

# THE REMEDY IN WHITE v JONES CASES

## Smoothing the Analytical Wrinkles

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### Introduction

The underlying principles, and proper analysis, of the remedy afforded to disappointed testamentary beneficiaries by the House of Lords in *White v Jones* [1995] 2 AC 207 have not been consistently applied in subsequent cases, although the decisions in these cases have been consistent with principle. Without a clear understanding of the legal basis of the cause of action established in *White v Jones*, the merits and likely outcomes of new claims cannot properly be assessed. Persistent analytical difficulties have led to a series of failed claims and applications and seemingly inconsistent judgments, including *Worby v Rosser* [1999] Lloyd's Rep PN 972, *Corbett v Bond Pearce* [2001] 3 All ER 769, *Daniels v Thompson* [2004] All ER (D) 357 and *Rind v Theodore Goddard* [2008] EWHC 459 (Ch).

I argue that confusion has arisen primarily by the failure to understand that the duty of care extended to beneficiaries is not truly independent of the duty owed to the client, so that there are, generally, no potentially competing claims for loss suffered by a disappointed beneficiary and loss to "the estate". There is, in the context of the *White v Jones* remedy, no proper distinction to be drawn between claims by the "estate" and by the persons entitled to it.

In this paper, I confine myself to applications of *White v Jones* in the context of the making of wills and related situations (such as estate planning and the administration

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<sup>1</sup> Teresa Rosen Peacocke represented the solicitor defendants in *White v Jones* [1995] 2 AC 207 and in subsequent cases such as *Walker v Geo H Medlicott & Son* [1999] 1 WLR 727 and *Cancer Research Campaign v Ernest Brown & Co* [1997] STC 1425.

of estates). The wider application of the doctrine, in distinct areas of law, must be left to another occasion.

***White v Jones* [1995] 2 AC 207**

In *White v Jones*, the House of Lords held (by a bare majority) that the duty of care owed to a client by a solicitor who accepts instructions to prepare a will for the client should be extended to the intended beneficiaries under the proposed will, so that a beneficiary who suffers loss as a result of a breach of the solicitor's duty of care will have a remedy in damages.

The salient points to bear in mind about the principles of *White v Jones*, for present purposes, are as follows.

1. The case involved the (relatively) straightforward situation in which the intended will was not made, without any complicating factors relating to losses in the form of costs incurred in posthumous proceedings (probate, construction or rectification) or avoidable tax charges.
2. The duty of care, extended from the client to the intended beneficiaries, is unique in several respects. It is truly an extension of the solicitor's duty to the client under a retainer for the preparation of a will, in the sense that the nature and scope of the duty are defined in all respects by the relationship between the solicitor and client alone<sup>2</sup>.
3. The duty thus owed to the client is extended to the person(s) intended to benefit under the proposed will for the simple, practical reason that the nature of a will is such that its failure (in whole or in part) will have no repercussions for the client, but would defeat the object of the will-making exercise unless those intended to benefit under it can claim compensation for any breach of the solicitor's duty to the testator in relation to its preparation.

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<sup>2</sup> The *White v Jones* duty is not like the separate duty held to be owed by the valuer to the house buyers (in addition to that owed to the lender) in *Smith v Eric Bush* [1990] 1 AC 831, or the notional duties owed to a company and its shareholder in *Johnson v Gore Wood* [2002] 2 AC 1, which are independent duties owed in respect of entirely different kinds of loss.

4. This is the lacuna in the law: the only person to whom the duty is owed will, by virtue of the nature of the exercise, suffer no loss, and the only person who has suffered loss would have no claim<sup>3</sup>.
5. Under *White v Jones*, the duty of care arises in favour of the testator, from the solicitor's retainer, and if that duty is breached in such a way as to cause loss to the intended beneficiary, as such, then the latter can recover compensation for such loss against the solicitor<sup>4</sup>.
6. If a will is prepared without a breach, then the solicitor's duty of care (to the client and the intended beneficiaries) is fully discharged, and does not extend to any further retainer by, or other activity undertaken by the solicitor for, the testator<sup>5</sup>.
7. Prior to the acceptance by the solicitor of instructions to prepare a will for a client in specific terms, no duty is owed to any prospective beneficiary. This is essential to the avoidance of irreconcilable conflicts of interest. There is, then, no duty owed to a potential beneficiary to obtain instructions<sup>6</sup>.
8. No claim lies by a prospective beneficiary for the loss of a chance to be included in the will; this is a claim for the loss of a chance of being owed a duty of care, which could never ground a cause of action in tort.
9. It follows that where a solicitor's retainer is ineffective or abortive (for instance, due to a client's lack of testamentary capacity) no duty of care arises in favour of beneficiaries under *White v Jones*.<sup>7</sup>

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<sup>3</sup> The lacuna is better stated in terms of relevant loss: If there were no claim in favour of a disappointed beneficiary, then the only person who had a claim would have suffered no loss within the scope of the duty of care, and the only person who suffered such loss would have no valid claim.

<sup>4</sup> See the speeches in *White v Jones* itself, and see *Trusted v Clifford Chance* [2000] WTLR 1219, per Jonathan Parker J (as he then was) and Neuberger J (as he then was) in *X v Woollcombe-Yonge* [2001] WTLR 301 at 307E.

<sup>5</sup> See Sir Donald Nicholls V.-C. (as he then was) in *White v Jones* in the Court of Appeal, [1995] 2 AC 207 at p 225D-F. See also *Clarke v Bruce Lance* [1988] 1 WLR 881 CA, and *Taylor v Sintons* [2007] 8 June, Ellera QC (forthcoming in Wills and Trusts Law Reports).

