Editorial

If you are worried about incurring liabilities for the wills that you draft, you can always seek safety from White v Jones liability by doing vasectomies instead

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The jurisprudence of White v Jones

By a variety of routes, the majority in the House of Lords in White v Jones [1995] 2 AC 207 affirmed that (subject to the terms of the retainer, and to there being no possibility of double recovery) in undertaking to act for a since-deceased¹ donor, testator, or purchaser of life insurance or pension provision,² an adviser³ may assume responsibility to third parties (beneficiaries and dependents) between whom and the adviser there is no reliance relationship.

In this issue, Sebastian Allen first reviews the consequences of breach of that duty through cases of foreseeable damage suffered by intended beneficiaries from dilatory execution of instructions to prepare a will;⁴ from neglect to ensure due execution of the will;⁵ from failure to bring property into the testator’s estate by severing a joint tenancy;⁶ and from vesting an absolute interest in a beneficiary intended to have only a life interest with remainder to another intended beneficiary.⁷

Second, while drawing attention to authorities that might prove to be obstacles⁸ to the plaintiffs on the substantive hearing, he reviews cases in which the courts have declined to strike out claims in respect of such damage arising in the form of tax liabilities flowing from alleged failure to so structure a gift as to have left no reserved interest in the donor;⁹ and from alleged failure to structure a share subscription to a family company in such a way as to qualify for business property relief from inheritance tax.¹⁰

Furthermore, albeit irrelevantly to all but the most unusually diversified professional lives of those advising on wills and trusts, Mr Allen points out that, whatever the uncertainties of the White v Jones doctrine, the Court of Appeal has held that it unarguably does not support at least one species of claim. This is a White v Jones damages claim against the surgeon in

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¹ A client who is still alive when the adviser’s mistake is discovered has the opportunity to have it corrected, and his failure to perfect the benefit by correcting the mistake could break the chain of causation between claimant and adviser: Gorham v British Telecommunications plc [2000] 1 WLR 2129, 2140. However, Mr Allen draws attention to the refusal of a strike out by a nonetheless dubious Court of Appeal in Richard v Hughes.

² Gorham v British Telecommunications plc [2000] 1 WLR 2129.

³ Most frequently a solicitor, but also, as in the first case in note 1, an insurance or financial adviser; or, as in the second case in that note, an accountant.

⁴ White v Jones [1995] 2 AC 207.

⁵ Ross v Caunters [1979] 3 All ER 580.


respect of the birth of a child to any new sexual partner a patient acquired after a vasectomy that—against all odds—spontaneously reversed: leading to her pregnancy.

Finally, practitioners in this field should know that Oxford University Press publishes a textbook that covers this field thoroughly, and ought to be in their libraries. It is Frost, Reed, and Baxter, Risk and Negligence in Wills, Estates, and Trusts (OUP 2009). Chapters 2 and 14 of Davies, Solicitors’ Negligence and Liability, (OUP 2008) also cover White v Jones.

**Testator’s instructions impossible of fulfilment**

John Rimmer notes Games v AG (Isle of Man High Court, 2012) for this issue. It was a will construction case in which the will appears to have been drafted in terms of the testator’s instructions to make a gift of certain property for a charitable purpose described in very particular terms: which were, however, impossible of fulfilment as a matter of planning law.

The court found no evidence of any underlying general charitable intent such as might have supported a cy près application of the property. Indeed, the existence of a residuary gift for general charitable purposes was construed as evidence that the testator intended those general charitable purposes to apply to the relevant property in the event that his very particular special purpose could not be executed.

White v Jones was not in issue in the case: no doubt because the will had been drafted exactly as the testator had intended; because that intention precluded any cy près application of the relevant property; and because the general charitable intention that then kicked-in was what the testator wanted if his precise specific gift should prove to be impossible of fulfilment.

The article makes the useful drafting point that, when crafting all-or-nothing provisions, it can be good will drafting practice to make clear that, if the precisely phrased purpose cannot take effect as stated, the intended gift falls into residue.

