Re Evans (deceased); Evans v Westcombe

CHANCERY DIVISION

[1999] 2 All ER 777

HEARING-DATES: 9, 10, 11, 15 December 1998, 28 January 1999

28 January 1999

CATCHWORDS:

Administration of estates - Distribution - Deceased dying intestate - Plaintiff beneficiary presumed to have died - Defendant beneficiary holding estate upon trust as personal representative - Defendant purchasing missing beneficiary policy - Estate wrongly distributed to defendant - Whether cost of policy a proper expense of the administration.

Executor and administrator - Administrator - Liability - Defendant administrator and trustee of intestate's estate - Personal liability to account for wrongful receipt of trust money - Relief - Legal advice followed - Defendant acting honestly and reasonably - Whether defendant ought to be relieved from liability - Trustee Act 1925, s 61.

HEADNOTE:

In 1987 E died intestate and the following year letters of administration to his estate were granted to the defendant, his daughter. By virtue of s 46(1)(ii) (Section 46(1)(ii) provides: 'If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate ...') of the Administration of Estates Act 1925, subject to administration, the defendant held E's estate on the statutory trusts for E's issue, ie herself and E's son, the plaintiff, and they were therefore entitled in equal shares to E's residuary estate. In 1990, when the time came for distribution of E's estate, on conclusion of the administration, the defendant assumed that the plaintiff, from whom she had not heard for nearly 30 years, was no longer alive and, subject to the purchase, on legal advice, of a missing beneficiary policy for approximately half the capital value of the assets at that time (some £21,000), the estate was distributed to the defendant. In 1994, however, the plaintiff reappeared and subsequently issued proceedings against the defendant, claiming accounts and inquiries in respect of the administration of E's estate. Although the policy proceeds yielded up £20,900 to him, the plaintiff claimed compensation for lost interest for the period since 1990, and took issue, inter alia, with the sum of £525 in respect of the insurance premium paid for the missing beneficiary policy, which the defendant claimed as an administration expense. The plaintiff contended that, although in some circumstances, such premiums would be properly allowable, for example in a case where distribution was being sought by persons other than the personal representative in the face of doubts about a missing beneficiary, that was not the case where the policy was purchased to facilitate an excessive distribution to the personal representative herself. The defendant contended that she ought to be relieved from any liability to account pursuant to s 61 of the Trustee Act 1925.

Held - (1) Personal representatives, particularly of small estates, should not be discouraged from seeking practical solutions to difficult administration problems, without the expense of resort to the court. The taking out of a missing beneficiary policy so that sizeable sums should not have to be tied up indefinitely for fear of the re-emergence of a long lost beneficiary was such a practical solution, and to some extent was more effective than the limited protection provided by the more costly application to court for a Benjamin order. No distinction was therefore to be drawn between cases where the personal representative was beneficially entitled and those where he or she was not. In the instant case, the defendant was advised to take a practical course where the beneficiary had been unheard of for nearly 30 years and the premium was consequently a proper and allowable expense of the administration.

(2) The mere fact that a personal representative had acted on legal advice would not automatically result in relief being granted under s 61 of the Trustee Act; it was important to have regard also to the nature of the estate, the circumstances of the defaulting representative and his or her actions in the light of the advice received. In the instant case, on the facts, the defendant had acted reasonably within the meaning of s 61. Moreover, although it would be wrong not to satisfy an interest claim by the plaintiff to the extent that it was capable of being realised out of a property derived from the deceased's estate which was still at the disposal of the defendant, fairness required no more of the defendant than that, and accordingly the court would relieve the defendant against the plaintiff's claim to interest to which he was otherwise entitled and/or to further accounts and inquiries to the extent that such claim could not be satisfied out of the proceeds of sale of that property; Marsden v Regan [1954] 1 All ER 475 considered.

NOTES:

For the general expenses of administration, and the court's jurisdiction to grant relief from liability for breach of trust, see 17 Halsbury's Laws (4th edn) paras 1186, 1556.

For the Trustee Act 1925, s 61, see 48 Halsbury's Statutes (4th edn) (1995 reissue) 333.

For the Administration of Estates Act 1925, s 46, see 17 Halsbury's Statutes (4th edn) (1993 reissue) 335.

CASES-REF-TO:

Allsop, Re, Whittaker v Bamford [1914] 1 Ch 1, [1911-13] All ER Rep 834, CA.
Bartlett v Barclays Bank Trust Co Ltd (No 2) [1980] 2 All ER 92, [1980] Ch 515, [1980] 2 WLR 430.
Benjamin, Re, Neville v Benjamin [1902] 1 Ch 723.
Marsden v Regan [1954] 1 All ER 475, [1954] 1 WLR 423, CA.

