

A In the estate of K deceased

High Court of Justice (Chancery Division)
Richard Arnold QC, sitting as a deputy judge

B Neutral citation: [2007] EWHC 622 (Ch)

Hearing: 26 February 2007
Judgment: 28 March 2007

C *Administration of estates; potential insolvency; payment of admitted creditors; protection for potential creditors; limitation of actions; potential argument that testator created express trust to pay debts; laches*

The deceased (K) died in 1992. Clause 5 of his will declared, *inter alia*:

D 'I GIVE DEVISE AND BEQUEATH the remainder of my estate of whatsoever nature and wheresoever situate including all property over which I have power of disposition by Will to my Trustee UPON TRUST to pay therefrom my debts funeral and testamentary expenses...'

E His estate was solvent if the claims of potential creditors were discounted, but insolvent if they were not. The unadmitted claims dated from approximately 14 years before the date of the hearing.

F The administrators applied for the court's sanction to pay certain admitted creditors and then to distribute K's estate without reference to the claims of a number of disputed and potential creditors. The administrators had admitted the claims of three creditors against the estate but not admitted certain claims or intimated claims by potential creditors. Issues arose as to:

1. the approach to be taken by the court in determining the matter;
- G** 2. whether the claims by the potential creditors were time-barred or liable to be struck out; and
3. the appropriate disposal of the deceased's estate.

H Held (granting the application - para [71])

1. In cases where there were claims or possible claims by potential creditors, the court in distributing a deceased's estate should adopt a similar approach to that taken in *Re Yorke, Stone v Chataway* [1997] 4 All ER 907. While the court would be sympathetic both to the desire of administrators to be immunised from personal liability and to the desire of beneficiaries not to be kept out of their inheritance longer than was necessary, the court should consider whether any, and if so what, protection should

be afforded to the potential creditors. Such protection might take the form of a retention, an indemnity from the beneficiaries or insurance (para [24]).

2. With two possible exceptions, all of the potential creditors' claims were statute-barred. However, it was possible that the potential creditors could overcome the problem with the argument that, under the *Limitation Act 1980* s21, cl 5 of the will created an express trust to pay K's debts (para [42]). They could also argue that the estate was insolvent if their claims were taken into account, but there had been no insolvency administration order. Accordingly, the estate was being administered otherwise than in bankruptcy and, that being so, 'the same provisions as may be in force for the time being under the law of bankruptcy... with respect to... debts and liabilities provable' applied and as a result, the relevant date would be the date of death. Debts which were not statute-barred at that date did not become statute-barred thereafter and were provable, and although such debts could not be recovered by an action, the administrators would nevertheless be bound to pay them if proved (para [50]). As a result, the application had to be considered on the basis that the claims might not be statute-barred, despite their antiquity (para [51]). However, the application also had to be considered on the basis that the potential claims were liable to be dismissed for want of prosecution or struck out as an abuse of process (para [56]).

3. The administrators were entitled to have the court's sanction to pay the admitted creditors and then to distribute K's estate without reference to the claims of the potential creditors, subject to a retention to fund the defence of any proceedings brought by those potential creditors (paras [68], [71]). The potential creditors had had more than ample time in which to make and pursue claims. The fact that they had not done so suggested that the claims were either not well founded in the first place, had been satisfied in other ways, or had been abandoned. There had to come a time when the administrators were entitled to say that they had waited long enough for the potential creditors to pursue those stale claims, and that the court should sanction payment of the admitted creditors and distribution without reference to those claims and without the administrators incurring any risk of personal liability if it subsequently turned out that any of the potential creditors had valid and enforceable claims that K's estate no longer had the assets to pay. In the instant case, that time had been reached and it was unjust to make either the admitted creditors or the beneficiaries wait any longer (para [66]).

Cases referred to

- Arbutnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426
Birkett v James [1978] AC 297
Re Blow, Governors of St Bartholomew's Hospital v Campden [1914] 1 Ch 233
Cotterell v Price [1960] 1 WLR 1097
Duke v Davis [1893] 2 QB 260
Fay v Chief Constable of Bedfordshire [2003] EWCA Civ 1770

- A** *Fielding v Rigby* [1993] 1 WLR 1355
Good Challenger Navegante SA v Metalexportimport SA [2004] 1 Lloyd's Rep 67
Green v Gaul [2006] WTLR 1391
Grovit v Doctor [1997] 1 WLR 640
Hansom v E Rex Makin & Co [2003] EWCA Civ 1801
- B** *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289
Lowsley v Forbes [1999] 1 AC 329
P & O Nedlloyd BV v Arab Metals Co [2006] WLR (D) 300
Patel v Singh [2003] CPLR 149
Re Pauling's Settlement Trusts [1964] Ch 303
- C** *Woodhouse v Consignia plc* [2002] 1 WLR 2558
Re Yorke, Stone v Chataway [1997] 4 All ER 907

Statutes referred to

- Insolvency Act 1986*, ss303, 314, 363, 382, 421, 591
Law Reform (Miscellaneous Provisions) Act 1934, s1
- D** *Limitation Act 1980*, ss2, 5-6, 21, 24, 36
Proceeds of Crime Act 2002
Supreme Court Act 1981, s116
Trustee Act 1888, s8
Trustee Act 1925, s57

E**Statutory instrument referred to**

- Administration of Estates of Deceased Persons Order 1986*, SI 1986/1999, Art 2-4, Sch 1
Civil Procedure Rules 1998, SI 1998/3132, rr3.9, 19.8, 19.8A, Pt 50, PD 51, Sch 1
County Court Rules 1981, SI 1981/1687, Ord 26 r5
- F** *Insolvency Rules 1986*, SI 1986/1925, r11
Rules of the Supreme Court 1965, SI 1965/1776, Ord 46 r2

ANONYMISED JUDGMENT

THE DEPUTY JUDGE:

G**Introduction**

[1] This is my judgment on an application by the administrators, in effect for the court's sanction to pay certain admitted creditors ('the admitted creditors') and then to distribute the deceased's estate without reference to the claims of a number of disputed and potential creditors ('the potential creditors'). The application was heard in private. I have anonymised this judgment in order to enable it to be handed down in open court.

