

Defence Studies — Trusts and Tax

When is a PR not a PR?

Gilead Cooper

3 Stone Buildings, Lincoln's Inn

Three Questions

- What loss has been suffered?
- Who has suffered the loss?
- When does the limitation period start to run?

Review of the problem

The solicitors advised the mother in 1993 that the gift was a PET (true) and that moving in with the daughter did not create a problem (false). In reliance on that advice, the mother

- gives away the property and
- moves in.

Has she suffered an immediate loss? *Daniels v Thompson* says no; but is that right?

The solicitors were not just negligent in failing to advise about reservation of benefit. They were instructed to advise about saving IHT: should they not have inquired whether the mother had made a will? If so, to whom was that duty owed? The intended beneficiaries of the hoped-for tax saving would have been the ultimate residuary beneficiaries of the mother's estate.

Next, in 1997, the mother moves out of the house and gives the daughter a further £100,000. Again, the solicitors give advice, this time that there may have been a reservation of benefit in the earlier gift, but that there is no problem because the gift is still a PET.

The mother could have taken out insurance but was not so advised.

The solicitors also drafted a will for the mother. What consequences flow from that?

25th December 2001, the mother dies. Under her will, her estate (worth £1million) passes to her grandchildren. The daughter is her executor and the solicitors act in the administration of the estate. Tax is assessed on the two failed PETs.

What loss has been suffered?

- The mother lost the property (by giving it away without receiving the intended benefit in return).
- The daughter has to pay IHT on the failed PETs that could have been avoided.
- The grandchildren have received less than they would have done if the gift of the house had not been a gift with reservation of benefit.

Who can sue? And in what capacity?

- The mother gave away the property. She intended to confer a benefit on her daughter and her residuary beneficiaries which did not materialise.
- The daughter (in her personal capacity) has had to pay tax on the gift.

- The daughter as executor has suffered a “loss” in the sense that the estate is worth less in her hands than it would have been if the gift had been exempt.
- The residuary beneficiaries have received less than they should have done.

When did the loss occur?

- When the advice was acted on?
- When the solicitors closed their file after advising on the original gift?
- When the solicitors advised again in 1997 when the will was executed?
- When the mother died?
- Is there a continuing duty?
- When did the loss become reasonably discoverable?

Daniels v Thompson

Identifying the loss: Dyson LJ held that the relevant loss was the Inheritance Tax liability payable by the estate on the death of the testator.

Identifying the loser: according to Dyson LJ, the testator never suffered any loss because the testator never had a liability in respect of the Inheritance Tax liability.

Identifying the limitation start-date: the Court of Appeal did not deal with this question directly, because in its view the claimant had suffered no loss. It assumed that the executor could only bring a claim if the claim had been vested in the testator before she died, and since the testator had no claim, neither did her executor.

The application for leave to amend: the claim had originally been brought by the son “as executor”. Counsel for the Claimant sought leave to claim “as personal representative”. What did this mean?

Some other key cases

Forster v Outred [1982] 1 WLR 86

Mother executed mortgage over her house as security for a loan by a third party to her son. Held that she suffered an immediate loss on the execution of the mortgage.

Nykredit Mortgage Bank Plc v Edward Erdman Ltd [1997] 1 WLR 1627

Plaintiff lent money on the security of property that had been overvalued by the defendant. Held: the cause of action arose when the first relevant and measurable loss had been revealed.

Melton v Walker & Stranger (1981) 125 SJ 861

Uncle made a gift of a farm to the plaintiff and her cousin in the shares 2/3:1/3, but they had agreed between themselves that the CGT would be payable equally. The defendant solicitors failed to give effect to this agreement. Held: the cause of action arose when the agreement was executed, not when the farm was sold triggering the CGT charge.

D W Moore and Co Ltd v Ferrier [1988] 1 WLR 267

Solicitors were negligent in the drafting of a restrictive covenant preventing an ex-employee from competing with his employer. Held: the cause of action arose when the contract of employment was entered into, not when the employee left the company.

Bell v Peter Browne & Co [1990] 2 QB 495

The defendant solicitors failed to protect the husband's interest in a property by a trust deed or mortgage. Held: the cause of action accrued at the date of the transaction, not when the property was subsequently sold and the money that should have been secured became irrecoverable.

(No "continuing duty" on a solicitor once he has closed his file and submitted his bill.)

Knapp v Ecclesiastical Insurance Group Plc [1998] PNLR 172

Claim against insurance brokers for failing to advise on disclosure of matters that rendered the policy voidable. Held: the cause of action arose when the policy was entered into.

Macaulay and Farley v Premium Life Assurance Co Ltd (Unreported) 29th April 1990

Executors claimed as damages the Inheritance Tax that became payable on the death of the testator as a result of negligent advice by the defendants. Held: the cause of action arose at the date of death. (Can this be reconciled with the other authorities?)

"The questions are: what is the alleged loss or damage *in respect of which this action is brought?* When did *that* loss or damage accrue?" [emphasis added]. (Is this the right test?)

See also three cases distinguishing [?] *Forster v Outred* —

UBAF Ltd v European American Banking Corp [1984] QB 713

Mathew v Maughold Life Assurance Co The Times, 23rd January 1985

First National Commercial Bank v Humberts [[1995] 2 All ER 673

White v Jones [1995] 2 AC 207

Chappell v Somers & Blake [2004] Ch 19

GILEAD COOPER

3 Stone Buildings