CASES-CITED:

Diplock's Estate, Re, Diplock v Wintle [1948] 2 All ER 318, [1948] Ch 465, CA; affd sub nom Ministry of Health v Simpson [1950] 2 All ER 1137, [1951] AC 251, HL.
Ponder, Re, Ponder v Ponder [1921] 2 Ch 59, [1921] All ER Rep 164.

INTRODUCTION:

By writ issued on 10 May 1996 the plaintiff beneficiary, David Ari Evans, brought an action against the defendant beneficiary and personal representative, Lilian Milona Westcombe, claiming accounts and inquiries in respect of her administration of the estate of David Kenneth Evans, deceased. The facts are set out in the judgment.

COUNSEL:

Anna Clarke for the plaintiff; Henry Legge for the defendant.

JUDGMENT-READ:

Cur adv vult 28 January 1999. The following judgment was delivered.

PANEL: RICHARD McCOMBE QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

JUDGMENTBY-1: RICHARD McCOMBE QC

JUDGMENT-1:

RICHARD McCOMBE QC. A. INTRODUCTION

1. On 18 October 1987 David Kenneth Evans (the deceased) died intestate. The plaintiff and the defendant are his two children. Their mother, Helene Evans, from whom the deceased had been divorced

on 28 November 1973, died on 19 October 1992. Letters of administration to the deceased's estate were granted to the defendant on 24 May 1988 out of the Principal Registry of the Family Division of this court. In these events, it is common ground that, subject to administration, the defendant held the deceased's estate upon the statutory trusts for the deceased's issue: s 46(1)(ii) of the Administration of Estates Act 1925. It is also common ground that the relevant issue are, and were at all material times, the plaintiff and the defendant and that they were, therefore, entitled in equal shares to the deceased's residuary estate.

2. In these proceedings, begun by writ issued on 10 May 1996, the plaintiff claims accounts and inquiries in respect of the administration of the deceased's estate in the circumstances which I now relate. Broadly, however, what has occurred is that, when the time came for distribution of the deceased's estate in 1990, on conclusion of the administration, the plaintiff was assumed by the defendant to be no longer living, and subject to the purchase of a missing beneficiary insurance policy for approximately half the capital value of the assets at that time (some £21,000), the estate was distributed to the defendant. The plaintiff reappeared in 1994. The policy proceeds have yielded up £20,900 to him, but he claims, essentially, to be compensated for lost interest in the period from 1990 to date. He also takes issue with four items of expenditure by the defendant which are claimed by her as administration expenses. I shall deal with these in more detail later.

B. FACTS

3. The deceased's family originally came from Wales. The deceased met his wife, who was Greek, during the war years. They married in Athens on 20 October 1945. The defendant was born on 11 August 1946 and the plaintiff was born on 7 October 1949. It appears that the deceased and his wife separated shortly after the plaintiff's birth, although they were not divorced until 1973. Upon the separation, the plaintiff and the defendant continued to live with their mother in various flats in north London, all of which were, however, within the fairly close vicinity of the house owned by the deceased's parents, the grandparents of the present parties (the grandparents), at 101 Broadburst Gardens, London NW6, where the deceased then went to live. In the 1950s, in these circumstances, the plaintiff and defendant continued to see the deceased regularly. They went to school in Hampstead and visited Garnant in Wales with the deceased and the grandparents during some of the school holidays. It appears, however, that theirs was not a happy childhood and that the mother favoured the plaintiff, while the deceased and his parents favoured the defendant. The defendant testified to regular beatings at the hands of her mother.

4. In about 1959, however, there was a most unfortunate incident in which it appears that the plaintiff showed violence to the defendant in a serious manner, with the result that the grandparents and the deceased decided to send the defendant to a private boarding school. This duly occurred and, during school holidays, the defendant either lived with the grandparents or frequently travelled to Wales to stay with relations or close friends. It appears that the grandparents became increasingly protective towards her. In 1962 the defendant was told by the grandparents that a further row had occurred with the parties' mother and that all contact with her had ceased. It appears that from this time onwards the defendant did not see or hear from the plaintiff again until 1994. The defendant told me that she also lost contact with her mother at this time. This, however, was disputed and I return below to my findings of fact in this regard. For his part, the deceased also continued to live with his parents in London until 1984 at which stage he began to spend more and more time in Wales and ultimately moved there permanently. At the time of his death he was living at Folland Road in Garnant.

5. The defendant told me, and I accept it, that her grandparents had told her that, in about 1975 or 1976, they had tried to find the plaintiff, but without success. She believed that they had consulted solicitors, called Gasters, about the problem. Her grandmother told her that she had heard at this time that the plaintiff might possibly be in Germany, but that she (the grandmother) was convinced that the plaintiff was dead. From this time, the defendant lived on in the growing belief that the plaintiff was indeed dead, although no further inquiries as to his whereabouts or fate appear to have been made in the years preceding the deceased's death.

