retained to advise, Mr Halpern's case is that the only party with a viable cause of action is James Lonsdale in his personal capacity, and due to yet further professional negligence on the part of other solicitors not a party to this action, that cause of action became statute-barred when they failed to serve the claim form in time in 2695, the sister proceedings (see paragraphs 31 and 32 above). This saga does not, I fear, reflect well on the legal profession and one can only have the most profound sympathy for Mr Lonsdale for the way he has been serially let down. Initially, a Settlement Trust was drafted which failed to reflect his actual wishes, but where the position was salvageable. Then, in 2008, he raised a query about the terms of the Trust but nothing was done at that stage. Realising that 25 June 2011 was a potentially critical day, he again raised the issue, but was given advice which has been admitted to be negligent so that what had been salvageable became unsalvageable. When the error was realised, he was encouraged to wait before seeking alternative advice in circumstances where it is said that the 3-year limitation period from his "date of knowledge" was running. And then, when he instructed new solicitors who issued proceedings which were undoubtedly in time, he was again let down by a failure to serve those proceedings in time, meaning that he has had to instruct yet further solicitors and issue new proceedings. However, Mr Lonsdale will appreciate that the decisions of the courts cannot be governed by sympathy and it is necessary for me to apply the law as I understand it in resolving the issues which have arisen on this application. Happily, as it turns out, my analysis of the legal position results, as will be seen, in a successful outcome for Mr Lonsdale and the Claimants.

The Claim by the Trustees

77. The first issue is whether the Trustees have a viable claim where the negligence has not resulted in any diminution in the Trust estate: it is argued that, on the face of the Trust, fiduciary duties are owed by the Trustees to all the beneficiaries, not just to James Lonsdale's children. Furthermore, the Trustees have the benefit of a wide exclusion clause should they be exposed to any claim by any of the beneficiaries: see the arguments at paragraph 38 above. In response, Ms Haren argues that the interests of James Lonsdale's children may be sub-divided into separate parts of the Trust assets, each of which has lost out as a result of the admitted negligence: see paragraphs 63-65 above.

78. In reply, Mr Halpern submitted that whilst the Defendants accept that that it is legally possible for Trustees to appropriate parts of a fund to particular beneficiaries and this is done by partitioning the fund between different beneficiaries, that was not done in this case, and there is nothing in the Particulars of Claim to allege that it was done or should have been done. Hence he describes this as a red herring. Referring to the judgment of Neuberger J in *Chappell v Somers & Blake* Mr Halpern submitted that the recovery by the executrix in that case was associated with the solicitors having assumed a responsibility to the beneficiaries, but for which there would have been a *White v Jones*-type *lacuna* or "black hole". He submitted that, having reached that conclusion, Neuberger J held that it did not matter if the claim was instead brought by the executrix, who would be obliged to hold the damages on trust for the beneficiary. The judge only treated the executrix as representing the beneficiary at a <u>procedural</u> level because he was satisfied at a <u>substantive</u> level that the beneficiary had a valid claim on the basis of *White v Jones* and there is nothing to indicate that he would have found in favour of the executrix, had it not been for the black hole identified.

79. In my judgment, the position of the Trustees in this case is analogous to the position of the executrix in *Chappell v Somers & Blake*. In paragraph 82 below, I have concluded that it is arguable that the solicitors owed a duty to James Lonsdale's children, the beneficiaries who have suffered loss as a result of the negligence, and who have a valid claim against the solicitors. In those circumstances, it is desirable that the Trustees should also be Claimants so that there is no arguable gap in the recoverability of the losses claimed: whether this is described as procedural or substantive is of no moment, it means that, at the stage of strike-out or application for summary judgment, it is not appropriate to strike them out as Claimants or award the Defendants summary judgment. As long as the court is astute to ensure that there is thereby no double recovery at trial, it is appropriate, in my judgment, for all the interested parties to be parties to the claim so as to ensure that all the legitimate claims are covered and all the legitimate interests are protected. Furthermore, I consider that the Trustees should have the right to argue at trial the point relating to sub-division: the Trustees clearly considered it to be appropriate, when Leonora and Rosanna respectively reached 25, to identify their supposed crystallised interests of 25% and not only to make income payments upon this basis, but also substantial loans equivalent to their interest in the capital. They did this in reliance on the negligent advice, and to the detriment of the other beneficiaries, not James Lonsdale's children but nevertheless full beneficiaries under the Trust, who, in the case of those that attained 25 without any variation to the Trust being made, might well have a claim against them. I do not consider that the exclusion clause is an answer: it is debatable whether it would constitute a failure to mitigate if the Trustees refused to rely on the exclusion clause, where they have a right to recover against the Defendants. The Trustees might consider that their fiduciary duty to the other beneficiaries was such that they would not wish to rely on the exclusion clause in those circumstances, and I am not prepared to say that such a stance would be wrong, at least at this stage of strike-out/summary judgment..