<sup>6</sup> See *Trusted v Clifford Chance* [2000] WTLR 1219; *Gibbons v Nelsons* [2000] Lloyd's Rep PN 603.

<sup>7</sup> A central (and often neglected) issue arising in such cases is the difference between negligence and an error of judgment. Unless a solicitor fails to act, or is negligently inattentive, solicitors faced with situations of doubtful capacity or possible undue influence are often called upon to exercise professional judgment, errors of which are not negligent: See *Moy v Pettman Smith* [2005] 1 WLR 581, citing Lord Hobhouse in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 (at p 737g-h) where he said that "... the standard of care to be applied in any negligence action was the same as that applicable to any other skilled professional who has to work in an environment where decisions and

These special features of the duty fashioned by the House of Lords in *White v Jones* are crucial to its application, as they are the means by which conflicts of interest between a client and his/her prospective beneficiaries can be minimised, and indeterminate liability can be avoided.

In this context, it is important to bear in mind that *White v Jones* cases are all claims in tort for economic loss, in the absence of reliance, often in respect of breaches in the form of omissions, for compensation for the failure to receive benefits (and not for losses properly so called). In all these respects, the courts have always carefully constrained the categories of maintainable claims.

***Caparo v Dickman; South Australia v York Montague***

*White v Jones* is a claim in tort, and thus falls to be analysed in accordance with the seminal reasoning of the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 as further analysed in *South Australia Asset Management Corporation v York Montague Ltd* [1997] 1 AC 191, decided about 18 months after *White v Jones* itself.

The principal points to emerge from those cases are these:

1. A claimant who sues for breach of a duty of care must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. See *Caparo Industries Plc v Dickman* [1990] 2 AC 605, in which it was held that the auditor's breach was not of a duty owed to an outside take over bidder, nor was it a duty in respect of the kind of loss which would be suffered by existing shareholders who bought additional shares.
2. In the case of an implied contractual duty of care (and the concurrent duty of care in tort), the scope of the duty is determined by the terms and object of the retainer (per Lord Hoffman, *South Australia* p 212 C-F).

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exercises of judgment have to be made in often difficult and time-constraining circumstances". In the same case, at p 726d-g he said that it could not be stressed too strongly that a mere error of judgment ... will not expose the professional to liability for negligence.

3. The scope of the duty of care, thus defined, determines the kind of damage from which the defendant must take care to save the claimant harmless (per Lord Bridge, *Caparo* at p 627).
4. The question whether loss has been suffered is not the same as the question of how one defines the kind of loss which falls within the scope of the duty of care (Lord Hoffman, *South Australia* p 218 A).

The object of a solicitor's retainer to prepare a will for a client, and thus the scope of that retainer, is to assist the testator to make effective testamentary dispositions to intended beneficiaries. By 'effective' one might reasonably imply that the will ought to be capable of taking effect on death without avoidable expense in the form of probate, construction or rectification proceedings.

The whole point, then, of making a will is to pass specified benefits to specified third parties. It is not part of a testator's object in making a will to create or preserve posthumous wealth generally, or to provide for those not specifically intended to benefit under the will, such as creditors. A testator's estate will comprise all property belonging to him at death whether or not a will is made, and meeting creditors' claims is not generally part of the object of making a will, and thus not part of the testator's object in retaining a solicitor to prepare a will.

A will is essentially a vehicle for distributing property after death to specified recipients, undiminished (it can be assumed) by costs occasioned by reasonably avoidable deficiencies in the preparation of the instrument.

### ***Carr-Glynn v Frearsons***

An unnecessary (and unjustifiable) complication was introduced to the *White v Jones* analysis in the case of *Carr-Glynn v Frearsons* [1999] Ch 326. There the testatrix intended to pass her undivided half share in real property to the claimant under her will, but by (what the Court of Appeal found to be) the solicitor's breach of duty to the testatrix, the property passed to another by survivorship on death and never fell into the estate.

From the facts of the case (and in most similar cases) it can readily be inferred that it was never part of the testatrix's object to increase the size of her estate generally by the value of her half share in this property, whether for those entitled to the residue of her estate, for her creditors or otherwise. There is no suggestion that severing the beneficial joint tenancy ever was, or would have been, contemplated by the testatrix independently of her testamentary intention to pass her share of the property to the claimant

Moreover, the loss of the value of the half share was never a loss which the testatrix could have suffered in her lifetime, so as to give rise to a cause of action which might then be asserted by her personal representatives after her death, pursuant to section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934<sup>8</sup>.

On this basis, then, it can be seen that there was no claim on the part of the testatrix, whether in her lifetime or following her death, for loss suffered by her as a result of the failure to sever the joint beneficial tenancy of the property<sup>9</sup>.

It is true that but for the solicitor's negligence, the estate would have been enhanced by the value of the property that passed by survivorship to the testatrix's co-owner. Nevertheless, the estate never had a claim against the solicitors for such loss. The solicitor's breach of duty was not in respect of such loss<sup>10</sup>. The personal representatives (or creditors or residuary beneficiaries) in *Carr-Glynn* were in no better position than the take over bidders in *Caparo*, or the lenders in *South Australia* in respect of the loss represented by the fall in the property market. Such a claim was not within the scope of the solicitor's duty of care.

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<sup>8</sup> This issue is discussed more fully below, in the context of the decision in *Daniels v Thompson* [2004] EWCA Civ 307.