6. From 1975 to 1978 the defendant lived in a flat near to her grandparents. In 1978 she had married Mr Westcombe (whose witness statement, verified by affidavit, was admitted in evidence by consent) and shortly thereafter moved to the Islington area of north London. In 1983 the defendant gave birth to a daughter, Lydia. The defendant and her husband separated in 1991 and were subsequently divorced. At or about this time the defendant went to live with the grandparents at 101 Broadhurst Gardens to look after

them. They both died in 1984, which, as I have said, was the year in which the deceased began to spend an increasing amount of his time in Wales.

7. In fact, unbeknown to the defendant, the plaintiff continued to live with his mother at various addresses in London, until 1975, when he married. The mother, at all material times, worked as a home help in the employment of the local authority. There was a dispute between the parties as to the extent of their mother's knowledge of the English language. The plaintiff said that she never mastered English and could not read or write it; he himself spoke Greek to her from a time, between when he was aged eight and sixteen, when he himself had learnt some Greek. The defendant, on the other hand, said that she recalled her mother filling in a form as to the hours she had worked for her local authority employers, the form obviously being made out and filled in in English. She also recalled her mother habitually reading the News of the World newspaper in bed on Sunday mornings. From what I have already related it is obvious that in the early years, before the plaintiff learned some Greek, the language of communication with the mother must have been English. I found the defendant's evidence more satisfactory on this point and, so far as it is material, I find that the parties' mother could speak adequate English for everyday purposes and was able to read and write the language moderately.

8. The plaintiff's career was in foreign exchange dealing and he has moved home regularly throughout his adult life according to the calls of that career. Between 1975 and 1977 he lived at Horley in Surrey. Between 1977 and 1989 he lived in Dusseldorf and Hamburg in Germany. From 1980 to 1982 he was at Horley again, and since then he has lived at various addresses in Cornwall. He kept in touch with his mother, until her faculties declined and she was received into local authority accommodation in the last years of her life. She died on 19 October 1992. He had no contact with the deceased from the time of the rift in the early 1960s until the deceased's death in 1987. In uncontested evidence, given on affidavit, several family friends from Wales and London testified to knowing the deceased, the defendant and the grandparents and also stated that that part of the Evans family appeared to have lost contact with the plaintiff from the early 1960s. A schoolfriend of both the plaintiff and the defendant, now Mrs Lawrence, gave evidence that she had kept up with many schoolfriends and often inquired of them what had become of the plaintiff, but none of them appeared to know what had become of him.

9. The plaintiff told me that his mother claimed that she knew where his sister lived and that they had met in shops in the area of their home. Mrs Lawrence told me that she had met the mother by chance in the street in London, in about 1982. Mrs Lawrence inquired about the plaintiff but Mrs Evans became abusive and Mrs Lawrence broke off the conversation. Mrs Lawrence reported this to the parties' grandmother but was specifically asked by her not to say anything of this to the defendant, because her mother had 'given her such a hard time'. The plaintiff said that in **1986** he asked his mother to pass on a message to the plaintiff to the effect that he would like to meet her. He said that the reply came back from his mother that the defendant did not want to see him. He also said in cross-examination that on two occasions, in 1981 and 1987 respectively, he had delivered personally two letters, addressed to his sister, to the house at Broadhurst Gardens where he knew that the grandparents had lived. He said he had had no reply. Clearly, the delivery of such letters was of some importance in this case. However, no mention was made of them in the plaintiff's witness statement. The defendant denied receiving any such letter from the plaintiff. I accept her evidence in this respect. The omission of this important material from the plaintiff's witness statement, in a case that appears to me to have been otherwise scrupulously prepared by his solicitors, gave me doubts as to the reliability of his evidence in this respect, and also in other areas where his evidence came into conflict with that of the plaintiff. The defendant, on the other hand, appeared to me to be careful and consistent in her evidence in this and in other respects. I find, therefore, that the plaintiff did not deliver the two letters that he claimed to have delivered to Broadhurst Gardens.