H**Background**

[2] The deceased died in 1992. By cl 3 of his will ('the will') he appointed his sister and another person ('the executors') as executors and trustees of the will. By cl 4 he bequeathed the sum of £22,500 to each of his children who survived him and attained the age of 18. Clause 5 provided:

'I GIVE DEVISE AND BEQUEATH the remainder of my estate of whatsoever nature and wheresoever situate including all property over which I have power of disposition by Will to my Trustee [*sic*] UPON TRUST to pay therefrom my debts funeral and testamentary expenses and to hold the residue UPON TRUST for my wife [name] for her own use and benefit absolutely PROVIDED HOWEVER that if my wife shall predecease me then and only then I GIVE DEVISE AND BEQUEATH the residue of my estate to my Trustees to hold the same UPON TRUST to divide equally between such of my children as shall survive me and attain the age of eighteen years.'

[3] In 1993 the deceased's sister signed a power of attorney appointing her and the deceased's brother ('the brother') to act as her attorney for the purpose of obtaining letters of administration of the estate. In 1994 the brother commenced proceedings against the estate for a substantial sum, as I shall relate in more detail below. Subsequently in 1994 the deceased's widow commenced proceedings seeking an order passing over the executors under *s116* of the *Supreme Court Act 1981*. That application was initially opposed by the brother, but ultimately he consented to it. Accordingly, in 1996 an order was made by the Family Division (Probate) appointing the [current] administrators as administrators of the deceased's estate. The first administrator is the deceased's widow. The second administrator is a solicitor.

[4] In January 1998 the administrators commenced the present proceedings. The deceased's children were joined as defendants, as were a considerable number of persons who had intimated claims against the estate. In February 1998 Sir Richard Scott V-C made an order that the deceased's eldest child should represent all the beneficiaries of the estate ('the beneficiaries') other than the first administrator and that one of the other defendants should represent all the creditors of the estate save for two. Later the same month Carnwath J made an order affirming the appointment of the administrators and giving them *Beddoe* relief in respect of actions commenced against the estate by two creditors, including one brought by the representative creditor. In September 1998 the administrators obtained a formal grant of probate. The administrators placed advertisements in *The Times* and the *London Gazette* in October 1998.

[5] In November 2000 HHJ Weeks QC made an order giving the administrators further *Beddoe* relief in respect of actions commenced against the estate by seven creditors, including the action brought by the brother, and in respect of a claim by the Inland Revenue for inheritance tax. The *Beddoe* relief granted in respect of the action brought by the brother was subject to the following proviso:

'Provided that no action shall be taken unless an application is made to lift the stay imposed by Paragraph 19 of the Practice Direction under CPR Part 51'

[6] In July 2002 HHJ Weeks QC made an order appointing the [current] representative creditor as representative creditor in place of the previous representative creditor. In September 2002 and February 2003 HHJ Weeks QC made

A orders sanctioning the payment of various sums to seven creditors of the estate, including the Inland Revenue, by way of compromises of those creditors' claims and ratifying the compromises of six further claims. These orders were expressed to be 'notwithstanding the Administration of Insolvent Estates of Deceased Persons Order 1986 and notwithstanding whether or not the Estate is solvent' and included permissions and directions pursuant to s57 of the *Trustee Act 1925* and ss303, 314 and 363 of the *Insolvency Act 1986*.

B [7] The administrators have now admitted or partially admitted the claims of the three admitted creditors. (One of these claims is partially admitted in that the sum agreed is the result of a compromise of proceedings brought by that admitted creditor seeking a larger sum.) Accordingly, the administrators seek the court's sanction to pay these claims.

C [8] One of the admitted creditors, which is the beneficiary of a partially satisfied judgment in its favour which it obtained in 1998, is the representative creditor. As counsel for the representative creditor candidly pointed out, the administrators' acceptance of its claim has had the unfortunate consequence of putting the representative creditor in a position of conflict of interest, since its interest lies in securing immediate payment of the sum admittedly due to it whereas for the reasons explained below that might not be in the interests of the potential creditors whom it represents. Accordingly, the representative creditor asks for an order relieving it of the requirement of representing the other creditors. I will make that order, which is clearly appropriate in the circumstances. In the circumstances, the burden of articulating the arguments that might be advanced by the potential creditors fell upon counsel for the administrators. I am satisfied that he discharged that task to the best of his ability, and I am grateful to him for doing so.

D [9] In addition to seeking the court's sanction to pay the claims of the admitted creditors, the administrators seek the court's sanction to proceed to distribute the estate to the beneficiaries. Needless to say, this application is supported by the representative beneficiary and by the first administrator in her capacity as a beneficiary.

E [10] There are two inter-related potential obstacles to this course. The first is the existence of the claims and potential claims of the potential creditors. The second is that the estate is amply solvent if the claims of the potential creditors are discounted, but is substantially insolvent if all the potential creditors have good claims for the amounts claimed, intimated or apprehended which are not statute-barred or otherwise unpursuable.

F [11] The application was originally made on paper, but in December 2006 Warren J ordered that it be listed for an oral hearing without notice to the potential creditors for the court to consider whether any of the potential creditors should be notified and, if not, determine the application.

G **The potential creditors' claims**

H [12] The potential creditors' claims divide into two main categories – claims which have actually been made and those which have merely been intimated or (in two cases) are apprehended.

