CHANCERY BAR ASSOCIATION

Annual Lecture: 19 March 2007

COMPLEMENTARY DUTIES

A solution to problems of double liability and double recovery?

A lecture delivered by
The Right Honourable Lord Justice Chadwick

I must begin with an apology for what some may see as an exercise in self-indulgence. A BAILII search for the phrase "complementary duties" will reveal that that phrase was first used in a juridical context in a judgment of my own on an appeal heard some nine years ago[1]. I wish that I could tell you that the phrase had since been adopted by others with approbation. To do so would be to exaggerate. It does appear in a later judgment of Sir Christopher Slade[2] ; but only, I think, because it was necessary for the Court to distinguish the earlier judgment of mine. Indeed, I note with some chagrin that, in recording counsel's argument in the later appeal, the word "complementary" has been put between inverted commas[3]: a drafting device used in the Court of Appeal to indicate that the word is not one which the author of the later judgment would have chosen. But I continue to think that the concept, for which that phrase was a label, is of some assistance in avoiding problems of double liability and double recovery; and so – self indulgent or not – I have welcomed the opportunity of developing the concept in a lecture to the Chancery Bar Association.

I should perhaps add, for the benefit of those who have come to gain their CPD points rather than in response to pure intellectual curiosity, that the title to this lecture has not been misspelt on the flyer. The word "complementary" in this context is, indeed, spelt with an 'e' and not with an 'i'. The meaning of the word is "to form a

---

[1] *Carr-Glynn v Frearsons (a firm)* [1998] EWCA Civ 1325, [1999] Ch 326, 337H
[2] *Corbett v Bond Pearce (a firm)* [2001] 3 All ER 769, 777*j*
[3] *Ibid*, 780*c*

complement" – also with an 'e': a complement is that which, when added, completes a whole[4]. Duties are complementary when each mutually completes the other.

The easiest way to introduce this concept of complementary duties is by reference to the facts in *Carr-Glynn v Frearsons*, the appeal to which I first referred. The claim was brought by a disappointed beneficiary against a firm of solicitors. The solicitors had advised the claimant's aunt in connection with her will. The aunt had been co-owner with her nephew, the claimant's brother, of a property known as Homelands. She had instructed the solicitors that she wished to leave her share in the property to the claimant – so that brother and sister would each have a half share. The solicitors prepared a will, in which there was a specific gift to the claimant of the testatrix's share or interest in Homelands. The testatrix executed the will; and died some six years later. But it turned out that the property had been held as beneficial joint tenants; and she had not severed the joint tenancy. So the whole interest in Homelands accrued to her nephew and co-owner by survivorship; no share in that property formed any part of her estate; and the claimant did not receive that which her aunt had intended she should have.

The solicitors were, of course, aware that, if Homelands were held by the co-owners as beneficial joint tenants, there was need to sever the joint tenancy if the wishes of the testatrix were to take effect on her death – it being likely that she would die before her nephew. Indeed, the solicitors had advised her that steps should be taken to ascertain the position. But, on a proper appreciation of the position, it was not necessary to know whether there was a beneficial joint tenancy – rather than a tenancy in common – in order to decide whether or not to serve a notice of severance. It was plain, in the circumstances, that the sensible course was to serve a notice in any event. The first question was whether, in failing to satisfy themselves that the testatrix had served a notice of severance before executing the will the solicitors had failed to exercise the care and skill required by their retainer. The Court of Appeal held – differing from the trial judge on this point – that the solicitors were in breach of their contractual duty to their client, the testatrix.

[4] *Shorter Oxford Dictionary(Third Edition)*

There was no doubt that the solicitors' breach of contractual duty caused loss to the testatrix – in that her estate was smaller (by an amount equal to the value of a half share in the property, Homelands) than it would have been if the beneficial joint tenancy had been severed. But, had the estate recovered, as damages for breach of contract, the loss which the testatrix had suffered, the sum recovered would have been of no benefit to the niece. That is because the sum recovered by the estate would form part of residue and (subject to the payment of debts and pecuniary legacies) would pass to the residuary beneficiaries. The niece was a specific beneficiary.

That, no doubt, led to the niece's decision to bring her own claim against the solicitors. And that gave rise to the second question: whether in failing to satisfy themselves that the testatrix had served a notice of severance before executing the will, the solicitors were in breach of a duty of care owed to the niece, as intended beneficiary. It was plain that, if the solicitors owed a duty to the niece, it was a duty in tort: there was no contract upon which she could rely.

The question whether a disappointed beneficiary could bring a claim in tort against solicitors for lack of care and skill in giving effect to the wishes of a testator had been considered in a number of cases, beginning with the judgement of Sir Robert Megarry, Vice-Chancellor, in *Ross v Caunters*[5] and reaching the House of Lords in *White v Jones*[6]. In the latter case the solicitors' breach of contractual duty to their client, the testator, lay in the failure of their employee, a legal executive, to carry out instructions to prepare a new will, restoring the inheritance of the testator's two daughters from whom he had been estranged, in time for execution by the testator before his death. The delay, which was held to be inexcusable, caused no loss to the estate: but it had the effect that the daughters did not receive, under the proposed will, the legacies which their father had intended to give them. The House of Lords, by a majority of three to two, upheld the daughters' claim. The ratio, I think, was best expressed in the final paragraph of the speech of Lord Browne-Wilkinson[7]: by accepting instructions to draw a will, a solicitor does come into a special relationship with those intended to benefit under it in consequence of which the law imposes a

[5] [1980] Ch 297
[6] [1995] 2 AC 207
[7] *Ibid*, 276F

duty to the intended beneficiary to act with due expedition and care in relation to the task on which he has entered.