<sup>9</sup> The claim for the loss to the estate of the half share is distinguishable from the small, independent (and entirely hypothetical) claim that the testatrix would have had for the cost of preparing and serving a notice of severance in her lifetime if the effect of its absence had been appreciated.

<sup>10</sup> As explained by Lord Hoffman in *South Australia*, the 'but for' test merely establishes that some loss was suffered as a result of the breach, but not that any part of that loss is within the scope of the duty of care. The fact that a claimant cannot recover for loss not suffered does not entitle him to an award of damages for loss which he has suffered but which does not fall within the scope of the solicitor's duty of care.

The parties in *Carr-Glynn* apparently conceded that the estate had a claim against the solicitors. But the court should nevertheless have considered whether a claim on behalf of the estate was consistent with settled law.

Chadwick LJ (who gave judgment for the court) cited relevant passages from *Caparo* and *South Australia* (p337B-E) in his judgment. He also correctly stated (at p335 H – 336 B), that it was essential to have in mind that the need to ensure that the property passed into the estate was “integral” to the carrying into effect of the testatrix’s intention to pass the property to the claimant. “On a proper analysis” he said “the service of a notice of severance was part of the will-making process. The [claimant] was as much an intended beneficiary of the severance as she was of the will-making process” (p336 A – B).

The learned judge did not, however, take the next, crucial, step of holding that as the sole purpose of severing the joint tenancy was to enable the property to pass to the claimant, the only claim for breach of the solicitor’s duty in relation to severance was the beneficiary’s claim for the loss of the value of the property.

Chadwick LJ, assuming that there was a competing claim by the estate for the same loss, stated (at p336H) that “the personal representative’s claim on behalf of the estate cannot be ignored – for there may be circumstances in which, at the time when the will was made, it would have been available as an asset of the estate to meet the liabilities of the estate”. On this basis, he concluded, ostensibly from the reasoning in *Caparo* and *South Australia* (at p337D-E) that “the loss from which the testator and his estate are to be saved harmless is the loss to which those interested in the estate (whether as creditors or as beneficiaries) will suffer if effect is not given to the testator’s intentions.”

This is confusing, and too widely stated. The loss which the solicitor assumed responsibility for was all and only the loss which the claimant (as the testatrix’s intended beneficiary) would suffer in the event that the testamentary gift to her was defeated by the failure to sever the joint tenancy, thereby preventing the property to pass to her under the terms of the will. It was no part of the solicitor’s retainer, and

thus outside the scope of his duty of care, to protect any other prospective (and fortuitous) claims to, or interests in, the property as an asset of the estate.

It is true (as was pointed out by Carnwath LJ in paragraph 64 of his judgment in *Daniels v Thompson* [2004] All ER (D) 357) that the testatrix in *Carr-Glynn* also had a complete cause of action against her solicitors in contract in her lifetime, which would have survived her death to be enforceable by her personal representatives. But that claim could only have been for breach of the implied term of the contract of retainer imposing the duty of care, the scope of which would not have differed from the scope of the tortious duty: "... the scope of the duty in tort is the same as in contract" (per Lord Hoffman *South Australia* at p211G). Thus the contractual claim on behalf of the estate could not have attracted more than nominal damages (representing the expense, if any, to which she would be put to correct the situation).

With respect to Chadwick LJ, it makes no sense to say, as he did in *Carr-Glynn*, that the duties owed by the solicitors to the testator and to the intended beneficiaries were "complementary", or that "[t]o the extent that the duty to the specific legatee is fulfilled, the duty to the testator is cut down". The duties are identical, defined by the terms of the testatrix's retainer, but the nature of the exercise is such that the only kind of damage that is within the scope of the duty is that suffered by the disappointed beneficiary.

Part of the problem of analysis that arose in *Carr-Glynn* stems, in my view, from the mistaken treatment of the "lacuna" referred to in *White v Jones* as a test, or prerequisite, for the extension of the duty of care to the intended beneficiary. The lacuna is not a test, or precondition, for a duty in favour of the beneficiary, but rather the rationale underlying the decision to extend the solicitor's duty of care to the third party beneficiary in the particular circumstances of a retainer to make a will.

The right result was reached in *Carr-Glynn*. The ratio of the decision should, however, simply be that where the will-making retainer requires ancillary advice to be given, or an ancillary act to be performed, in order to give effect to an intended testamentary disposition, the solicitor's duty of care arising from that retainer will

include a duty to exercise reasonable skill and care in relation to any such ancillary matter.

***Kecskemeti v Rubens Rabin & Co***

An earlier claim by a disappointed beneficiary for the failure to sever a joint tenancy, *Kecskemeti v Rubens Rabin & Co* (1992) Times, 31 December<sup>11</sup>, does not add to the development of the law in this area. In that case, Macpherson J applied *Ross v Caunters*, and declined to follow *White v Jones* (which had been decided at first instance in the solicitor's favour). The judgment did not touch upon the distinction between claims by a disappointed beneficiary and the deceased's estate.

The interesting point that arose *Kecskemeti*, but which was not really dealt with in the judgment, was the conflict of interest between the testator and the claimant, who was his adult son by a previous marriage, and issues relating to causation.

In that case, the testator held the relevant property jointly with his wife, whose income from a beauty business operated from the property was the couple's principal source of income. The wife gave evidence that her husband was well aware of how strongly she would have reacted against being served with a notice of severance, and the loss of a half share in the property on his death<sup>12</sup>. She further confirmed that she would have brought a claim under the Inheritance (Provision for Family and Dependents) Act 1975 if the property had not passed to her by survivorship.