<u>The Children's Claims</u>

80. As both parties recognised, the starting point to any consideration of the claims of the Children is *White v Jones* [1995] 2 AC. 207. In that case, intended beneficiaries under a will suffered loss when, as a result of the solicitor's negligence, the testator's new will was not executed before his death. The general rule would have been that the duty

owed by the solicitor was to the client, namely the testator, and not to the intended beneficiaries: this would have meant that the neither the testator nor his estate could sue because they had suffered no loss; and the intended beneficiaries could not sue because no duty was owed to them. It is this which has been described as the *lacuna* or "black hole" which the decision of the majority of the House of Lords bridged or filled. Giving the leading judgment, Lord Goff expressed the position as follows (at page 268C):

> "In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. Such liability will not of course arise in cases in which the defect in the will comes to light before the death of the testator, and the testator either leaves the will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant benefit."

Thus, on one view, the critical distinction is between a testator who has died, and cannot therefore amend the will, and a testator who remains alive and can remedy the position. Considering the position of an *inter vivos* gift, Lord Goff said:

> "Let me take the example of an inter vivos gift where, as a result of the solicitor's negligence, the instrument in question is for some reason not effective for its purpose. The mistake comes to light some time later during the lifetime of the donor, after the gift to the intended donee should have taken effect. The donor, having by then changed his mind, declines to perfect the imperfect gift in favour of the intended donee. The latter may be unable to obtain rectification of the instrument, because equity will not perfect an imperfect gift, though there is some authority which suggests that exceptionally it may do so if the donor has died or become incapacitated: see *Lister v. Hodgson* (1867) L.R. 4 Eq. 30, 34-35, per Romilly M.R. I for my part do not think that the intended donee could in these circumstances have any claim against the solicitor. It is enough, as I see it, that the donor is able to do what he wishes to put matters right. From this it would appear to follow that the real reason for concern in cases such as the present lies in the extraordinary fact that, if a duty owed by the testator's solicitor to the disappointed beneficiary is not recognised, the only person who may have a valid claim has suffered no loss, and the only person who has suffered a loss has no claim."

81. The question that arises in the present case is whether James Lonsdale, 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 remains alive and able to sue the solicitor for damages which can then, if he so chooses, be applied to the disappointed beneficiaries to make good their losses, he is in the same position as the donor in Lord Goff's example above.

82. In my judgment, it is arguable – and the Claimants should have the right to argue at trial – that as a result of the decision in *White v Jones* and subsequent decisions, the law has moved on and now allows for recovery where the Claimant falls within the principles laid down by *Caparo Industries PLC v Dickman* [1990] 2 A.C. 605. As already observed, in *Carr-Glynn v Frearsons* [1999] Ch. 326, Chadwick LJ identified the key as being to recognise that, in a case of this nature, the duties owed by the solicitors are limited by reference to the kind of loss from which they must take care to save harmless the persons to whom those duties are owed. Thus, in the case of that particular plaintiff, "the loss from which the specific legatee is to be saved harmless is the loss which he will suffer if effect is not given to the testator's testamentary intentions. That is the loss of the interest which he would have had as a beneficiary in an estate comprising the relevant property." So too, here, I consider it arguable that the law recognises a duty owed by the solicitors to the Children given that it was specifically their interests which James Lonsdale was seeking to protect when he sought advice from Ms Stanyer in June 2011 and this was known to Ms Stanyer. The quotation from Chadwick LJ's judgment cited at paragraph 40 above can be applied almost directly to the position of the Children and James Lonsdale if, for the reference to "the specific legatee" there is substituted "the Children" and if, for "the testator" there is substituted "James Lonsdale".