Claims which have been made

[13] These can be summarised as follows:

- (i) After the deceased's death, the brother intimated various claims against the estate and against a company owned by the deceased. There are inconsistencies in the amounts claimed, and the justifications for those amounts given, by the brother during the period between the death of the deceased and the issue of proceedings by the brother. The brother issued a writ against the personal representatives of the deceased in 1994. The statement of claim indorsed on the writ recited a series of debts allegedly due from the deceased with skeletal particulars. The brother obtained an order appointing the Official Solicitor to accept service of the writ. It is assumed that the writ was served in accordance with that order. No order appointing the administrators to defend the action has ever been obtained. In 1996 the brother's solicitors sent the administrators a copy of the writ for information. In 1997 the brother's solicitors came off the record. In 1999 a different firm of solicitors wrote on behalf of the brother regarding one of the alleged debts. Since then nothing has been heard from the brother. It appears that he had sold his London residence, and the deceased's family believe that he has returned to the country from which the family originates. The brother's action is subject to the automatic stay imposed by *para 19 of the Practice Direction - Transitional Arrangements* which supplements *CPR Pt 51*. The administrators' evidence in support of the present application sets out the information that is presently available about each of the claims listed in the brother's statement of claim. This information yields more questions than answers about the validity of these claims. The administrators' solicitor states his belief that the passage of time since 1994 will have made it much more difficult to investigate the validity and quantum of the various claims.
- (ii) A second creditor, who I will refer to as creditor A, obtained a judgment, presumably in default, in 1993 on a counter-claim in county court proceedings brought against him by the deceased. It appears that the judgment was entered without any order to carry on against any person representing the estate or to proceed in their absence. Nothing has been heard from creditor A for many years. There is little information about his claim and the documentation is incomplete. The administrators' solicitor states that there would now be considerable difficulty in undertaking enquiries to obtain further information.
- (iii) A third creditor, who I shall refer to as creditor B, issued proceedings in 1994 in respect of an alleged guarantee given by the deceased. It appears that creditor B's claim is inconsistent with one of the claims made by the brother. In 2001 a trial of creditor B's claim was adjourned pending the final determination of his entitlement to Legal Services Commission funding and creditor B was ordered to provide further information within 14 days of that determination. Nothing

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A has happened since then. It may be inferred that creditor B lost his LSC funding. The administrators' solicitor states his belief that the delay is likely to have resulted in evidential prejudice.

(iv) A fourth creditor, who I shall refer to as creditor C, issued proceedings in 1994 in respect of an alleged liability of the deceased for certain building works. Nothing has happened since the administrators served their defence in 2000. The administrators' solicitor states his belief that the delay is likely to have resulted in evidential prejudice.

C *Claims which have been intimated or are apprehended*

[14] In addition to the claims which have actually been made, there are eight further claims which have been intimated by various potential creditors, including the deceased's father. Finally, the administrators apprehend that claims might be made by two potential creditors, a company ('the company') and a bank ('the bank') under separate guarantees given by the deceased in respect of the indebtedness of a company owned by the deceased. The size of the various claims ranges from relatively small sums to very substantial ones.

[15] None of these potential creditors has instituted proceedings, and nothing has been heard from any of them for many years. Indeed, in several cases nothing has been heard from them since they intimated a claim in 1992 (this includes the company and the bank, both of whom sent letters referring to their guarantees in 1992). In most cases information about the claims intimated is scant, as is documentation relating to them. Some of the claims appear to be related to other matters which have been disposed of in one way or another. In each case the administrators' solicitor states his belief that undertaking further enquiries to obtain further information now would be difficult.

F **The approach to be adopted to an application of this nature**

G [16] In *Re Yorke, Stone v Chataway* [1997] 4 All ER 907 the plaintiffs were the executors of the deceased, who had been a 'name' at Lloyd's from 1983 until his death in 1991. The deceased's estate had the benefit of reinsurance into Equitas in respect of every possible Lloyd's risk to which it would or might otherwise be liable. Having settled the debts and liabilities of the deceased, other than unascertained potential future liabilities arising from his position as a Lloyd's name, the plaintiffs wished to complete their administration by distributing the residue. The plaintiffs wished to be sure, however, that distribution would not involve them in personal liability should creditors in respect of the deceased's position as a Lloyd's name emerge. Accordingly they applied to the court for directions as to whether, given the protection of Equitas, they were under a duty to distribute to the beneficiaries without retention or security and without risk of personal liability, or whether they should retain a fund against the emergence of claims. Lindsay J held that the personal representatives of Lloyd's names protected by Equitas were not under a general duty to distribute to beneficiaries without retention or further security and

without first obtaining the sanction of the court. Nevertheless, he held that in the instant case, balancing the injustice of beneficiaries being kept out of benefit on account of unascertained liabilities which might never come to anything against the risk of unknown contingent creditors who had paid for cover finding their matured debts unmet, the plaintiffs would be permitted to distribute to the beneficiaries without retention or further security beyond that provided by Equitas. In reaching this conclusion, he attached considerable importance to the fact that, on the evidence before him, there was no reason to think that Equitas was likely to fail, in whole or in part.

[17] In the course of his judgment Lindsay J reviewed the applicable law in detail at 916e-922j. While the whole of this passage repays study, for present purposes the following extracts are particularly pertinent. At 918h-919a he said:

‘Although in considering the making of an order giving protection to executors the court would not look to create for a creditor some security which he had not stipulated for by his contract and would not act upon an attempt by a creditor in such a behalf (*King v Malcott* (1852) 9 Hare 692, 68 ER 691), the court would nonetheless, in making such orders, consider whether any and if so what indirect protection should be extended to creditors and including contingent creditors: *Fletcher v Stevenson* and *Dean v Allen*; see *Re Nixon, Gray v Bell* [1904] 1 Ch 638 at 694.