Thus, *Carr-Glynn* should not be seen as authority for the proposition that a solicitor invariably owes the intended beneficiary of a share of jointly held property a duty to advise a testator to serve a notice of severance of co-owned property, as opposed to a duty to advise that without severance the intended testamentary gift might fail.

Moreover, *Carr-Glynn* should not be seen as stating that the failure to sever a joint tenancy necessarily gives rise to a claim for the loss of the client's interest, as such a claim may fail on causation.

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<sup>11</sup> In which the writer acted for the defendant solicitors.

<sup>12</sup> Indeed, the testator told the solicitor that the property was held on a tenancy in common, and he sought to make an *inter vivos* payment to his son.

## **Costs incurred due to Negligent Drafting or Execution and Probate Contests:**

### ***Worby v Rosser and Corbett v Bond Pearce***

The duty of care owed to the client by a solicitor retained to prepare a will includes a duty to exercise reasonable skill and care to prepare the will in a form that will pass the proposed gifts to the intended beneficiaries without avoidable probate, construction or rectification proceedings<sup>13</sup>.

A breach of that duty will, prima facie, result in a defective instrument<sup>14</sup>. The defect would be remediable by the testator, if discovered in his lifetime, but as a will is entirely ambulatory and ineffective before death, the loss would be nominal.<sup>15</sup> The testator's cause of action in contract and tort in respect of that kind of loss would be fully constituted in his lifetime<sup>16</sup>.

It does not follow, however, that losses suffered after the testator's death are recoverable by the estate on behalf of the testator. The issue is not one relating to the measure of damages, but goes to the kind of loss that is within the duty of care.

It is important to bear in mind in this context that the costs of remedying a defective will *inter vivos* would be within the scope of the solicitor's duty of care precisely because, and only because, avoiding such costs can be assumed to be part of the testator's object of passing testamentary benefits to the intended beneficiaries after death.

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<sup>13</sup> This is not to say that contested probate, construction or rectification proceedings invariably (or even generally) arise from negligence.

<sup>14</sup> Where solicitors are negligent in the retention of the original will, the cost of proving a copy would also come within these general principles.

<sup>15</sup> As explained by Dyson LJ in *Daniels v Thompson* (at para 40 of his judgment) the position would be that the testator had paid fees for the defective performance of services. He may be able to recover these fees in restitution on the basis of a failure of consideration, but there would be no claim in damages for loss caused by the defendant's negligence.

<sup>16</sup> On some views, it may also be the case that if the solicitor learned of the defect, he would owe a duty to his client and the intended beneficiary in relation to any necessary remedial action. Sir Christopher Slade, in *Punford v Gilberts Accountants* [1998] PNLR 763, said (at p 767) that "... a professional man, who has undertaken the preparation of a will ... intending to benefit a third party, owes a duty of care to that third party when giving subsequent advice to the testator which is intended to ensure that his instructions as expressed in the will continue to benefit the third party".

In will cases, the ‘estate’ cannot properly be distinguished from those intended to benefit from it. Such a distinction falls apart in any case where the estate passes to those not intended to receive it (such as occurred in *Corbett v Bond Pearce*). If reference to ‘the estate’ is meant to refer to the alter ego of the testator, then it easy to see that he had no interests to be protected after death that were independent of his interest in benefiting those named in his will.

Where a defect in the will is not discovered until after the client’s death, the loss occasioned by the defective drafting (or execution) diminishes the benefits intended to pass under the will, and it is that loss that is then recoverable. As the object of the solicitor’s retainer was to pass the intended benefits to those intended to receive them, undiminished by avoidable costs incurred from defects in the instrument, the loss occasioned by the solicitor’s breach of duty within the scope of the duty of care is that suffered by his/her intended beneficiaries.

This is the part of the analysis that has become most confused by the introduction of the concept of separate but complementary duties owed to the testator, for loss to the estate, and the beneficiaries, for loss of testamentary benefits. It led Eady J, at first instance in *Corbett v Bond Pearce* [2000] WTLR 655, to say (at para 21) that “In the Disappointed Beneficiaries Action, the claim obviously had to be based upon a duty of care owed to [the disappointed residuary beneficiaries]. In the present proceedings, equally obviously, the claim is based upon the duty owed during her lifetime to [the testatrix], in accordance with the retainer. *The allegations thus relate to distinct breaches of duty.*” (emphasis supplied)<sup>17</sup>.

The testator, in making a will, had no separate object of preserving assets generally, for anyone (whether unintended beneficiaries or even creditors<sup>18</sup>) other than the

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<sup>17</sup> On this point I respectfully disagree with the analysis of the decision of Eady J and the Court of Appeal in *Corbett v Bond Pearce* by Sue Carr QC and Graham Chapman in “*Where there’s a Will there is a Damages Claim*”, published by the Association of Corporate Trustees in April 2001.

<sup>18</sup> I accept that the position of creditors, *per se*, may be controversial. If a creditor’s claim would have reduced an intended beneficiary’s entitlement in any event, then the damages payable under *White v Jones* fall to be reduced. This was the causation argument in *Horsfall v Haywards* [1999] Lloyd’s Rep PN 332, as the unintended beneficiary who took the estate would have taken it anyway under the Inheritance (Provision for Family and Dependants) Act 1975. If an estate that is being administered for those not intended to benefit is depleted by creditors’ claims, the unintended beneficiaries have no

intended beneficiaries. There would be no point in making a will if a testator did not care to whom his estate was distributed after death.

Where (in the event) the estate passes to those unintended by the testator, after expensive proceedings, there would have been a duty of care owed in respect of the kind of loss which has been suffered, but it would not have been owed to persons not intended to benefit from the estate at all.