10. The defendant told me in evidence that she had no contact with her mother from 1962 onwards. The plaintiff, however, said in his witness statement of 8 April 1998 that, after his mother's death, he found among her papers a photograph of the defendant's daughter, Lydia, taken at a time when he took the girl to be about four years old. Thus, he concluded that the defendant and her mother must have been in contact in about 1987. The papers, he said, had been sent to him by the social services department that had been caring for his mother. He said that, on a visit to Wales in 1994, he had met a Mrs Scourfield, whom he described as the sister of a friend of his. He said that Mrs Scourfield had produced a picture like the one referred to in his statement. This caused him to look again at his mother's papers on his return to Cornwall and there he

found the photograph produced in evidence. No mention was made of the existence of this photograph in correspondence between solicitors in April 1997 when the alleged contacts between the mother and the defendant were being debated between the parties' advisers. The plaintiff did accept that he had stayed with Mrs Scourfield for one night during 1997. He said that he did not recall whether or not he had stayed with her at Christmas 1997, but that he might have done. He said that he had only seen her twice in the period since 1994.

11. The defendant told me that she had not seen the photograph before it was supplied with the plaintiff's witness statement. She recognised it, however, as a photograph of her daughter, which she believed must have been taken in about 1985. She recognised the chair in which the little girl was sitting and the ashtray shown on one of the arms of that chair: they were items she remembered seeing in Mrs Scourfield's flat. At that time, said the defendant, she had travelled to Wales for a job interview and had left Lydia with Mrs Scourfield to be looked after. In the photograph Lydia is shown holding some cards and the defendant recalled Mrs Scourfield having commented upon the mess that Lydia had made with the cards on the day in question. In cross-examination she was firm that she had not sent a copy of this photograph to her mother. Mrs Scourfield was not called and the plaintiff's counsel made the point that no challenge to his client's evidence on this had been intimated until he was being cross-examined.

12. The plaintiff's evidence about his contact with Mrs Scourfield, however, was hesitant and in parts, to my mind, evasive. Again, I found his evidence unsatisfactory in this area of the testimony. Accordingly, I do not find it sufficiently cogent to cast doubt on the defendant's evidence that she had no contact with her mother from 1962 onwards: I accept her evidence on the point.

C. THE ESTATE AND ITS ADMINISTRATION

13. The deceased died on 18 October 1987 as a result of a traffic accident. The defendant instructed Gasters, the solicitors who she understood had been consulted by the grandparents in the 1970s, to act for her in obtaining a grant and to advise her in the administration of the estate. Within the firm, the matter was handled by Mrs Payne who was a probate partner with them from 1983 to 1989. Mrs Payne had also been consulted by the deceased in the weeks before his death with regard to the making of a will and an inquiry as to inheritance tax saving on a transfer of the Folland Road property to the defendant's daughter, Lydia. However, no conclusion, with regard to the proposed will or the transfer of the property, had been reached prior to the death.

14. It is clear to me that the defendant put her complete trust in Mrs Payne to advise her as to what was appropriate to do in the circumstances surrounding her family background and the deceased's intestacy. Mrs Payne gave evidence before me and said that, not unnaturally, she did not recall details of conversations with the defendant at this time but she did recall advising the defendant about the relevance of her mother's position and that of her brother in the light of the intestacy. Mrs Payne's view, no doubt rightly, was that, if the mother and the deceased had not been divorced, the mother would have been entitled to the grant and probably to the whole of the estate. She carried out a divorce search and discovered the decree absolute. She does not appear ever to have considered the mother, if still alive, as a potential source of inquiry as to the whereabouts of the plaintiff. Mrs Payne recalled being instructed that the plaintiff had disappeared completely and she stated that the defendant seemed certain that the plaintiff had died. Mrs Payne was told of the grandparents having made inquiries about the plaintiff during the 1970s, as I have already related.

15. So far as the plaintiff was concerned, the advice the defendant received was to advertise for him in the national press and, in July 1988, Mrs Payne instructed advertising agents to place advertisements 'in say two newspapers; we suggest one national paper and one local to the area in which our client has always lived'. The agents proceeded to advertise in the News of the World on 24 July 1988. They seemed to take the view that this was all that was appropriate and Mrs Payne recorded, in a letter to the defendant of 8 August 1988, that she was-

'surprised ... to learn that this was the newspaper in which it is customary to place such advertisements but ... was assured by the firm who deal with this sort of thing that this was in fact the case.'

In spite of the surprise expressed and her original instructions for advertisement in two papers, she took the matter no further. The only response received to the advertisement was from a firm of genealogists and

probate researchers who offered to carry out inquiries as to the plaintiff's whereabouts on a contingency basis. Mrs Payne informed the defendant about this in a letter of 18 October 1988, but her advice was: 'I suggest that we now make enquiries about obtaining an indemnity insurance policy.' No further inquiries were made as to what had become of the plaintiff.