As for the forms of protection to be given to executors, they seem principally or exclusively to have consisted on the one hand of a retention by the executors out of the estate or, alternatively, the provision of an indemnity from the beneficiaries by whom (usually) a distribution without retention was sought.’

[18] At 919g-j:

‘If security was to be provided by a beneficiary to an executor so as to indemnify the executors in a secured way and, alternatively, where there was a retention by the executor in lieu of sufficient security from the beneficiary, then the question of the amount of the security or of the retention would be adjourned to be fixed by the master: *Simmons v Bollard*, *Dobson v Carpenter*, *Re Bennett* and *Re Owers*. That reference to the master was not, it seems, by reason of any rule or principle requiring it but simply because the material for an assessment had not been put before the judge: see *Re Owers*.

The principle on which the master would act in fixing the amount or nature of the security or retention is not disclosed in the cases but it is nowhere suggested that the calculation had to be such that the security would necessarily and in all possible events suffice to meet in full whatever the executor might have to pay the creditors.’

[19] At 920a-b:

A 'Even though a contingent creditor had no strict right at law or in equity to insist upon a retention or upon security, the better view, in my judgement, is that the court would have in mind, in fixing a retention or security, that it was proper, as noted above, that creditors should to some extent be protected.'

B [20] At 920e:

'The courts looked in general at the "reasonable probability" of there being future demands against the estate: *Dean v Allen*. A practical view would be taken.'

C [21] At 920h:

'... the court could take a practical view, even against executors who asked for better protection, that no retention or security beyond the personal liability of the beneficiaries was needed and could decree accordingly, thus conferring the immunity which the executors had sought: see *Waller v Barrett* and *March v Russell*.'

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[22] Lindsay J expressed his conclusions as to the law at 921d-j as follows:

E 'First, a distribution made pursuant to a decree of the court affords a complete protection for the executor and the executor need not and indeed should not look, for example to a retention, for any protection beyond that. Secondly, it has long been the practice of the court to enable personal representatives to set apart "a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach" of covenants in a lease held by the deceased: Kindersley V-C in *Dodson v Carpenter*. These observations can comfortably co-exist if the case was that where an executor during his administration knew of no likelihood of any contingent debt maturing he could, by having an account taken in court of all known liabilities, obtain a decree which permitted him to distribute to legatees without making any retention but which nonetheless gave him complete freedom from a devastavit (save in exceptional circumstances such, for example, as fraud, misrepresentation or concealment). Where that was done a creditor with a late maturing contingent debt would be able to recover, if at all, only against the legatees.

H Conversely, if, during an administration some real possibility of some contingent debt maturing came to the executor's notice, the executor could, either of his own volition or under the guidance of the court, retain a sum out of the estate against that risk or seek security direct from the prospective recipient beneficiary. If there was a retention and if his retention was pursuant to a direction of the court, or if the security from the beneficiary was given under the direction of the court, then, again, he would be

protected against devastavit once the fund retained or the security so given was exhausted in application towards a risk against which it had been reserved. But if the executor failed to obtain the directions of the court in that he distributed with neither a retention, nor a security from a beneficiary, sanctioned by the court nor had obtained the sanction of the court upon the taking of an account and a decree then, in any such case, he remained at risk of personal liability.'

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[23] Finally, Lindsay J emphasised at 921j-922j and again at 925f-926c that it was important for executors to obtain the sanction of the court and that in most cases executors could not be criticised for seeking the court's directions. In this connection, he pointed out at 925j and again at greater length at 926j-927j that on such an application arguments on behalf of absent, unknown or contingent creditors could be heard and balanced.

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[24] *Re Yorke* was a case about the contingent liabilities of estates, as were most of the authorities cited in it. Counsel were unable to refer me to any authority as to the approach to be adopted in a case such as the present, where the cause of concern is a series of disputed and stale claims against the estate. In principle it seems to me that a similar approach should be adopted. While the court will be sympathetic both to the desire of administrators to be immunised from personal liability and to the desire of beneficiaries not to be kept out of their inheritance longer than is necessary, the court should consider whether any, and if so what, protection should be afforded to the potential creditors. Such protection may take the form of a retention, an indemnity from the beneficiaries or (as in *Re Yorke*) insurance. The court will take a practical view. It may in an appropriate case conclude that no protection beyond the personal liability of the beneficiaries is needed. Even if the court concludes that a greater degree of protection is required, it is not bound to protect the potential creditors in respect of the full value of their claims.

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Should the potential creditors be notified of the application?

[25] Counsel for the administrators pointed out that, looking at the matter from the perspective of the potential creditors, it was in their interest to be notified of this application in order that they could oppose it if they so desired. That aside, counsel were unanimous in opposing any notification of the potential creditors for three reasons. First and foremost, notification carries the obvious risk of stirring up claimants who have been dormant for a long time (in some cases, for over 14 years), and who might easily misinterpret notification of the application as in some way constituting an invitation to proceed with their claims when they would otherwise not do so. Secondly, there would be practical difficulties in notifying all the potential creditors since the administrators do not have current contact details for all of them and some appear to be abroad. Thirdly, even simple notification would involve the administrators in expense.

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[26] Initially, the representative creditor suggested that, while there should be no advance notification, there should be subsequent notification of the court's judgment

A and order under *CPR 19.8A*. During the course of the hearing, however, the representative creditor withdrew this suggestion.

B [27] I have come to the clear conclusion that, in the particular circumstances of this case, notification would not be appropriate for the reasons given by counsel, and in particular the first reason. While justice demands that the court should consider the interests of the potential creditors, it does not follow that the court should positively invite parties who have not themselves sought to pursue their claims for many years to press their cases.