Probate (and related) costs incurred after death as a result of defective drafting are often payable out of residue (but the same principles of analysis would apply even if this were not the case). Where the residuary beneficiaries are those intended by the testator to benefit, then breach of the solicitor's duty to the testator causes loss to those residuary beneficiaries, who have a claim under *White v Jones*<sup>19</sup>.

The point is essentially the same as that made in relation to the alleged loss to the estate in *Carr-Glynn*. The costs of probate (or similar posthumous) proceedings are not losses suffered by the testator, but fall within the scope of the solicitor's duty of care only because they diminish the value of the estate for those intended to receive it.

### ***Worby v Rosser***

Thus Chadwick LJ's answer to the beneficiaries' claim in *Worby v Rosser* [1999] Lloyd's Rep PN 972 is potentially confusing, although the outcome of the action was right. There, beneficiaries under an earlier will sought to recover costs incurred by them personally in opposing probate of (what was found to be) an invalid later will.

An essential point in that case was that the (purported) retainer alleged to have been breached was not one in which the defendant solicitor had accepted instructions to

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complaint. It is hard to imagine a case in which the estate becomes insolvent in consequence of the solicitor's negligence, but my view is that the creditors' loss would not be recoverable, as no duty of care was owed to them, or to the deceased's personal representatives, and the duty owed to the testator was not in respect of the kind of loss that would be suffered if he died insolvent.

<sup>19</sup> Title to sue may vest in the personal representatives, as to which see below. This does not mean, however, that there is a claim on behalf of the estate independently from that of the disappointed residuary beneficiaries.

prepare a will. Strictly speaking, then, the case was not, therefore, within the decision in *White v Jones*.

In giving judgment for the court, Chadwick LJ explained that the reason why the beneficiaries under the earlier, valid, will had no claim for personal costs incurred in resisting probate of the subsequent, invalid, document was that those costs were prima facie recoverable from the estate (which was correct), and that when a solicitor's negligence gives rise to probate proceedings, the costs of those proceedings are recoverable from the solicitor by personal representatives on behalf of the estate, which is not necessarily true (as the court found in *Corbett v Bond Pearce*).

What ought to have been emphasised in *Worby* was that the breach alleged in that case was not of a duty of care arising from a retainer to make a will, and the case was therefore not a *White v Jones* case at all. Moreover, beneficiaries under an earlier will are not owed duties of care in relation to a subsequent exercise undertaken by solicitors.

The position of the beneficiaries under the earlier will is covered by the decision in *Clarke v Bruce Lance* [1988] 1 WLR 881. There it was held that a beneficiary under an executed will have no claim for a breach of a solicitor's duty to the testator in circumstances unconnected with the making of the will under which he was named as a beneficiary.

Where there is no retainer to make a will, the recovery of damages by personal representatives on behalf of an estate for a breach of a duty owed by a solicitor to the testator will depend on the ordinary principles of contract and/or tort. This is so even where the unconnected circumstances involve the execution of a document purporting to be a new will.

Although the judgment in *Worby* reveals little about the alleged negligence of the solicitor in the abortive will-making exercise, it should not have been based upon *White v Jones*, as there was (as the court effectively found) never a valid retainer between the testator and the solicitor to prepare a will in favour of intended

beneficiaries, and thus no duty of care arose in favour of any intended beneficiaries (including those named in the earlier will).

A solicitor who negligently undertakes to act for someone who is incapable of instructing him, due to mental incapacity, undue influence or fraud by a third party (such as occurred in *Worby*) may be liable to the putative client on the well established basis of assumption of responsibility. Damages for loss within the scope of such a duty of care would also, prima facie, be recoverable by such person's estate if the negligence were only discovered after death. But recovery in such a case is based on ordinary principles of contract and tort and the survival of causes of action under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934. Such a cause of action does not arise from a duty of care owed to beneficiaries under *White v Jones*, which is a point of confusion exacerbated by the judgment in *Worby v Rosser*.

### ***Corbett v Bond Pearce***

The correct analysis of *White v Jones* was (for the most part) adopted by the Court of Appeal in *Corbett v Bond Pearce* [2001] 3 All ER 769. There, the beneficiaries under the testatrix's last will lost their intended testamentary gifts when that will was declared invalid after costly probate proceedings. Unlike *Worby*, the later will was the one intended by the testatrix to take effect when she died, thereby revoking her previous will. The result was, therefore, that those who, in the event, benefited from the estate were not intended to do so. The obvious dilemma arising from this scenario is that any damages recovered by the estate would pass to those not intended to any testamentary benefits, who would as a result be better off than they would have been if there had been no negligence.

The *White v Jones* claim, by the disappointed beneficiaries named in the last will, was compromised by compensating them for their lost benefits, undiminished by any probate costs. However, Mr Corbett, as personal representative of the estate, contended (correctly) that the estate had been diminished by the costs of the probate proceedings, and sought (incorrectly) to assert the testatrix's claim to recover those costs, based upon the dicta in *Carr-Glynn* and *Worby v Rosser*.

Sir Christopher Slade applied *White v Jones*, analysed in accordance with *South Australia*, although strained to accommodate the concept of 'complementary duties' introduced by the dicta of Chadwick LJ in *Carr-Glynn* and *Worby*.

At paragraph 31 of his judgment, Slade LJ said "... it is necessary to determine the scope of the duty of care owed by the defendants to the Testatrix by reference to the kind of damage from which they had to take care to keep her harmless, having regard to the terms of their retainer", and (at paragraph 34) he made the important point that "In the events which have happened ... [the residuary beneficiaries] under the February will ... will be better off than they would have been if there had been no breach of duty on the part of the defendants ..."<sup>20</sup>.