16. On behalf of the plaintiff, criticism was levelled against the defendant for the instructions given to Mrs Payne. It was said that Mrs Payne was given the impression that the plaintiff was dead without her being given any detail as to the basis of the defendant's belief. I do not think that criticism is justified. It seems to me that the defendant told her solicitor the facts as she understood them to be and looked to the solicitor to advise her as to what inquiries, or other steps, were required of her in the position in which she found herself. I am quite satisfied that the defendant would have followed any line of inquiry that Mrs Payne recommended as appropriate in all the circumstances and was not intending to dissuade Mrs Payne from giving her full advice on what to do in the unusual circumstances of this case.

17. On 8 May 1989 a missing beneficiary policy was duly effected with the Sun Alliance Insurance Group, and by letter dated 16 August 1989 Mrs Payne advised the defendant in the following terms:

'As we have now obtained the missing beneficiary indemnity policy there is no reason why the administration of your father's estate should not be completed. The Policy provides a limit of indemnity of £21,000 and as the initial value of the estate appeared to be less than £40,000 this should be more than adequate to meet your brother's share of the estate should he still be alive and make a claim ...'

No advice was given as to any potential claim to interest that might arise if the plaintiff reappeared after some years, as ultimately occurred. Very shortly after this Mrs Payne left Gasters and the winding up of the administration, by the distributions to which that I shall shortly turn, proceeded without further advice to the defendant as to what, if any, further steps were required to secure the plaintiff's interest.

18. By an account exhibited as LMW1 to an affidavit of the defendant sworn on 2 October 1997, the deceased's net estate was stated to have been worth £43,230769. The figures given for distributions, however, add up to some £500 more. In the absence of a satisfactory explanation from the defendant about the discrepancy, therefore, it seems to me that I should treat the higher figure (£43,730769) as the correct one. The account was provided pursuant to an order made in this action on 25 June 1997. These assets yielded up £27,230769 in cash, the freehold property at Folland Road, Garnant (treated as being worth £16,000) and personal effects valued at £500. The personal effects were retained by the defendant. The freehold property was assented in favour of her also and the cash was distributed as to £22,222796 to her and as to £5002773 to her daughter, Lydia. In effect, the whole of the deceased's residuary estate was distributed to the defendant or at her direction. Of the cash, £2,500 was paid to the defendant on 2 November 1988. The freehold property was vested in her in August 1990, the personal effects were retained at the same time and simultaneously the £5002773 was paid to Lydia Westcombe. The final payment of £19,727796 was made to the defendant on 26 September 1990.

19. The property at Folland Road remains unsold to this day in the hands of the defendant. It was valued shortly after the deceased's death at £16,000. The defendant told me that the property is thought now to be worth about £20,000. It has been on the market for sale for the last 18 months at £24,950. Two offers of £10,000 and £15,000 respectively have been received in that period. Each has been withdrawn. This may mean that the £20,000 estimate is rather optimistic.

D. THE ISSUES

20. Out of these events two principal issues arise. First, the plaintiff criticises the debiting of the estate with four items of expenditure charged or claimed to be chargeable to the estate account. Secondly, whereas the plaintiff contends that he is entitled to an account of income and profit of the estate in the defendant's hands or, alternatively, at his option interest, on his share of the capital of the estate from September 1990 to date, the defendant contends that she ought to be relieved of all such liability under s 61 of the Trustee Act 1925.

E. EXPENSES

21. As I have said, four items of expenditure are challenged as improper charges to the estate. These items are: (1) a sum of £628763 said to be in respect of a bill owed by the defendant to her solicitors' in

respect of administration expenses incurred subsequent to the relevant period, between September 1994 and October 1995; (2) £525 in respect of the insurance premium paid to the Sun Alliance Insurance Group for the missing beneficiary policy; (3) a bill of £752750 from Gasters, rendered on 15 August 1990; and (4) a sum of £500, sought to be charged by the defendant, as an estimate of expenditure on items described by her in her affidavit of account as follows:

'These includes [sic] a payment I made to the vicar who attended the funeral to cover his fares ... insurance premiums paid to Legal & General in respect of Folland Road during the relevant period; fares; telephone charges; numerous oath fees; and other such miscellaneous items which to the best of my knowledge and belief totalled at least the £500 figure shown [in the account].'

I shall take these items in turn. In doing so, I take into account the definition of an administration expense to be found in 17 Halsbury's Laws (4th edn) para 1185, to which I was referred:

'The general principle is that the estate must bear the expenses incident to the proper performance of the duties of the personal representative as personal representative but not the expenses involved in the execution of the trusts which arise after the estate has been administered or an assent given ...'