Can the potential creditors pursue their claims?

C [28] In considering whether the potential creditors should be given any, and if so what, protection in the event of a distribution, an important question is whether the potential creditors are now able to pursue their claims or whether those claims are statute-barred or otherwise unpursuable. This gives rise to a number of issues.

Limitation

D [29] If any claim by a potential creditor would be time-barred, then it seems clear the administrators would not commit a devastavit or breach of trust or breach of fiduciary duty by distributing the estate without reference to that claim. Certainly, there would be no reason for the court not to sanction that course.

E *Limitation applying the ordinary limitation periods*

F [30] Many of the claims made or intimated by the potential creditors appear to be simple debts or otherwise founded in contract. Under s5 of the *Limitation Act 1980* such claims will have become statute-barred six years after the date on which the cause of action accrued, that is to say, the date of breach. The breaches alleged all appear to have occurred more than six years ago.

F [31] Some of the claims are in respect of loans, in which case the six-year period would (absent contractual terms to the contrary) run from the date on which repayment was demanded in writing: s6(3) of the *1980 Act*. It would appear that repayment has been demanded more than six years ago in every case.

G [32] The claims by the company and the bank are under guarantees, both of which were payable 'on demand'. There is no evidence that payment has ever been demanded by either the company or the bank. Accordingly, these claims may not be statute-barred. It may be, however, that the company and the bank have recovered from the primary debtor. So far as the bank in particular is concerned, it is a large commercial organisation which has settled a different claim against the estate and might be expected to have said something within the last 14 years if it thought it had an outstanding claim.

H [33] Finally, so far as creditor A's claim is concerned, this has proceeded to judgment (subject to the question of whether the judgment was regularly obtained, which I shall consider below). Counsel submitted that an action on the judgment would have become barred six years after it became enforceable: s24(1) of the *1980 Act*. While this is true, in my judgement it is beside the point for present purposes since

s24(1) has no application to enforcement of the judgment: see *Lowsley v Forbes* [1999] 1 AC 329. This is not to say that the passage of time since 1993 is irrelevant: see below.

[34] Accordingly, with the exception of creditor A's judgment and the possible exception of the claims by the company and the bank, it appears that all of the potential creditors' claims are (or, in the case of the brother, creditor B and creditor C's claims, would be if the existing proceedings were dismissed or struck out) statute-barred applying the ordinary limitation periods.

[35] Counsel for the administrators has, however, identified two arguments which might be advanced by potential creditors to overcome this problem.

An express trust?

[36] The first argument is that cl 5 of the will creates an express trust to pay the deceased's debts. Counsel for the administrators pointed out that this is what cl 5 appears to say. He acknowledged, however, that there were problems with the drafting of the will, since cll 4 and 5 purport to give the specific legatees priority over the creditors, which the deceased had no power to do. Counsel for the representative beneficiary and for the representative creditor argued that it would be strange if it had been the deceased's intention to create a trust, in particular because it seems doubtful that the deceased would have wanted creditors whose claims would ordinarily be statute-barred to be paid in preference to the beneficiaries. They suggested that one way round this difficulty might be to construe 'debts' as meaning legally enforceable debts. Counsel for the administrators replied that ordinarily the will was to be construed as at the date of death, and that it would be curious to construe the will as creating a trust which ceased to apply to debts as they became statute-barred.

[37] If cl 5 of the will did create an express trust to pay the deceased's debts, then the potential creditors could argue that no limitation period ran while the administrators were in possession of the trust property (s21(1) of the 1980 Act) and/or that a six-year period would start to run if and when the administrators distributed the estate without reference to their claims (s21(3) of the 1980 Act).

[38] In this connection counsel for the administrators drew to my attention the following statement in *Williams, Mortimer and Sunnocks on Executors, Administrators and Probate* (18th ed, 2000) at 64-09:

'If the testator creates an express trust for the benefit of his creditors, however, it seems that section 21 of the 1980 Act will apply and the creditors will become beneficiaries for the purpose of that section.'

A footnote to this sentence states:

'See, however, *Re Blow, Governors of St Bartholomew's Hospital v Campden* [1914] 1 Ch 233 (creditor not a "beneficiary" for the purposes of s8(1)(b) of the Trustee Act 1888)...'

A [39] As counsel for the administrators pointed out, however, *Re Blow* was not a case where the testator had created an express trust for the benefit of his creditors. Rather, it was argued that the creditors were in the position of beneficiaries of a trust because of the fiduciary duties owed by personal representatives. This argument was rejected by the majority of the Court of Appeal. It was in this context that Swinfen Eady LJ said at 246:

B ‘In my opinion a creditor is not a beneficiary within s8(1)(b). An executor is not an express trustee for residuary legatees or next of kin, and certainly not for creditors.’

C [40] A further complication is that, if s21(1) of the 1980 Act applied, then in principle a defence of laches would be available to the administrators by virtue of s36(2) of the 1980 Act: see *Green v Gaul* [2006] WTLR 1391 at [33]-[41]. If s21(3) of the 1980 Act applied, on the other hand, then it would appear not to be possible for the administrators to rely on a defence of laches, but nevertheless possible for them to rely upon a defence of acquiescence (if this is different): see *Re Pauling’s Settlement Trusts* [1964] Ch 303 as explained in *Green* at [35]-[37].

D [41] Whether a defence of laches or acquiescence would be available on the facts is another matter. It appears from *Green* at [42] that mere delay is not sufficient and that the question is whether in all the circumstances it would be unconscionable for the claimant to be permitted to assert its right, but the subsequent decision of the Court of Appeal in *P&O Nedlloyd BV v Arab Metals Co* [2006] EWCA Civ 1717 at [61] (where neither *Green* nor two earlier decisions of the Court of Appeal which were applied in *Green* appear to have been cited) left this point open.

