"Put 'Em Up": *Parsons v Reid* and trustee disclosure

COMMENTARY BY TIFFANY SCOTT QC, 31ST AUGUST 2022

Introduction

In *Parsons v Reid* [2022] EWHC 755 (Ch) executors of William Reid ("the Testator") had issued proceedings seeking an order permitting them to distribute estate funds without being at risk of facing claims for breach of duty that had been intimated by the Testator's daughter. They sought a "put up or shut up" order requiring the daughter to issue any claim she wished to bring within a stipulated timeframe, and at a directions hearing before Master Clark they argued that disclosure of their reasons for reaching their decision as to distribution could not be ordered. The Court disagreed and ordered full disclosure as "*the price to be paid*" for the exoneration that was being sought.

Factual background to *Parsons v Reid*

The Testator died in March 2018 and the principal asset in his estate was a farm in Wiltshire. Under his last will dated 2004 he left his residuary estate on full discretionary trusts for classes including his two children, Stephen and Judith, and his grandchildren. The net value of his estate was about £3.4 million. In 2016 he made a letter of wishes which expressed the wish that his payments be made to his son Stephen reflecting various moral and financial obligations the Testator owed to him, with his residuary estate then being divided as to 60% for Stephen and 40% for Judith.

Probate was granted to the Claimants (the Testator's solicitor and his land agent) in March 2019. Stephen presented the Claimants with schedules of sums that he said should be paid to him to reflect the Testator's wishes before division of the residuary estate. The Claimants did not accept all the sums claimed and in November 2019 wrote to him setting out the payments they proposed to make. In December 2019

Judith expressed concern to Stephen about the schedules and the distribution of the estate and also wrote to the Claimants, indicating that she was content with the majority of the various items claimed and would be content with the rest if the Claimants considered them to be legitimate costs. The Claimants replied that they had not made any decisions as to the payments to be made as yet, but that in any event they would not need her agreement to whatever decision they made. Judith responded thanking them for their reply which she said "*has cleared up my queries*".

By a Deed of Appointment in January 2020 the Claimants appointed a sum of money to Stephen and the remainder of the residuary estate in the 60/40 shares expressed in the letter of wishes. The farm was sold in March 2020 and the Claimants sent Judith a breakdown of the sum appointed to Stephen. Interim distributions were made in April/May 2020 and in September 2020 and as at the date of the hearing the Claimants held a balance pending distribution of about £455,000.

Judith's solicitors wrote to the Claimants in September 2020 complaining about the sums claimed by Stephen and by the Claimants for costs and expenses and seeking an undertaking by the Claimants not to distribute the remainder of the estate. In November 2020 the Claimants' solicitors wrote to Judith and Stephen setting out their position, including that they were under no obligation to consult either party regarding the exercise of their discretion, and pointed to Judith's email of December 2019. They indicated that if the parties could not reach agreement, then the Claimants would need to apply to Court for permission to distribute the remainder of the trust fund.

In December 2020 Judith's solicitors wrote a lengthy letter of claim setting out that she did not accept the propriety of what the Claimants had done. Thereafter matters stalled, with Judith not withdrawing her challenge but not issuing a claim and the Claimants holding a substantial fund with the threat that if it were paid out Judith might sue and they might be found to have paid out under a defective or invalid Deed of Appointment.

The Executors' Application

The Claimants therefore issued Part 8 proceedings in August 2021 seeking the Court's directions to permit distribution of the retained funds pursuant to the terms of the January 2020 Deed of Appointment "*without being at risk of any later challenge to its*

validity or propriety". The relief sought was "*An order that the Claimants may distribute the funds retained by them pursuant to*" the Deed of Appointment.

Blessing vs *Benjamin* Order vs "Put Up or Shut Up" Order

At a directions hearing before Master Clark, Judith argued that the application was in the nature of a *Public Trustee v Cooper* category (2) application (to determine whether a proposed course of action is a proper exercise of the trustees' discretion where there is no real doubt as to the scope of the trustees' powers – i.e. a "blessing" application). On that basis, if the Claimants obtained the Order that they sought, this would have the effect of extinguishing Judith's right to challenge the Claimants' decision.

As such, it was submitted that the Claimants were under the usual duty of full and frank disclosure to provide the Court all relevant facts and documents and to disclose all documents which they have or ought to have which were materially relevant to their decision (referring to *Tamlin v Edgar* [2011] EWHC 3949 (Ch) at [25], *Re A and B Trusts* (2007) JLR 444 at [22] and *Thomessen v Butterfield Trust (Guernsey) Limited* (2009-2010) GLR 102 at [16]).

Judith therefore proposed directions that reflected that position including disclosure of documents that were materially relevant to the Claimant's decision to execute the Deed of Appointment and/or to distribute the funds, and witness statements setting out and confirming all the considerations which the Claimants took into account in reaching their decisions.