**Why the ‘no trusts on the register’ doctrine is reversed in Italy**

The Hague Convention facilitates the recognition, in countries that adhere to it, of foreign trusts. It does this even where—as in Italy—the domestic law does not recognize trusts.

Since 1994 Maurizio Lupoi, by working in its slipstream, has used the Convention to enable Italian settlors to benefit Italian beneficiaries via Italian trustees constituted according to the law of England or of some other state the legal system of which includes equity. By this means the trust has been adopted widely to create protected patrimonies in situations where that would be impossible as a matter of Italian domestic law. As a result the Italian courts have become so used to dealing with trust matters that around 200 orders and judgments in trust matters have been given.

In this issue Signor Lupoi discusses these happenings, describes how this process has been working out, and explains why in Italy trusts ‘must’ be entered on the titles in share and land title registries.

**Switzerland but not as we knew it**

Two years ago, strict EU regulations saw some hedge funds leaving the UK and becoming domiciled in Switzerland, which, for these purposes, was the land of the free. In April this year it was announced that Switzerland is about to move from being one of the freest environments for these funds to being one of the most controlled.11

This comes atop its 2009 decision to cease being the most impenetrable of jurisdictions so far as banking secrecy was concerned, and to fall into line with the OECD model tax treaty by agreeing to provide information to foreign Revenue authorities even where

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that information otherwise would have been covered by bank secrecy. This information will include assistance in establishing whether a foreign taxpayer is the beneficial owner of an undeclared Swiss bank account.

In their article Guillaume Grisel and Raphael Gani consider that the Swiss Federal Tax Authority may be empowered, and duty-bound, to seek from Swiss [but not foreign, quaere] trustees or protectors any information about such an account that they may have been unable to obtain from the bank itself.

However, they raise the necessity to check whether any particular Swiss tax treaty shall have been—as the Hong Kong treaty has been—restricted to less than the full range of taxes: Switzerland having sometimes exercised its right, under paragraph 1 of Article 26 of the Model Convention, to confine its obligations to the taxes covered by the Convention. Any adviser failing to check this, and providing information that related to other taxes imposed by the other Contracting State, could be in an uncomfortable situation.

And, in each case where the point might arise, they urge consideration of the decision of the Swiss Federal Administrative Court—overruling the disclosure that the Swiss Federal Tax Authority had been prepared to make—to refuse disclosure to the US authorities of UBS accounts on the ground that discretionary beneficiaries of the trusts on which the accounts were held were not beneficial owners of the trust estate.

Third, they point out that the principle of reciprocity also can be an obstacle to the ordering of disclosure.

Finally, it is their view that ‘depending on the circumstances, bank accounts held in trust may enjoy a far better protection than accounts directly held by foreign taxpayers, against foreign requests for exchange of information.’

**Trust variation in England**

In *Wright v Gater* [2011] EWHC 2881 (Ch), [2012] WLR 802 (7 November 2011), the subject of Marcus Flavin’s article, two-year-old Rory inherited £515,000 when his father then, intestate, on 17 May 2010. This property had only just come to his father on the death of Rory’s grandfather on 28 October 2009.

Mitigation of the inheritance tax consequences of the fund’s passage through two administrations in such quick succession called for a variation of the statutory trusts on intestacy (vesting the fund in Rory contingent on his survival to the age of 18 years) on Rory’s behalf.

On application under the Variation of Trusts Act 1958, Norris J posed the question he had to decide:

‘Should Rory consent to this arrangement?’

That question is answered in the sense ‘Only if the judge is satisfied that it is for his benefit.’ So it is never enough that the proposal does Rory no real harm: to elicit his consent it must always confer on him a real benefit.