E [42] It is neither necessary nor appropriate for me to decide whether the potential creditors could rely upon s21 of the 1980 Act in the manner suggested or, if so, whether the administrators could successfully rely upon a defence of laches or acquiescence. I am satisfied that the argument on behalf of the potential creditors is one that on the materials before me appears to have a real prospect of success applying the CPR 24.2 standard, and for present purposes that is sufficient.

G *The effect of insolvency*

H [43] The second argument which counsel for the administrators suggested might be advanced by the potential creditors arises by virtue of the potential insolvency of the estate. Section 421 of the *Insolvency Act 1986* (as amended) provides, so far as is material:

‘(1) The Lord Chancellor may, by order made with the concurrence of the Secretary of State, provide that such provisions of this Act as may be specified in the order shall apply in relation to the administration of the insolvent estates of deceased persons with such modifications as may be so specified.’

- (2) An order under this section may make different provision for different cases and may contain such incidental, supplemental and transitional provisions as may appear to the Lord Chancellor necessary or expedient.

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- (4) For the purposes of this section the estate of a deceased person is insolvent if, when realised, it will be insufficient to meet in full all the debts and other liabilities to which it is subject.'

[44] The *Administration of Insolvent Estates of Deceased Persons Order 1986*, SI 1986/1999, was made pursuant to s421 of the 1986 Act. It provides, so far as is material:

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'2. In this Order -

"the Act" means the Insolvency Act 1986;

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"insolvency administration order" means an order for the administration in bankruptcy of the insolvent estate of a deceased debtor (being an individual at the date of his death);

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"insolvency administration petition" means a petition for an insolvency administration order; and

"the Rules" means the Insolvency Rules 1986.

- 3.(1) The provisions of the Act specified in Parts II and III of Schedule 1 to this Order shall apply to the administration in bankruptcy of the insolvent estates of deceased persons dying before presentation of a bankruptcy petition with the modifications specified in those Parts and with any further such modifications as may be necessary to render them applicable to the estate of a deceased person and in particular with the modifications specified in Part I of that Schedule, and the provisions of the Rules, the Insolvency Regulations 1986 and any order made under section 415 of the Act (fee and deposits) shall apply accordingly.

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- (2) In the case of any conflict between any provision of the Rules and any provision of this Order, the latter provision shall prevail.

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- 4.(1) Where the estate of a deceased person is insolvent and is being administered otherwise than in bankruptcy, subject to paragraphs (2)

A and (3) below, the same provisions as may be in force for the time being under the law of bankruptcy with respect to the assets of individuals adjudged bankrupt shall apply to the administration of the estate with respect to the respective rights of secured and unsecured creditors, to debts and liabilities provable, to the valuation of future and contingent liabilities and to the priorities of debts and other payments.

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(2) The reasonable funeral, testamentary and administration expenses have priority over the preferential debts listed in Schedule 6 to the Act.

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(3) Section 292(2) of the Act shall not apply.

SCHEDULE 1

PROVISIONS OF THE ACT APPLYING WITH RELEVANT MODIFICATIONS TO THE ADMINISTRATION IN BANKRUPTCY OF INSOLVENT ESTATES OF DECEASED PERSONS DYING BEFORE PRESENTATION OF A BANKRUPTCY PETITION

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PART II

E

PROVISIONS OF THE ACT NOT INCLUDED IN PART III OF THIS SCHEDULE

31. Section 382 with the modification that in the definition of "bankruptcy debt" for the words "commencement of the bankruptcy", wherever they occur, there shall be substituted the words "date of death of the deceased debtor".'

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[45] *Section 382(1) of the 1986 Act* in its unmodified form provides, so far as is material:

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"Bankruptcy debt", in relation to a bankrupt, means (subject to the next subsection) any of the following -

(a) any debt or liability to which he is subject at the commencement of the bankruptcy,

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(b) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy,...

[46] It was common ground before me that s382(1)(a) does not extend to debts which are statute-barred at the relevant date. Under ordinary bankruptcy law, time

stops running for limitation purposes from the commencement of the bankruptcy, and so the question is whether the debt in question is statute-barred at that date. If it is not statute-barred at that date, it is provable in the bankruptcy (subject to the time limit provided by r11 of the *Insolvency Rules 1986*). As I understand it, this is not the result of any specific statutory provision, but of judicial decisions: see eg *Cotterell v Price* [1960] 1 WLR 1097 at 1104-1105.

[47] Counsel for the administrators submitted, however, that the potential creditors could argue as follows:

1. the estate is insolvent if their claims are taken into account;
2. there has been no insolvency administration order;
3. accordingly, the estate is being administered otherwise than in bankruptcy;
4. that being so, *para 4* of the *1986 Order* applies 'the same provisions as may be in force for the time being under the law of bankruptcy... with respect to... debts and liabilities provable';
5. those provisions include the modified version of *s382(1)*;
6. as a result, the relevant date would be the date of death;
7. it follows that debts which were not statute-barred at that date did not become statute-barred thereafter and were provable; and
8. such debts could not be recovered by an action, but nevertheless the administrators would be bound to pay them if proved.

Counsel also submitted that this argument was supported by the consideration that, otherwise, if a creditor whose claim was not statute-barred obtained an insolvency administration order, with the consequence that the modified version of *s382(1)* clearly did apply, debts which had become statute-barred since the death of the deceased would be unenforceable before the order was made but enforceable after it was made.