(1) The £628763 bill from the defendant's solicitors

22. No more was said in evidence before me as to the nature of the work carried out which gave rise to this bill, other than the brief statement contained in the defendant's affidavit, which I have already quoted. In such circumstances, it is difficult to conclude precisely whether or not the charges are proper administration expenses. The period to which the account is said to relate is after conclusion of administration properly so-called and covers the early months after the re-emergence of the plaintiff. It would appear, therefore, that the expense falls outside the definition of administration expenses to which I have referred. Mr Legge, for the defendant, submitted however, that the expense should none the less be allowed as an expense properly incurred by his client, as a trustee. In my view, however, the defendant did not hold the policy or its proceeds upon trust for the plaintiff, or for anyone else. The policy proceeds were her money to do with as she pleased, but derived from a policy designed to protect her from liability to the plaintiff. I would, therefore, disallow this item as an administration expense.

(2) The £525 insurance premium

23. The plaintiff objects that this sum was indeed spent as a protection for the defendant against a claim for breach of trust and should not, therefore, be allowed as an administration expense. As I understood the closing submissions of Miss Clarke, for the plaintiff, on his behalf, she was prepared to accept that in some circumstances such premiums would be properly allowable, for example in a case where distribution was being sought by persons other than the personal representative in the face of doubts about a missing beneficiary. But, she submitted, this should not be the case where the policy is purchased to facilitate an excessive distribution to the personal representative herself. Mr Legge responded that it would have been open to the defendant to apply to the court for directions and/or for a Benjamin order (Re Benjamin, Neville v Benjamin [1902] 1 Ch 723) at far greater expense, the costs of which would have been properly allowable. It is to be recalled that such an order gives protection, if made as asked, to the personal representative but not to the beneficiary whose share has been wrongfully augmented at the expense of the late claimant. Should I, therefore, draw a distinction on the grounds submitted by Miss Clarke? There appears to be no authority on the point.

24. In my view, personal representatives, particularly of small estates, should not be discouraged from seeking practical solutions to difficult administration problems, without the expense of resort to the court. Further, in small intestate administrations, where frequently the representative will have a personal interest, sizeable sums should not have to be tied up indefinitely for fear of the re-emergence of a long lost beneficiary. The missing beneficiary policy does provide, at relatively small cost, a practical answer to such problems. Such a policy provides a fund to meet the claim of such a beneficiary in exoneration of the representative and of the overpaid beneficiary. The policy is to the advantage of all and is to some extent more effective than the limited protection provided by the more costly application to court for a Benjamin order. I am disinclined, therefore, to a draw distinction in this case between cases where the personal representative is beneficially entitled and those where he or she is not. It may be that circumstances will differ in future cases, but in my view the defendant was advised to take a practical course in circumstances

where the beneficiary had been unheard of for nearly 30 years and to my mind the premium was a sensible and proper expense of this administration.

(3) The Gasters' bill for £752750 dated 15 August 1990

25. A copy of this bill appears at p377 of the bundle. The text of the bill may be treated as read into this judgment. Having regard to my view that the insurance policy was a proper expense of the estate, it seems to me equally that advice given as a preliminary to its being obtained ought similarly to be allowed. Other common items of estate administration are also covered, such as gathering in assets, correspondence in relation thereto and advertising costs. Those too should be allowed. However, I do not agree with Mr Legge that the legal expenses of wrongful distributions should be recoverable from the estate. The bill cannot be apportioned with exactitude and, therefore, I would allow to the defendant one half of it, namely £376725.

(4) The £500 for miscellaneous expenses

26. I accept the defendant's evidence as to the fact and nature of the expenses covered under this head. It would be surprising if an administration of this sort did not involve such costs, for which paperwork is not readily available. I would, therefore, allow them in total. It would be unfortunate to my mind if a personal representative's office was to be burdened with the vouching of such expenses by written evidence in every case.

F. ACCOUNTS, INTEREST AND RELIEF UNDER S 61 OF THE TRUSTEE ACT 1925

27. Clearly, the estate has been wrongly administered and distributions have been wrongfully made to the defendant at the expense of the plaintiff. Absent relief under the Act, therefore, the plaintiff is entitled to a remedy to the extent that he has been underpaid with regard to his proper entitlement. Miss Clarke submits that that relief should be, at the plaintiff's option, an account of unpaid capital and an account of interest on all capital from the date on which it should have been received to the date of actual receipt or, alternatively, an account of income and profits actually received from trust property wrongfully received by the defendant. Miss Clarke also submits that the plaintiff is entitled to an inquiry into the value of the Folland Road property in the hands of the defendant. In my judgment, the normal form of relief would be of this nature, although it would obviously be regrettable, having regard to the sums involved, if these proceedings and this trial merely led the plaintiff to proceed with further accounts in chambers. No doubt there could be adverse costs consequences to the plaintiff if he were to pursue further accounts which ultimately yielded less than such interest entitlement that he might have. The principal question is whether the defendant should be relieved from such liability under s 61. In addition, in respect of two payments in cash to the defendant, totalling £7,502773, the defendant also claims the benefit of s 21(2) of the Limitation Act 1980.