Slade LJ goes on, however, to retain Chadwick LJ's reasoning, that "... this kind of damage was the loss which those who would become interested in her estate, whether as beneficiaries under the September will or as creditors, would suffer if effect were not given to her latest testamentary intentions" and then (in paragraph 32) "The duties owed by the defendants (in contract) to the Testatrix and (in tort) to the beneficiaries named in the September will were not inconsistent, but complementary."

Damages should never be recoverable for a breach of the duty of care relating to the making of a will where the damages would pass to those not intended to benefit under the will. That is precisely the opposite of the lacuna that motivated the House of Lords in deciding *White v Jones*. The better response, in *Corbett*, would have been that the duties owed to the testator and the intended beneficiaries are the same, and when the testator dies, it is the loss suffered by the beneficiaries that becomes recoverable as result of the breach of duty, because posthumous costs, in respect of which the duty was owed, are not suffered by the testator, and the beneficiaries under the earlier will, who were not intended to benefit, are not within the scope of the duty of care.

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<sup>20</sup> This passage was qualified by reference to the question whether there would be a residue payable to these beneficiaries, which led to further (in my view unnecessary) complications in the purported claim by the estate. The only point that needed to be made is that no one interested under the earlier will would have had any interest in the deceased's estate if there had been no breach of duty, and it follows that no claim to recover loss of any kind could be maintained.

Procedurally, title to sue may properly vest in the personal representatives, by virtue of the fact that, as explained by Lord Templeton in *Marshall v Kerr* [1995] 1 AC 148, 157:

"the entire ownership of the property comprised in the estate of the deceased person which remains unadministered is in the deceased's legal representative for the purpose of administration without any differentiation between legal and equitable interests ..."

In the same case (at p 165f), Lord Browne-Wilkinson said that "during the period of administration the legatee has no legal or equitable interest in the assets comprised in the estate".

This means that it is not necessarily improper for a claim to be asserted by personal representatives, especially on behalf of residuary beneficiaries, who are said to have no interest in, or claim to, any part of an estate until the residue is constituted on completion of administration. See *Marshall (Inspector of Taxes) v Kerr* [1995] 1 AC 148 and *Chappell v Somers & Blake* [2004] Ch 19. But this is no more than a procedural technicality and should not give rise to confusion as to whether it is the testator's, or the beneficiaries', claim being asserted.

There is, then, no separate, independent cause of action vested in the testator's personal representatives to recover any loss for breach of a duty relating to the making of a will, in favour of an estate which passes to those not intended to receive it.

In short, when a solicitor is negligent in the performance of a retainer to make a will, there will usually be a disappointed beneficiary. If a specific gift is lost, then the specific legatee is disappointed. If the gift is saved, but only after costly construction or rectification proceedings, which are paid from residue, then the residuary beneficiaries lose out. To distinguish between an estate and its beneficiaries in this context is not only artificial, but impermissible, as only the loss to the intended beneficiaries is within the scope of the solicitor's duty of care.

#### **The Law Reform (Miscellaneous Provisions) Act 1934**

The question whether losses suffered after death (such as a half share of jointly owned property, probate costs or inheritance tax) due to solicitors' negligence in the making of the will are recoverable by the estate on behalf of the deceased was always central to a proper understanding and application of the doctrine of *White v Jones*. The issue simply didn't arise in *White v Jones* itself.

An important element in the reasoning of the House of Lords in extending the duty of care to intended beneficiaries in *White v Jones* was the fact that a will is effective only from death, when the testator will no longer be capable of suffering loss due to any defects in its operation. Although their Lordships were only concerned with the failure of intended testamentary benefits, this reasoning applies equally to other losses suffered after death, in consequence of a breach of the solicitor's duty of care, including avoidable costs and/or (possibly) inheritance tax.

This is consistent with the operation of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934, which provides (in essence) that on the death of any person after the commencement of the Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

The 1934 Act was passed to abolish the common law rule that actions in tort did not survive for the benefit of or against the estate of a deceased person<sup>21</sup>. Actions in contract did survive if they resulted in pecuniary damage, even if they were also torts. But actions for damages in tort, even if based in contract as well, did not: *Ronex Properties Ltd v John Laing Construction Ltd* [1983] 1 QB 398 per Donaldson LJ at p 405.

The 1934 Act refers to "causes of action". A "cause of action" was defined by Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 at 131 as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the

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<sup>21</sup> *Harris v Lewisham & Guy's Mental Health Trust* [2000] 3 All ER 769, per Stewart-Smith LJ at para 18. It is noted that the statute does not refer in terms to actions in tort, but as Denning LJ stated, in *Sugden v Sugden* [1957] P 120, at 134 "The legislature had particularly in mind causes of action in tort which used to fall with the death of either party under the old common law maxim *action personalis moritur cum persona*".

judgment of the court”. In *Letang v Cooper* [1965] 1 QB 232 Diplock LJ said (at page 242)

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

Thus, causes of action in tort to recover lost shares of property held on a joint tenancy, probate costs, or IHT are not vested in the deceased client at death, as a cause of action in tort is not fully constituted until loss is suffered, and such losses are only suffered after death. This was the point made (for the first time) in *Daniels v Thompson* [2004] All ER (D) 357.