[48] Against this, counsel for the representative beneficiary and the representative creditor argued as follows:

1. *para 4* of the *1986 Order* only applies at all if the estate is insolvent within the meaning of *s421(4)* of the *1986 Act*, which is not the case if the potential creditors' claims are (as the representative beneficiary and the representative creditor would contend) unfounded;
2. even if it is assumed that the estate is insolvent, *para 4* of the *1986 Order* only applies 'the same provisions' which must mean the relevant provisions in the

- A *1986 Act* (and possibly the *1986 Rules*), and not the general law as to the effect of bankruptcy on limitation;
3. furthermore, it is only (so far as relevant here) provisions 'as to debts and liabilities *provable*' (emphasis added) which are applied by *para 4* and this wording was not apt to bring in the modified version of *s382(1)(a)*, and certainly not the limitation consequences of the modified version;
- B 4. any other construction would mean that the *1986 Order* was *ultra vires* the enabling power contained in *s421(1)* of the *1986 Act*; and
- C 5. there is no reason of principle for time to stop running if the estate is being administered outside bankruptcy, since the alternative procedure of proof is not available.

D [49] To my surprise, counsel were unable to refer me to any decided case or textbook which sheds any light on this problem, although I would presume that it is not an uncommon one.

E [50] Again, it is neither necessary nor appropriate for me to decide whether the potential creditors could successfully argue as counsel for the administrators suggests. On the materials to which my attention was drawn, I am satisfied that the potential creditors would have a real prospect of success in such an argument, and that is sufficient for present purposes.

Conclusion

F [51] It follows that I must approach this application on the basis that the potential creditors' claims may not be statute-barred notwithstanding their antiquity.

Want of prosecution and abuse of process

G [52] The actions commenced by the brother, creditor B and creditor C have not been pursued for periods ranging from approaching six to approaching 13 years. In those circumstances counsel for the representative beneficiary and the representative creditor submitted that the actions are vulnerable to being dismissed for want of prosecution or struck out as an abuse of process.

H [53] So far as dismissal for want of prosecution is concerned, in *Birkett v James* [1978] AC 297 at 318F-G Lord Diplock said that the power to dismiss an action for want of prosecution:

'... should be exercised only where the court is satisfied either: (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the

issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.'

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[54] As to abuse of process, in *Grovit v Doctor* [1997] 1 WLR 640 Lord Woolf said at 647G-648A:

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'To commence and to continue litigation which you have no intention to bring to a conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to have the action struck out and if justice requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v James* [1978] AC 297. In this case once the conclusion was reached that the reason for the delay was one which involved the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.'

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[55] In *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426 at 1436G-1437B Lord Woolf MR said:

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'While abuse of process can be within the first category identified in *Birkett v James* [1978] AC 297 it is also a separate ground for striking out or staying an action (see *Grovit v Doctor* at 642-643) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigating questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired. The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action: see *Janov v Morris* [1981] 1 WLR 1389. The position is the same as it is under the first limb of *Birkett v James*. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.'

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[56] I am not in a position to decide, in the absence of evidence and argument from the relevant potential creditors, whether these actions should be dismissed

A for want of prosecution or struck out as an abuse of process. Nevertheless, on the evidence that is presently available, it seems to me that the scale of the delay in each case is both inordinate and invites the inference that the claim has been abandoned. In addition, it is likely that the delay will have significantly prejudiced the possibility of a fair trial of the claims, particularly in the case of the brother and creditor C.

B Accordingly, I consider that I am entitled to proceed on the basis that the claims are *prima facie* liable to be dismissed for want of prosecution (if the limitation periods have expired) alternatively struck out as an abuse of process (if they have not).

The automatic stay

C [57] Paragraph 1(1) of the *Practice Direction - Transitional Arrangements* which supplements *CPR Pt 51* defines 'existing proceedings' as proceedings issued before 26 April 1999. Paragraph 19 of the *Practice Direction* provides, so far as is relevant:

- D (1) If any existing proceedings have not come before a judge, at a hearing or on paper, between 26 April 1999 and 25 April 2000, those proceedings shall be stayed.
- (2) Any party to those proceedings may apply for the stay to be lifted.
- [...]
- E (4) For the purposes of this paragraph proceedings will not be "existing proceedings" once final judgment has been given.'

[58] The cases on applications to lift the stay establish the following propositions:

- F (i) The stay is to be treated as a sanction, and therefore on an application to lift it the court must have regard to *CPR 3.9*: see *Woodhouse v Consignia plc* [2002] 1 WLR 2558 at [29]-[31].
- G (ii) If the stay remains in place, the effect is to deprive the claimant of access to the court. For this reason it is important to apply *r3.9* methodically in order to decide whether that is a just and proportionate result: see *Woodhouse* at [42]-[44].
- (iii) An important factor is whether a trial remains possible: see *Fay v Chief Constable of Bedfordshire* [2003] EWCA Civ 1770 at [34]-[35] and *Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801 at [27].
- H (iv) If the court concludes that the claimant's delay amounts to an abuse of process, then it may lift the stay but strike the claim out, as was done in *Fay*.

[59] The brother's claim has been subject to the automatic stay for approaching seven years. As I have already concluded, it is also *prima facie* liable to be dismissed

for want of prosecution, alternatively struck out as an abuse of process. In these circumstances it is likely that an application by the brother to lift it so as to permit him to proceed with the claim would be unsuccessful.

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Creditor A's judgment

[60] So far as creditor A's judgment is concerned, two questions arise. The first is whether the judgment was valid. The second is whether it is still enforceable having regard to the passage of time.