28. Before turning to interest, it seems to me that, logically, I should deal with the point arising under s 21 of the 1980 Act. This section provides, so far as relevant:

'(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action ... (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover the trust property shall be limited to the excess over his proper share. This subsection only applies if the trustee acted honestly and reasonably in making the distribution.

(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued. For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.'

By s 38(1) of the 1980 Act the word trustee has the same meaning as it has by virtue of s 68(1) of the 1925 Act, and therefore includes a personal representative. The distributions making up the £7,502773 that I have mentioned were (according to the defendant's account): (a) the sum of £5,002773 paid to an account for the benefit of Lydia Westcombe in August 1990 and (b) the £2,500 paid to the defendant on 2 November 1988. The writ in this action was issued on May 1996.

29. It is difficult to see how the section could apply to the August 1990 payment, made as it was within six years before the issue of the writ. However, Miss Clarke submits that, in any event, the cause of action in favour of her client in respect of recovery of trust property did not accrue until completion of administration in August or September 1990 and, therefore, that the primary limitation period had not expired with regard to either payment at the date of issue of the writ. Further, she submits that, on the facts of this case, her client's claim in any event does not exceed a claim against the defendant to recover more than the 'excess of her proper share'. This, says Miss Clarke, is not a case where a trustee has unwittingly distributed to other beneficiaries in addition to himself and cannot, therefore, provide additional protection to the defendant: see eg the note to s 21 in 24 Halsbury's Statutes (4th edn) 723. In my judgment, these two submissions of Miss Clarke are correct and s 21 does not, therefore, assist the defendant in this case.

30. I turn to the interest claim. By way of distribution the defendant has received, or has had transferred to her order, cash sums totalling £27,230769. She also received, unsold, the deceased's personal effects (estimated at £500) and the Folland Road property, treated in the defendant's account as worth £16,000, although in fact unrealised. There would appear to be no wrong done to the defendant, therefore, in using the figures in her own account to conclude that, by the end of September 1990, the plaintiff should have received cash or assets worth one half of £43,730769, plus the figure of £376725 disallowed, under this judgment, from the administration expenses claimed in schedule 4 to the account, ie a total of £44,106794. The half share would have been £22,053797. The plaintiff received (from the proceeds of the policy) £17,500 on May 1996 and £3,400 on 23 April 1997. That is £20,900 in total.

31. These figures would represent an underpayment of capital to the plaintiff of £1,153797. If interest were to be the plaintiff's remedy, it would, in my judgment, be payable on the unpaid capital entitlement from time to time from 26 September 1990 to the date of payment. Miss Clarke accepted that any interest payable should be simple and not compound.

32. As to the rate of interest, I was referred to Snell's Equity (29th edn, 1990) pp 288-289 and to Underhill's and Hayton's Law Relating to Trusts and Trustees (15th edn, 1995) pp 825-826. I have also read the passages in the latter work between pp 839-843. The rival contentions on rates of interest were (for the plaintiff) 1% above base lending rate from time to time and (for the defendant) some figure between 6%, said to be the rate payable on unpaid legacies, and the rate payable on special account, which, I was told, has fluctuated between 1475% and 8% in the relevant period. (On the plaintiff's counsel's calculations in her opening skeleton argument simple interest at 8% between 1 September 1990 and 9 December 1998 would have been £10,207.) In his judgment in Bartlett v Barclays Bank Trust Co Ltd (No 2) [1980] 2 All ER 92 at 98, [1980] Ch 515 at 547 (cited in Underhill and Hayton pp 825-826), Brightman LJ said that a proper rate of interest to be awarded in the absence of special circumstances was that allowed on special account. He observed that the high interest rates payable reflect and compensate for the continued erosion in the value of money by reason of galloping inflation. That case also involved a claim against professional trustees. In the circumstances of this case, involving the non-professional administrator of a small estate in times of more gentle inflation, equity is satisfied, in my judgment, by an award of interest at 8% in each relevant period. Thus, apart from s 61 of the 1925 Act, the plaintiff would be entitled to interest at that rate on unpaid capital from time to time in the period that I have mentioned.

33. The question remains as to whether and, if so, to what extent the defendant ought properly to be relieved from such a liability and/or from any liability to account pursuant to s 61.

34. Section 61 of the Trustee Act 1925 provides:

'If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he

committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.'

35. It is not argued by the plaintiff that the defendant acted dishonestly. But, it is said that she did not act reasonably and that she ought not 'fairly to be excused'.