Some confusion on this point may have arisen from a misinterpretation of cases preceding *White v Jones*. *Otter v Church, Adams, Tatham & Co* [1953] Ch 280 has been cited as a precedent for claims by personal representatives, on behalf of the deceased, against solicitors for losses suffered by the deceased client’s estate<sup>22</sup>. There, negligent advice resulted in the client failing to execute a disentailing deed, thereby preventing an asset (settled land) becoming the deceased’s absolute property in his lifetime. The parties accepted that the deceased’s cause of action survived his death. The loss (of the value of the property) could have been prevented for nominal cost in the deceased’s lifetime. The case was decided only in contract, and the damages were ascertained “at the time that the damage accrued”.

Upjohn J described the deceased as having been “deprived of the opportunity of increasing his estate by executing a disentailing deed”. The word ‘estate’, however, is not used in the modern sense of a reference to the situation prevailing after death.

In *Lockier v Paterson* (1844) 1 Carr. & K. 272, which is referred to by Upjohn J in his judgment in *Otter*, and in the early statutes preceding the 1934 Act, the cause of action that survives death is that which causes damage “to the personal estate of the testator in his lifetime, whereby it has become less beneficial to the executor”.

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<sup>22</sup> See Sir Christopher Slade in *Corbett v Bond Pearce*, at paras 16-17 of his judgment, and *Rind v Theodore Goddard* [2008] EWHC 459 (Ch) per Morgan J at para 40 of his judgment.

The loss in *Otter v Church Adams* was not a loss suffered only after death, by the deceased's estate. The essence of an entailed interest is its inalienability in the lifetime of the tenant in tail: notwithstanding any purported alienation by the estate owner, the land would descend to the lineal descendants on death (or in default of issue, would revert to the original donor)<sup>23</sup>.

Going back to basics, it is fundamental to the nature of a will that it is entirely ineffective<sup>24</sup>, and revocable<sup>25</sup>, during the testator's lifetime. Other instruments do not have these characteristics. The very special features of a will are what gave rise to the lacuna filled by the House of Lords in *White v Jones*: the whole purpose of the exercise would be defeated if only the testator had a claim, as the effect of the will, for good or ill, could make no difference to him.

*Otter*, then, is not authority for a cause of action vesting in the estate, maintainable by personal representatives, to recover losses which could only be suffered by the estate.

*Macaulay and Farley v Premium Life Assurance Co Ltd* (unreported, 29 April 1999) is also cited as an example of a claim by personal representatives for loss suffered by the estate in consequence of a breach of a duty owed to the deceased in her lifetime. However, the decision in that case related only to the preliminary issue of limitation, and Park J left open the question whether the claim had been properly constituted.

To summarise, *White v Jones* applies (in the present context) only to claims arising from a retainer for the preparation of a will. During the lifetime of the testator, the will is entirely ineffective, and only the testator could claim for the (nominal) costs of remedying any defect in its preparation. Nothing that happens after the testator's death has any impact on the testator *per se*, but can only frustrate or defeat his purpose of passing benefits to intended beneficiaries. It should, therefore, only be the

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<sup>23</sup> *Otter* was criticised by Salmon LJ (with concurrence of Karminski LJ) in *Sykes v Midland Bank Executor and Trustee Co Ltd* 1971 1 QB 113, 129-30 as a "strange case": "The judge concluded that, although Michael Otter suffered only nominal damages as a result of the defendant's negligence, his estate could nevertheless recover substantial damages. It is unnecessary for me to express any view on that perhaps surprising conclusion".

<sup>24</sup> *Re Baroness Llanover* [1903] 2 Ch 330, at 335; *Re Thompson* [1906] 2 Ch 199, at 205.

<sup>25</sup> *Vynior's Case* (1610) 8 Co Rep 82a.

beneficiaries who can properly claim for losses suffered in consequence of a breach of the solicitor's will-making duty of care<sup>26</sup>.

### ***Corbett v Bond Pearce Revisited in 2006***

The uncertainty arising from the assertion of a separate claim on behalf of a testator's estate is illustrated in the further decision in *Corbett v Bond Pearce* [2006] EWHC 909 (Ch).

There, Rimer J had to grapple with the provision made in the Court's previous order for the possible recovery of damages by the estate (in addition to those received by the disappointed beneficiaries) in the event that creditors (and possibly specific legatees) were worse off than they would have been had the solicitors not been negligent. Understandably, Rimer J could not discern the rationale underlying the Order, although he acknowledged (in paragraph 53 of the judgment) that "the estate has an interest in ensuring that its creditors do not suffer in consequence of Bond Pearce's negligence". Be that as it may, neither the estate (as such) nor the creditors were owed a duty of care, and probate costs are not losses capable of being suffered by the testatrix in her lifetime, which survive to be claimed by her estate on her behalf.

### **Inheritance Tax Claims: *Daniels v Thompson***

Solicitors who advise in relation to tax can be liable for negligence resulting in avoidable tax charges. In *Estill v Cowling Swift & Kitchen* [2000] WTLR 417 a client, in reliance upon negligent advice, executed a discretionary trust that gave rise to a large inheritance tax charge in her lifetime. A successful claim for the tax that would have been saved by creating an interest in possession trust was brought on her behalf by her personal representatives after her death.

*Daniels v Thompson* [2004] All ER (D) 357, however, appears to have decided the question whether tax incurred only after death, following a solicitor's breach of duty owed to the client, is recoverable in damages on behalf of the client by her personal representatives.

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<sup>26</sup> Even though losses to the residuary estate may properly be maintained by personal representatives, *albeit* on behalf of those entitled to residue, not on behalf of the testator.