83. Furthermore, in my judgment, Ms Haren is arguably right when she submits that the rationale behind the exclusion of claims in the case of *inter vivos* transactions is directed to causation because the donor can do something to give effect to his intention and thus remedy the position. It is arguable that where the donor has irrevocably divested himself of the estate, the legal ownership of which is now vested in the Trustees, for the cause of action arising from the negligence to lie with the Trustees and beneficiaries is much neater and legally more satisfactory, and much less likely to result in over-recovery or under-recovery. Thus, the right or ability of the donor to recover from the solicitor might be limited by the donor's own bankruptcy or lack of means, or the donor might have lost capacity by reason of age or mental incapacity. I hasten to add that there is no suggestion that any of these apply to James Lonsdale, but I cite them as examples showing how the position might be complicated or compromised by external events, which might lead to the intended beneficiaries ultimately not recovering that which was intended for them.

84. Given that this is a strike-out/summary judgment application, the decision of the Court of Appeal in *Richards v Hughes* [2004] PNLR 35 is highly pertinent. The issue in that case was stated by Peter Gibson LJ in the first paragraph of the judgment as follows:

> " When A contracts with B for B to perform professional services in connection with the establishment of a trust for the benefit of C and B is negligent in the performance of those services with the result that C receives no benefit from the trust, does A or C have a remedy in tort against B? That is the primary issue raised on this appeal. It arises because David and Alison Hughes ("the parents") by one action and their infant children, Thomas,

> Stephanie and Charlotte Hughes ("the children") as the beneficiaries under a trust created by the parents, by another action have sued the defendant, Colin Richards, alleging negligence by him in connection with the establishment of a trust for the benefit of the children. Mr. Richards applied for the striking out or dismissal of the children's claim. His Honour Judge Norris Q.C. sitting as a High Court judge in the Birmingham District Registry, Chancery Division, on July 30, 2003 refused the application. Mr. Richards appeals with the permission of the judge."

At first instance, Judge Norris QC refused the solicitor's application to strike out the claim, stating:

> ""56 I am not going to strike out the children's claim. First I regard Mr. Hill-Smith's submissions as extremely strong in relation to the investment retainer, and as in accord with orthodox learning. But I am impressed by Miss Shaldon's submission that all of the observations cited have been obiter, admittedly from the highest authority, but given at a time when the basic principles themselves were just being ascertained and established. There is no decided case drawn to my attention where these obiter observations have in fact been applied to defeat a claim.
>
> 57 Secondly, certainly part of the reasoning in White v Jones proceeds on the footing that it lies in the power of the donor to put right the intended gift which has failed, either because the original transaction has never effectively proceeded, or on the footing that if it has, the intending donor can, by proceeding against the solicitor, recoup the property and redirect it. It may make a difference that in the present case the transaction (the establishment of the trust) was an effective one and it is the nature of the investment (as it has been called) that has failed (ie the preservation of the capital). Or it may be that a court at trial would determine that the third party claim by the children should not in law depend on whether or not the parents as donors can afford to sue the solicitor to recoup damages and to make the gift which they originally intended.
>
> 58 I have reached the clear conclusion that it would be wrong on this summary application to express a concluded view on those difficult questions, particularly since I am satisfied that the "monitoring claim" is by no means straightforward, and that I cannot say in relation to that claim that there are no reasonable grounds for bringing it. …"

The Court of Appeal upheld that decision. Having considered the authorities and the submissions, Peter Gibson LJ observed that whilst the case for the solicitor was strongly arguable that the parents and not the children were owed a duty in the respect of the investment claim in that case, he also considered that "the relevant area of law is still

subject to some uncertainty and developing and where it is highly desirable that the facts should be found so that any development of the law should be on the basis of actual and not hypothetical facts." In those circumstances, he said:

> "The correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out (see *Barrett v Enfield London Borough Council* [2001] 2 A.C. 550 at p.557 per Lord Browne-Wilkinson). Lord Browne-Wilkinson went on to add:
>
> > "[I]n an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

I consider that all the above applies equally here.

85. Ms Haren suggested that paragraph 32 of the judgment also assists the Claimants here, where Peter Gibson LJ said:

> "I can of course understand why as a matter of tactics Mr. Richards would like the children's action out of the way so that he can then deal only with the parents, who may have a limitation problem and who are not legally aided. But that is not a factor which should have weighed in the exercise of the court's discretion. I think it wrong in principle that the court should pay any regard to the fact that the children have public funding. That would discriminate against publicly funded litigants, contrary to s.31(1)(b) of the Legal Aid Act 1988."