His Lordship saw it as an unacceptable risk for a fatherless child, in a ‘family not accustomed to significant wealth’, to come into a fund on his 18th birthday that was likely (subject to expenditure on his maintenance, and assuming only a modest accumulation rate) to have reached £750,000. He accordingly ordered that Rory should become entitled to the income (not including the accumulated income) at 18; to 10% of the capital at 21; and to the balance of the capital, including those accumulations, at 25: with appropriate remainders in the event of his earlier death.

**Trust variation in Bermuda**

Writing on the successful, unopposed, application in *GHIJ v KL & Ors* [2011] SC (Bda) (2 December 2010), Keith Robinson notes that the Bermuda counterpart of Section 57 of the Trustee Act 1925 (UK) is Section 47 of the Trustee Act 1975, and that it appears to be less constrained than the UK section.

So, notwithstanding the view of Evershed MR in *Re Downshire Settled Estates* [1953] 1 Ch 218, 266—that the UK court’s function is not to permit trusts to be
varied for tax avoidance purposes—the Chief Justice accordingly made an order approving the alteration of beneficial interests to permit accumulation of the life tenant’s income, and the application of a certain fraction thereof to the children of the life tenant: on the ground that this was expedient for the trust as a whole, not least because of the beneficial tax consequences that would follow.

**Trustee vacillation in exercise of discretion**

Among trust lawyers, one of the most frequently consulted judgments never to have been named, let alone reported, must be that of Robert Walker J from which Hart J cited a long extract in *Public Trustee v Cooper* [2001] WTLR 903, 922–4. In *Re the S Settlement* [2001] JRC 154 at [10], Birt DB held that:

> We think that the extract is extremely useful and is to be taken as reflecting the position under Jersey Law just as much as under English Law, and we would therefore like to take the opportunity of setting it out.

In the extract, Robert Walker J identified ‘at least four distinct situations when the court has to adjudicate’ on a ‘course of action proposed or actually taken by trustees’, namely:

1. Where there is doubt whether, properly construed, an applicable deed or enactment empowers the trustee to take a particular course of action.
2. Where, although there is no real doubt about their power, and they are agreed on its exercise, the trustee’s proposed decision will have such ‘momentous’ consequences that they consider it prudent to seek formal confirmation from the court.
3. Where, although there is no real doubt about their power, the trustees are in honest disagreement as to its exercise, or are disabled (eg by conflict of interest and duty); and they wish to surrender their decision and have the court make it instead.
4. Where, the trustees having acted themselves, the beneficiaries have brought hostile proceedings attacking their action as having been ultra vires or otherwise improper.

In their article in this issue, Edward Mackereth and Shaun Maloney consider the decision of the Commissioner in the Jersey Royal Court in a case falling within the second of those categories, namely, *Re the Y Trust* [2011] JRC 135. At para [40] of the judgment, the Commissioner adopted the guidance of *Lewin on Trusts* (Sweet & Maxwell 2006, 18th edn) 29-299, that, among other things:

The court... acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees’ deliberations as they would have in such proceedings.

If the court is left in doubt on the evidence as to the propriety of the trustees’ proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court’s assessment of the proposed exercise.

The question for the Court was whether to approve the trustees’ decision as to the division of the trust estate, notwithstanding that, a year and a half previously, they had met with the protector, secured his approval to, and minuted, a ‘final decision’ that it would be distributed in a different way.

While expressing regret that the trustees should have created confusion, the Royal Court held that their earlier ‘final decision’ had been neither final nor a decision: thereby bringing to mind Lord Greene MR’s remarks—in *Associated Portland Cement Manufacturers Ltd v IRC* [1946] 1 All ER 68, 70—on
the item ‘Sundry Special Reserves’ in the accounts before him:

It was Voltaire (who had a certain dislike of shams) who said of the Holy Roman Empire that it was neither Holy nor Roman, nor an Empire.12

It followed, in the view of the learned Commissioner, that the beneficiary, whose share had diminished between that earlier minute and the real decision, had had no legal or equitable right to expect his share to be on the earlier basis rather than on the basis of the real decision.