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Validity of the judgment

[61] Counsel for the representative creditor submitted that the judgment was a nullity for two reasons. The first was that the counter-claim against the deceased ceased to exist when he died. In support of this submission he cited *Duke v Davis* [1893] 2 QB 260. I do not think that, even if that was ever the law, it can still be the law following the enactment of s1(1) of the *Law Reform (Miscellaneous Provisions) Act 1934*: cf *Fielding v Rigby* [1993] 1 WLR 1355. The second reason was that the judgment was obtained against the deceased after the latter's death. In support of this submission counsel cited *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, but that case may be distinguishable on the ground that there the person named as the judgment debtor had not existed at the date of the writ or any time thereafter. I note that *CPR 19.8(3)(b)* provides that a claim brought against a person who was dead when it was started shall be treated as having been brought against the deceased's estate.

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[62] It is not necessary to reach a conclusion on this, because it seems to me that the judgment was in any event irregular since creditor A failed to obtain an order either to carry on against the executors or any other person representing the estate or to proceed in the absence of such a person (as to which, see now *CPR 19.8(1)* and *Williams* at 63-13). Accordingly, I consider that the administrators would probably succeed in an application to set it aside. Whether the administrators would be well advised to have it set aside is another matter.

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Enforceability of the judgment

[63] A writ of execution cannot be issued more than six years after the date of judgment without the court's permission: *RSC Ord 46 r2(1)(a)* and *CCR Ord 26 r5(1)(a)* (preserved by *CPR Pt 50 and Sch 1*). It is now settled that permission will only be given in exceptional cases: *Patel v Singh* [2003] CPLR 149 and *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67. It is not possible for me to decide, in the absence of evidence and argument from Creditor A, whether he could establish such circumstances; but I consider that I am entitled to proceed on the basis that he would face an uphill task in doing so.

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What should be done?

[64] In summary the position is as follows. There are two categories of person whom the administrators seek the Court's sanction to pay, who stand in somewhat different positions. First, there are three admitted creditors whose claims are wholly or

A partially admitted by the administrators. The admitted creditors are entitled to be paid in full unless the estate is insolvent. They have already been kept out of their money for lengthy periods. The sums involved are relatively modest compared to the size of the remaining estate. Secondly, there are the beneficiaries. They have also been kept out of their inheritances for a long time, but their entitlement only arises once the claims of the creditors of the estate have been satisfied. While the bequests to the specific legatees are again modest, the residue of the estate will amount to a substantial sum if the claims of the potential creditors are disregarded.

B [65] The potential creditors have had more than ample time in which to make and pursue claims (or, in the case of creditor A, to enforce his judgment). The fact that they have not done so suggests that the claims were either not well founded in the first place, or have been satisfied in other ways, or have simply been abandoned. The potential creditors' claims may or may not be statute-barred. The actions brought by the brother, creditor B and creditor C are *prima facie* liable to be dismissed for want of prosecution or struck out, and even if the claims are not statute-barred those potential creditors would face considerable difficulties in bringing further actions. In the brother's case there is the additional consideration that the action is stayed.

C [66] There must come a time when the administrators are entitled to say that they have waited long enough for the potential creditors to pursue these stale claims, and that the Court should sanction payment of the admitted creditors and distribution without reference to those claims and without the administrators incurring any risk of personal liability if it subsequently turns out that any of the potential creditors have valid and enforceable claims which the estate no longer has assets to pay. In my judgement that time has now been reached, it would be unjust to make either the admitted creditors or the beneficiaries wait any longer.

D [67] The final question which remains is whether, even now, the potential creditors should be afforded any protection or should be left to their remedy against the beneficiaries. In my view, it is right that the potential creditors' principal remedy should be the possibility of pursuing the beneficiaries who will benefit from a distribution. In this connection, I should record that the beneficiaries through counsel for the representative beneficiary expressly agreed that, if the court were to sanction a distribution of the estate, then in principle the potential creditors could claim against the beneficiaries up to the limit of the amounts received by each beneficiary.

E [68] The possible forms of additional protection available are a retention, an indemnity from the beneficiaries and insurance. In my judgement, save with regard to potential future litigation costs, a retention is not appropriate in this case. The main reason for this is that it is virtually impossible to make any rational assessment of what sum should be retained or for how long. A subsidiary reason is that it would leave the administrators still in the frame with regard to any future claims by the potential creditors, which I accept should be avoided so far as possible. Despite this, I consider that the administrators should retain a sum purely to fund the defence of any proceedings brought or revived against the estate. Counsel for the administrators suggested a retention of £100,000 for six years, but this figure was

unsupported by evidence and I agree with counsel for the representative beneficiary that it seems excessive given that: (i) the estate will have no other assets after distribution; and (ii) the administrators will be immune from personal liability. I will sanction a retention of £50,000 for a period of three years. The money should be kept in an interest-bearing account unless or until needed. As for an indemnity, in the circumstances of this case it seems to me that this would add little to the protection afforded to the potential creditors by the agreement recorded in para [67] above. Moreover, it would again leave the administrators on the hook.

[69] That leaves the question of insurance. At my request the administrators investigated the possibility of obtaining insurance against the claims of the potential creditors after the hearing. The result was that three prospective insurers approached by the broker instructed by the administrators declined to offer cover. Furthermore, the broker has expressed the view that, even if cover could be obtained, the premium would be very expensive. Accordingly, insurance does not appear to be a practical proposition. This does not alter my view that a distribution is now appropriate.

Conclusion

[71] I conclude that the administrators should have the Court's sanction to pay the admitted creditors and then to distribute the estate without reference to the claims of the potential creditors, subject to a retention as set out above. I invite counsel to agree an order to give effect to this conclusion.

NCIS notification?

[72] A final and separate matter is that the administrators have asked for directions as to whether they should make a disclosure to the National Criminal Intelligence Service under the *Proceeds of Crime Act 2002*. There is nothing in the evidence which leads me to believe that the administrators should be directed to make such a disclosure.

Counsel

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