In *Daniels*, the deceased's son, as personal representative, brought a claim against his late mother's solicitors on her behalf for negligent advice as to the *inter vivos* transfer of her home to her son in order to reduce the inheritance tax payable on her death. The claim failed, primarily on limitation grounds, but fundamentally because the loss claimed (the IHT payable on death) could not have been suffered by her in her lifetime, and consequently there was no cause of action in tort vested in her capable of surviving her death pursuant to section 1(1) of the 1934 Act.

During argument a late application to amend, to allege breach of a duty of care owed to the personal representative directly (as the person charged with payment of the IHT) was rejected. There is no authority (or any justification) for the imposition upon a solicitor giving a client tax advice a duty of care towards the client's personal representatives.

The case is correctly decided. This was not a *White v Jones* claim. The relevant retainer was not to prepare a will, and the claimant, who was the sole beneficiary under a will previously made, did not claim in that capacity<sup>27</sup>. Moreover, once a will is made, no duty of care is owed to a beneficiary under it in respect of advice or assistance given to a testator under a subsequent retainer.

It does not follow, however, that losses suffered as a result of negligent inheritance tax advice are irrecoverable on any basis. The best legal analysis of *Daniels*, on its facts, might be that it is in essence a reliance case, analogous to *Dean v Allin & Watts* [2001] EWCA Civ 758. In other words, the solicitors instructed by Mrs Daniels would have been aware that she and her son had discussed and agreed that she should transfer her house to her son in her lifetime in order to reduce the IHT payable on her death for the benefit of her son, and that it was reasonable for the claimant to rely

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<sup>27</sup> Dyson LJ considered (*obiter*, in paragraph 38 of his judgment) that the solicitor's estate planning retainer was reasonably analogous to the retainer in *White v Jones*, although he also held (in para 37) that the frustration of the client's wish to confer on her beneficiary the benefit of a reduction in tax was "not a detriment recognised by our law as damage which is capable of assessment in money terms".

upon the solicitors to exercise reasonable skill and care in advising his mother how to effect the intended tax saving.

Alternatively, on other facts, the court might find that a solicitor who undertakes to give estate planning advice as part of a retainer for the preparation of a will would be liable to the intended beneficiaries for any losses suffered as a result of the negligent failure to reduce tax.

In the further alternative, the court may distinguish entirely the failure of a tax saving scheme from the loss of a beneficiary's intended inheritance. The social policy considerations are certainly less compelling, and at least one judge, Harman J, was completely unmoved by charitable beneficiaries' complaints that solicitors had failed to consider avoidable IHT: *Cancer Research Campaign v Ernest Brown & Co* [1997] STC 1425.

Failed IHT saving claims also give rise to special difficulties, including obvious (and potentially serious) conflicts of interest, and circumstances in which a testator could only have achieved the desired IHT saving by taking further steps in his lifetime that cannot be adequately accommodated in the calculation of compensation<sup>28</sup>.

The general position emerging from these cases appears to be that there is yet no authority casting doubt on the ability of a disappointed beneficiary to recover damages for the diminution in the value of his/her intended testamentary benefit as a result of negligent tax advice given by a solicitor as part of his retainer for the preparation of a will.

Following *Daniels v Thompson*, however, the position on the authorities is fundamentally different from the dicta in *Carr-Glynn* and *Worby v Rosser* in relation to personal representatives asserting the deceased's purported claim for losses suffered by the estate in consequence of a breach of duty to the client before death.

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<sup>28</sup> The most obvious example is where a testator would have had to pay a rack rent out of income for his continued occupation to avoid the reservation of benefit, but such payments would not have reduced the capital value of his estate on death.

***Rind v Theodore Goddard***

*Corbett v Bond Pearce* and *Daniels v Thompson* represent failed tests of the notion that negligence by solicitors in the preparation of wills gives rise to claims on behalf of a testator's estate for costs or charges incurred in consequence of the negligence.

The claim asserted in *Rind v Theodore Goddard* [2008] EWHC 459 (Ch) was, by contrast, a beneficiary's claim for unsaved IHT, but like *Daniels v Thompson* it was not a *White v Jones* claim, as it did not arise from an alleged breach of a duty of care assumed under a retainer for the preparation of a will.

*Rind* also went much further than *Daniels* in blurring the distinction between claims by a client and her intended beneficiaries, as the activities relied upon in support of the claim in negligence were undertaken over several years, were not directly related to any will-making exercise, and were not specifically, or even primarily, directed toward achieving a posthumous tax benefit (as opposed to being generally tax efficient during the client's life and then after death).

On the basis of the foregoing analysis, this claim should be seen as falling completely outside the *White v Jones* duty owed to intended beneficiaries under a retainer for the preparation of a will. Instead, the decision appears to encapsulate the present state of confusion as to the correct application of the doctrine of *White v Jones*.

The basis for the duty of care relied upon in *Rind* was summarised in paragraph 34 of the judgment of Morgan J. The claimant, it was said, "was always foreseeably within a class of persons who might be identified by Mrs Rind as a residuary beneficiary". But this is the indeterminate class to whom no duty is owed, as discussed in *Clarke v Bruce Lance* [1988] 1 WLR 881, confirmed in *Punford v Gilberts* [1998] PNLR 763. This can also be seen as an assertion that the claimant was within a class of persons who was prospectively owed a duty of care, which could never form the basis of liability in tort.

Reliance was also placed on there being an unacceptable lacuna in the law unless the claimant could recover the avoidable IHT, but this is another misplaced and misconceived application of that principle.

On the basis of the authority of *White v Jones*, the facts of *Rind* could not support a claim by a disappointed beneficiary. On the present state of the law, however, it is not surprising that the judge was not prepared to strike out the claim in *Rind*.

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