I agree with Ms Haren in this regard. As I have stated, whether or not James Lonsdale is in a position to sue – whether for financial or any other reason – should not affect the position in principle. In addition, the short judgment of Jacob LJ is of relevance and, in my view, applicable to the present case. He said:

> "There is also, it seems to me, a narrower, arguable ground of liability. This is that in relation to both retainers the defendant should be regarded as acting not only for the parents, but also directly for the children. After all they could not act for themselves—they were under age. Putting it another way, it is at least arguable that viewing the transaction as a whole, the defendant was advising both donors and donees. If that analysis is correct, then this would not be a case of a duty of care extended to a stranger intended to be benefited by a contract between two

> others. There would be a direct contractual duty owed to the children."

86. There is a second strand to Ms Haren's argument based on the decision of Ferris J in *Yudt v Leonard Ross & Craig* (1998/99) 1 ITELR 531, which does not depend on establishing a *White v Jones lacuna*. See paragraphs 60-62 above. It is not necessary for me to repeat what is set out there: it is sufficient to indicate that I agree with Ms Haren that it is arguable that Ferris J was correct to distinguish between beneficiaries under a disposition already made and disappointed beneficiaries under a disposition which was not made at all because of the negligence of solicitors.

87. Mr Halpern argued that, on this application, I should grasp the nettle of considering and deciding whether the Children have valid claims against the solicitor. Ms Haren submitted that I should take the course adopted by HHJ Norris QC in *Richards v Hughes* and conclude that there is sufficient uncertainty in relation to the law that I should exercise my discretion not to strike out the claim or grant summary judgment, as endorsed by the Court of Appeal. "Grasping the nettle", as Mr Halpern put it, 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 solicitors' negligence was to make the disposition irrevocable. There now exists a body of authority arising since the decision in *White v Jones* to support this view: Jacob LJ in *Richards v Hughes*, Chadwick LJ in *Carr-Glynn v Frearsons*, and Ferris J in *Yudt v Leonard Ross & Craig*. However, in any event, in a case such as this where there are arguments both ways, and I consider that the law is in a state of development, I would exercise my discretion to refuse to strike-out the claim or to award summary judgment.

Limitation

88. Given that I have found that it is arguable that the Children have a valid claim so that their claim should not be struck out and there should not be summary judgment awarded against them, the action will proceed as there is no argument that the Children's claims are statute-barred. The final question that arises is whether time has expired in the case of James Lonsdale and whether, if it has, that bars the right of action of the Trustees given James Lonsdale's dual capacity as both an individual receiving advice from the solicitors and as a Trustee, arguably receiving advice on behalf of all the Trustees. Three questions arise: (i) when did the primary 6-year limitation period start to run; (ii) did James Lonsdale acquire sufficient knowledge in July 2018 to start time running for the purposes of section 14A of the Limitation Act; and, if so, (iii) are the other Trustees endowed with James Lonsdale's knowledge so that the cause of action of the Trustees is compendiously statute-barred?

(i) When did the primary 6-year limitation period start to run?

89. It is argued on behalf of the Defendants that time started to run when the first damage accrued, on 14 June 2011, upon Leonora attaining the age of 25. Any later instances of negligence are only relevant if they give rise to a fresh claim for subsequent loss. Although further loss occurs when further beneficiaries attain 25, this is but further loss caused by the original negligence in 2011: time in respect of that negligence started to run from the date when appreciable loss was first suffered. The solicitors had no duty to re-visit the advice that had been given in 2011, relying on *Capita Banstead v RFIB* [2016] QB 836.

90. For the Claimants, it is argued that part of the Claimants' claim is within the primary limitation period: Wedlake Bell continued until July 2018 wrongly to advise that the Settlement was held in four shares for the benefit of the Children and had they given the correct advice at any time prior to February 2018, it would still have been possible to exercise the Power to Vary to a greater extent than subsequently was the case. It is submitted that, after 2011, the solicitors continued in a myriad of ways positively to advise the Trustees (and Leonora and Rosanna) that the Children were or were presumptively entitled to a ¼ of the fund each. They did so even when they had cause to, and apparently did, revisit the terms of the Settlement to give that advice. If they had given the correct advice as to the provisions of the Settlement, the Power to Vary would have been exercised to the extent then possible (as indeed it later was). The principles in *Capita* do not apply: this is not a case of once and for all advice on the issue relevant to the claim.