The Claimants by contrast submitted that their application was not for a blessing as they were not seeking the Court's approval to their decision, and that the Court should not therefore order disclosure of the reasons for exercising their discretion as they had. In the evidence in support of their application the Claimants stated that they "*did not think it unreasonable that Judith should decide now whether she proposes to bring a claim in respect of the appointment, and if she does not that the trustees have the comfort of knowing that she will not bring a claim when they no longer have any part of the fund to which she lays claim*" and that they had been advised "*that it is perfectly orthodox for a court to direct a fiduciary to act on the basis that a claim which has been alleged, but not brought, will not in fact be made and for the fiduciary to be*

protected from distributing on that footing…" Alternatively the Court might direct that funds should be retained pending some possible future challenge by Judith.

The Claimants' claim was said to be akin to a *Benjamin*[1] order which is made where executors and trustees cannot be certain that a particular person has died, or that they have identified every member of a particular class, or where the original trust instrument is lost. In such cases the Court can authorise distribution of the estate on a particular footing and the effect will be that the executors/trustees cannot thereafter be sued for breach of trust; however the right of any person actually entitled to follow the trust property is preserved (see *Re Evans* [1999] 2 All ER 777 for an interesting case where the personal representative had taken out missing beneficiary insurance rather than seeking a *Benjamin* order and the missing person then turned up – the Judge, Richard McCombe QC, remarked that personal representatives of small estates should not be discouraged from taking out such insurance as a practical solution to the problems of administration as that course might be regarded as somewhat more effective and cheaper than going to Court).

However as observed in Lewin on Trusts (20th Ed) at 39-032, citing *Re MF Global UK Ltd* [2013] EWHC 1655 (Ch), the power to make a *Benjamin* order is "*not apt where the trustees are faced with a claim to a beneficial interest which the claimant fails to pursue*". That is because a *Benjamin* order deals with cases where it is not possible or practicable to establish a fact one way or the other. If there is in fact a person who has made a claim (or who threatens to make a claim) then the claim exists as a matter of fact. The Court does however have jurisdiction to authorise trustees to distribute the estate without regard to that claim, by analogy to the jurisdiction to authorise a distribution even though there is a known adverse claim to the trust assets by a third party. *Re MF Global* indicates that the Court will exercise that jurisdiction where there is reason to think that the claim is "*insubstantial*".

In *Parsons v Reid* the Court was referred to *Sherman v Fitzhugh Gates* [2003] EWCA Civ 886 where the Court of Appeal concluded that there was no reason why the Court's inherent jurisdiction could not be invoked to impose a time limit on a potential challenge to probate – in effect a direction to "put up or shut up" following which the executor would be free to distribute under the will. *Sherman* was applied in *Cobden-*

[1] *Re Benjamin* [1902] 1 Ch 723

Ramsay v Sutton [2009] WTLR 1303 where Deputy Master Behrens ordered that the claimant might distribute the estate in accordance with the will and a codicil whose validity was questioned (on grounds of capacity) unless the defendant issued a claim within 28 days.

In *Cobden*, the claimant had made available to the defendant all the material that was believed to be relevant to the issue of capacity, but the defendant refused to bring a claim to revoke the grant of probate, instead insisting that the claimant bring a claim to prove the validity of the codicil.

The Claimants' primary position in *Parsons v Reid* was that the Court should grant them permission to distribute the Testator's estate immediately, without allowing Judith any further time to bring her challenge since she had already had 2 years to challenge the Deed of Appointment. As a fall back, the Claimants submitted that if the Court were willing to allow Judith to bring a challenge this should be brought by Part 7 Claim Form with pleaded particulars and a time limit for bringing the claim should be imposed. Stephen supported the Claimant's position save that he considered that it would be more efficient for any claim by Judith to be brought by way of counterclaim within the existing proceedings. The Claimants submitted that such an order could and should be granted without the necessity of going through an exercise in disclosure.

Decision of Master Clark

Master Clark considered that it would be necessary for the Judge at the final hearing to decide first whether Judith's potential claim was "*insubstantial, remote or speculative*". That would involve considering its merits and therefore <u>all</u> the available material relevant to those merits, including documents and information held by the Claimants (compare *Cobden-Ramsay*), would have to be disclosed.

The Claimants submitted that it would be sufficient for the Court to consider whether Judith had been able to articulate her claim in a letter before claim (which she clearly had), in which case disclosure was not required; but that submission was not accepted. If the letter of claim put forward a substantial case then that was a factor in favour of, not against, ordering disclosure.

The Court would then need to be satisfied that it had been fully informed before making the order sought since the order would extinguish the Claimants' liability to Judith and that was a draconian outcome. The Master agreed with Judith's submission that she should be in no worse position as regards disclosure than if the Claimants were seeking a blessing. Full disclosure was *"the price to be paid"* by the Claimants for the exoneration they sought.

Directions were therefore given for the disclosure and witness evidence proposed by Judith and the duration of the trial (3 days) reflected the need for consideration by the Court of the merits of Judith's intimated claim.

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