The trustees’ decision was sanctioned accordingly.

Cyprus International Trusts Amendment Law 2012

In *Perpetuities and The Revocation and Variation of Trusts: Review of the Law of Trusts Third Issues Paper* (Law Commission Issues Paper 22, April 2011), the New Zealand Law Commission researchers wrote:

3.29 The reforms of the rule against perpetuities have had evident financial impacts in the United States. Sitkoff and Schazenbach’s empirical research based on 2003 statistics concluded that, on average, a state’s abolition of the rule increased its reported trust assets by US$6 billion and its average trust account size by approximately US$200,000. They found that in 2003 approximately US$100 billion in trust assets moved to states that had abolished the rule.162 In particular, it was states that also did not levy income taxes on trusts funds that attracted trust funds from other states and showed an increase in trust business. This shows that out-of-state settlors are sensitive to the difference in tax laws between states and will send their trust assets to the states that provide the most benefit.163

3.30 The increased trust business that has occurred in states that have abolished the rule has little direct benefit for the Government of the state itself. It is a state’s trust lawyers, bankers and administrators that stand to benefit the most from increased business in perpetual trusts, and it was these professions that formed the basis of local lobby groups that pressured for the reforms in a number of states.164 Jesse Dukeminier has commented that reforms of the rule are ‘pushed along by lawyers for the rich seeking tax advantages and trust companies seeking fees for managing perpetual trusts’.165

3.31 The trend of abolishing the rule among states of the United States has persisted with the continuation of federal tax laws that give an advantage to those with perpetual trusts.166 While tax law has almost certainly led to the abolition of the rule in many states, it is thought to be unlikely that there would be much impetus for the rule to be reinstated in the event that tax laws were changed to remove the tax advantages of perpetual trusts.167

3.32 As a rather different taxation environment, in particular one where there is no estate duty, New Zealand is in a different position from the United States. However, it may be that if abolition of the rule spreads it will be seen to be more and more obsolete. The one rationale that convinced the United Kingdom not to repeal the rule, the need to reduce or avoid dead hand control, was also persuasive in Canada and Ireland.

162 Sitkoff and Schazenbach ‘Jurisdictional Competition for Trust Funds’, above n 152, at 359.
163 Ibid, at 362.
164 Ibid, at 363.

...
Death of the Rule Against Perpetuities’ (2000) 35 Real Property, Probate and Trust Journal 601 at 613. Somewhat anomalously, under the Economic Growth and Tax Relief Reconciliation Act 2001 no estate tax or GSTT applies for those who died in 2010. However, both have been reinstated for 2011 (Sitkoff and Schazenbach ‘Jurisdictional Competition for Trust Funds’, above n 152, at 373).

Ibid, at 414.


Whatever concern it may have had about dead hand control of ‘international trusts’ created in that nation, or about the direct benefits of unlimited time trusts accruing to trust lawyers, bankers and administrators, and their clients, has not been permitted to stand in the way of the enactment by the Government of Cyprus of the International Trusts (Amendment) Law 2012. It was passed on 23 March 2012. It abolishes the rule against remoteness of vesting so far as International Trusts created in the Republic are concerned. It accordingly places the Republic on at par with Jersey and Guernsey in offering timeless trusts, and in seeking the rewards of that Yale study.

It is noteworthy that the states and countries that have sought a sense of timelessness by this means do not include England, Australia, India, and New Zealand. Perhaps these countries have not seen the need for it because they play cricket: which Lord Mancroft famously described as the:

game which the English, not being a spiritual people, invented in order to give themselves some conception of eternity.

Whether or not there is anything in that theory, there is a great deal more in the International Trusts (Amendment) Law 2012 to make Cyprus a most competitive trust jurisdiction; and, in this issue, Elias Neocleous, a senior commercial lawyer from Cyprus, teams with co-editor Toby Graham to describe the impact of that legislation in detail.