91. Whether a solicitor retains a continuing obligation was considered by Oliver J (as he then was) in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, whose decision was reviewed, and arguably overruled, by the Court of Appeal in *Bell v Peter Browne Co* [1990] 2 QB 495. In *Capita*, Popplewell J (as he then was) at first instance considered that the solicitor's conduct in that case fell on what he called the *Midland Bank* side of the line rather than the *Bell v Peter Browne Co* side of the line, but, as Longmore LJ observed in *Capita*, the trouble with this is that it is a very elusive line. He took the view that it is not simply delineated by whether the solicitor has closed the file and been paid, as was suggested by the Privy Council in *Maharaj v Johnson* [2015] PNLR 27. He said:

> "19 As to that the first question is whether the distinction from the *Midland Bank* case [1979] Ch 384 referred to in the subsequent cases, namely that there was a continuing retainer because the file had not been closed and further advice was sought and obtained, is a distinction of principle rather than of incidental fact. In my opinion it is a factually incidental distinction rather than a distinction of principle. The obtaining and receiving of advice after a mistake has been made (even if the mistake can be easily rectified) cannot to my mind mean that an obligation to correct one's mistake or negligence continues to accrue and give a fresh cause of action every day after the mistake has been made. As Mustill LJ pointed out in the *Bell case* [1990] 2 QB 495 it would be unusual for there to be an express term in the average retainer contract (or the average pension adviser contract) requiring the adviser to exercise continuing vigilance to discover any mistakes he may have made and then to busy himself to put them right. Moreover it cannot be right to imply what he called such "a strange obligation" into an apparently usual form of contract.
>
> 20 Once it is clear that there is no principled distinction between the *Midland Bank* and *Bell* cases, it is clear that our obligation is to follow the Bell case as a decision of this court. If the decision in the Midland Bank case is to be preferred, that must be for a higher court to decide.

> 21 I would therefore conclude that despite the existence of a continuing retainer on the part of CHBC, it does not follow that fresh acts of negligence occurred, in respect of each of the amendments, of failing to secure the Trustees formal adoption of the amendments in a signed document and failing to inform them that the amendments could not be retrospective. These were original acts of negligence which occurred before 30April 2004 and are accordingly not acts of negligence for which Capita/CHBC are responsible under the indemnity, even though Mr Le Cras made no attempt to repair his omission thereafter."

92. In my judgment, it is arguable that, by continuing to act and to advise the Trustees and Beneficiaries, the solicitors had a continuing obligation so to act and advise upon the correct basis, and by failing to correct the erroneous advice given in 2011, they committed fresh breaches of duty which crystallised into fresh loss with the beneficiaries in turn attaining the age of 25. Had the solicitors simply advised in 2011 and then had nothing more to do with the matter but had closed the file and become *functus officio*, the position would have been different, but the fact that they not just continued to act but to give advice and act in relation to the Trust accounts and the like makes the position crucially different. The court at trial which hears all the evidence will be in the best position to assess whether the solicitor's continuing involvement and what they did amounted to, in effect, fresh consideration of the position, but I consider it likely that, given this involved assuming that the Trust gave the Children a quarter interest and that the solicitor carried out further work (for which they were paid) on that basis, it is likely that their continued retainer carried an implied obligation to advise upon the correct basis so that, on the facts of this case, there was a continuing breach.

93. On that basis, for the purposes of these applications, I consider it to be arguable that the first 6 year limitation period started on 14 June 2011 in relation to the loss caused by Leonora attaining 25; that a further 6 year limitation period started on 14 January 2013 when Rosanna attained 25 in relation to the additional loss accruing; and similarly there were further losses and new primary limitation periods from 14 April 2013 (Susannah Shipp), 11 February 2014 (Alexander Shipp) and Patrick Shipp (14 February 2018). These primary limitation periods had all expired by the time these proceedings were issued on 16 December 2021 except for that relating to Patrick Shipp and the claims arising from the additional loss accruing to the Children from Patrick attaining 25 without any variation to the Trust being made are arguably in time.