36. Miss Clarke's principal submission is that it is difficult to see how a trustee who receives property to which she has no beneficial entitlement and converts it to her own use could ever be properly relieved for the breach. She says that the policy cover was inadequate in making no provision for any potential interest liability; it was said that some such provision, perhaps to cover five years' interest, would have been more appropriate. It is also said that there was no reasonable ground for believing that the plaintiff was dead and that reliance on the ungrounded beliefs of friends and relations was misplaced and unreasonable. The total estrangement of the family factions was, says Miss Clarke, good reason to believe that the plaintiff was indeed alive, but merely avoiding contact with the defendant: it was not, she submitted, as if the plaintiff had last been seen disappearing into a burning building. In so far as legal advice is invoked in the defendant's aid, it is said that such advice was inevitably tainted by the inadequate instructions given by the defendant: this was not a case, like for example, Re Allsop, Whittaker v Bamford [1914] 1 Ch 1, [1911-13] All ER Rep 834, where the advice given by the solicitor was as to the technical legal meaning of an obscurely worded will.

37. I have already acquitted the defendant of the charge of giving inadequate instructions to her solicitor. As I have said, she placed the facts squarely before Mrs Payne and relied upon her for her advice. Just like the trustee in Re Allsop, she was relying upon her solicitor to guide her in the technicalities of administering an estate, although in this case the problem was as to what to do where the fate of one potential beneficiary was uncertain, and where (not to my mind irrelevantly) family and friends had had no idea of the plaintiff's whereabouts for some years. The correct actions of a personal representative in such circumstances are just as much a matter for technical legal guidance as the correct construction of a will. I bear in mind the points made by Cozens Hardy MR in the Court of Appeal in Re Allsop, Whittaker v Bamford [1914] 1 Ch 1 at 13, [1911-13] All ER Rep 834 at 839 and by Evershed MR in Marsden v Regan [1954] 1 All ER 475 at 482, [1954] 1 WLR 423 at 434-435. Those observations, are in my judgment, pertinent here. The judgment of Evershed MR in Marsden v Regan clearly shows that to act on legal advice is not a 'passport to relief' under s 61, but that it is important to have regard to the nature of the estate, the circumstances of the defaulting representative and his or her actions in the light of the advice received. This too was a relatively small estate, the representative was a lay person unaccustomed to problems of this nature who was at all times willing to abide by the advice of solicitors. In the end that advice led to some provision being made for the plaintiff's potential claims.

38. As for the contention that the defaulting trustee receiving the trust property should hardly ever be relieved under the Act, it seems to me that this would have more force if the defendant had simply ignored the potential claim and had pocketed the assets. In this case, the defendant did make provision for what she thought was the plaintiff's potential entitlement. She was never advised to consider interest. If she had been so advised, what would have been the proper sum for which to insure? Would five years or a longer or shorter period have been appropriate, in the light of the plaintiff's long absence? In the end, she was clearly advised that, having regard to the provision of the policy, she could proceed to distribute the estate. In the circumstances, in my judgment, the defendant did act reasonably. Ought she fairly to be excused and, if so, to what extent?

39. No submissions were advanced to me that the defendant was impecunious or otherwise could not meet any liability that might arise in the action. However, the figures quoted above indicate that the potential liability is not entirely negligible. Further, there remains in the defendant's hands a property, derived from the deceased's estate, which, while not of the most desirable quality, was professionally valued at £16,000 in 1987 and which has attracted two offers of purchase. It must clearly be of some substantial value in relation to the amount of any interest liability in this case. In any case, it would be wrong, in my view, not to satisfy an interest claim by the plaintiff to the extent that it is capable of being realised out of a property derived from the deceased's estate which is still at the disposal of the defendant. However, as I see it, fairness in this case requires no more of the defendant than that.

40. In these circumstances, I am prepared to relieve the defendant against the plaintiff's claim to interest to which he is otherwise entitled, calculated on the basis set out in paras 30-32 above, and/or to further accounts and inquiries in this case, to the extent that such claim cannot be satisfied out of the proceeds of sale of the Folland Road property. Relief will also include a stay of enforcement of the plaintiff's interest entitlement until a sale has been effected. It appears to be to be fair that the defendant's liability should be relieved in this way so as to be limited to the extent of the remaining unrealised property derived from the deceased in her hands. Steps must be taken to dispose of that property speedily for the best price reasonably obtainable and machinery must be provided in the court's order to that end, as to which (in the absence of agreement) I will hear the further submissions of counsel. Equally, I would be willing to hear any further submissions as to the accuracy or otherwise of the figures and calculations given in this judgment.

DISPOSITION:

Order accordingly.

SOLICITORS:

Wolferstans, Plymouth; Simmonds Church Smiles