<u>(ii) Did James Lonsdale acquire sufficient knowledge in July 2018 to start time running for the purposes of section 14A of the Limitation Act?</u>

94. The provisions of s. 14A Limitation Act 1980 are set out in paragraph 46 above. In my judgment, the critical provision for the purposes of this application is that set out in sub-section (7) which provides:

> "(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."

As referred to above (paragraph 46) Mr Halpern submitted that not only did Ms Stanyer's letters of 25 and 31 July 2018 provide sufficient information to start time running, but James Lonsdale's letter of 13 August 2018 made it clear that he had such knowledge, namely that he had been given the wrong advice in 2011 and that this had resulted in loss to himself, the Trustees and the Children.

95. However, in my judgment, the position is by no means as simple as Mr Halpern makes out. Although he is right that, as a result of Ms Stanyer's letters, he knew that he had been given wrong advice, what remained unclear at that stage was how and to what extent the position was remediable. I refer to paragraph 23 above and Mr Hicks' letter to James Lonsdale of 21 September 2018. In my judgment, Ms Haren is correct to argue on behalf of the Claimants that Mr Lonsdale was thereby led to believe that it might be possible for something to be done "to put matters on the correct footing" and that he was encouraged to wait until Wedlake Bell were able to "produce an analysis of where we are and the ways forward" before he considered taking independent advice. A reasonable person in Mr Lonsdale's position would, in my judgment, consider the issuing of proceedings premature and unjustified. Suppose, for example, that, with the consent of the other Trustees and all the beneficiaries, Wedlake Bell had been able to reach an arrangement whereby the one-quarter interest of James Lonsdale's children was effectively restored at relatively small expense which the solicitors were prepared to cover: the solicitors would have been justified in arguing that proceedings issued by Mr Lonsdale were premature and they should have been given the opportunity to remedy the situation. The fact that it was only after receiving Wedlake Bell's letter of 24 January 2019 (see paragraph 25 above) that Mr Lonsdale sought independent legal advice speaks volumes: Mr Lonsdale has, as it seems to me on the evidence I have seen, at all times acted eminently reasonably and the fact that it was then that he sought independent legal advice indicates strongly to me that it was only then, after receiving the letter of 24 January, that he had finally acquired the necessary knowledge for the purposes of s. 14A Limitation Act 1980. I accept and adopt for the purposes of this judgment the arguments of Ms Haren set out at paragraph 69 above.

96. In the circumstances, on the basis of the evidence that is before me – and I acknowledge that the evidence at trial may cast a different light on the situation – I do not consider that it is sufficiently clear, or indeed clear at all, that James Lonsdale acquired sufficient knowledge before January 2019 to start time running for the purposes of s. 14A, whereby these proceedings are statute-barred and such as to justify striking out the claims or granting summary judgment.

(iii) Are the other Trustees endowed with James Lonsdale's knowledge so that the cause of action of the Trustees is compendiously statue-barred?

97. Given my findings on question (ii), this question does not arise. Had I needed to make a decision, I would have been inclined to find that Mr Lonsdale was holding himself out as agent for the other Trustees and had their ostensible authority to do so, and thus to accept and adopt the argument of Mr Halpern at paragraph 48 above, but this is clearly *obiter* and it would remain open to Ms Haren to argue otherwise at trial should she need to do so.

Conclusion

98. In summary, based upon my findings above, I conclude as follows:

(i) The Trustees and Children both have viable claims against the Defendants and it is desirable that they should all be Claimants so as to avoid any *lacuna* in recovering the loss occasioned by the solicitors' negligence, so long as the court is astute to avoid double recovery, as it will be;

(ii) The primary limitation period of 6 years had expired by the time these proceedings were issued on 16 December 2021 except for the claim relating to Patrick Shipp and the claims arising from the additional loss accruing to the Children from Patrick attaining 25 without any variation to the Trust;

(iii) James Lonsdale did not acquire the necessary knowledge for the purposes of s.14A Limitation Act 1980 until at least January 2019 so that these claims are in time and are not statute-barred;

(iv) On any application for summary judgment, the court retains a discretion: even if I am wrong about the above matters, this is a case in which I would be inclined to exercise my discretion not to strike out the claim or to grant summary judgment given that the full evidential position will only become clear at trial and the law remains in a state of development;

(v) The applications on behalf of the Defendants are accordingly dismissed.