There is, I think, no doubt that a factor – perhaps the overriding factor – which led the House of Lords to recognise that a duty of care was owed by the solicitor to the disappointed beneficiaries in *White v Jones* was the fact that, if such a duty were not recognised, the only persons who might have a valid claim (the testator and his estate) would have suffered no loss, and the only person who had suffered a loss (the disappointed beneficiary) would have no claim[8]. As Lord Goff put it: "It can therefore be said that, if the solicitor owes no duty to the intended beneficiary, there is a lacuna in the law which needs to be filled. This I regard as being a point of cardinal importance in the present case"[9].

The position in the *Carr-Glynn* case differed from that in *White v Jones* in that, in the former case, the solicitors' breach of contractual duty had caused loss to the estate of the testatrix for which the estate would have had – at least, at first sight – an unanswerable claim to damages. The lacuna identified by Lord Goff in *White v Jones* was not a feature on the facts of *Carr-Glynn*. But there was another, no less startling, anomaly. An award of damages to the estate would be of no benefit to the disappointed beneficiary: such an award would benefit those (the residuary beneficiaries) whom the testatrix did not intend to have the share in Homelands. In order to give practical effect to the duty[10] arising out of the special relationship between the solicitors (as the solicitors instructed to carry out the testamentary wishes of the testatrix) and the niece (as intended beneficiary of the share in Homelands) it was necessary to provide a remedy in damages.

The problem, of course, was that it would plainly be unjust to expose the solicitors to the risk of double liability: that is to say, it was necessary to avoid the position in which the solicitors would be liable, both to the estate (at the suit of the executors) and to the niece, for damages equal to the value of the lost share in Homelands. It is important not to lose sight of the fact that breach of the duty owed to the estate had

[8] *Ibid,* p*er* Lord Goff of Chieveley at 259H, and see, also, *per* Lord Browne-Wilkinson at 275B and *per* Lord Nolan at 295D
[9] *Ibid*, 259H-260A
[10] Identified by Lord Browne-Wilkinson in *White v Jones* [1995] 2 AC 207, 276F

caused loss to the estate. Had the property been got in at the time when the will was made (or at any time before the death of the testatrix) it would have been available to meet the liabilities of the estate. It cannot be right to fashion a remedy to avoid injustice to the disappointed specific legatee which, itself, leads to the injustice of imposing a double liability on the solicitors.

In the *Carr-Glynn* case I suggested[11] that the key to unlock this problem lay in recognising that, in cases of this nature, the duties owed by the solicitors were limited by reference to the kind of loss from which they must take care to save harmless the persons to whom those duties are owed. It was necessary to keep in mind the observation of Lord Bridge of Harwich in *Caparo v Dickman*[12] that: "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless".

Adopting that approach, the duty owed by the solicitors to the testatrix was a duty to take care that effect were given to her testamentary intentions. That was the context in which the duty to take care to ensure that the relevant property formed part of the estate arose. The duty in relation to Homelands was a duty to take care to ensure that that property formed part of the estate so that it could pass to intended beneficiaries on her death: for it was not in contemplation that she would dispose of it during her lifetime. The loss from which the testatrix and her estate were to be saved harmless by due performance of the duty was the loss which those interested in the estate (whether as creditors or as beneficiaries) would suffer if effect were not given to her testamentary intentions. The duty owed by the solicitors to the niece, as specific legatee, was not a duty to ensure that she received a share in Homelands. The duty owed to her, also, was a duty to ensure that effect was given to the testamentary intentions of the testatrix. The loss from which the niece was to be saved harmless by due performance of that duty was the loss which she would suffer if effect were not given to those testamentary intentions. That was the loss of the interest which she

[11] [1999] Ch 326, 337C-D

[12] *Caparo Industries Plc v Dickman and others* [1990] 2 AC 605, 627; and see *per* Lord Hoffmann in *South Australia Asset Management Corporation v York Montague Ltd* and conjoined appeals, on appeal from *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 212.

would have had in the estate, as specific legatee, if the estate had included the share in Homelands.

In the *Carr-Glynn* case I went on to say this[13]:

> "The duties owed by the solicitors to the testator and to the specific legatee are not inconsistent. They are complementary. To the extent that the duty to the specific legatee is fulfilled, the duty to the testator is cut down. If and to the extent that the relevant property would have been distributed to the specific legatee in the ordinary course of administration, the other persons interested in the estate can suffer no loss. In so far as the relevant property or any part of it would have been applied in the ordinary course of an administration to discharge liabilities of the estate, the specific legatee can suffer no loss."

And I observed[14] that there was no reason in principle why, in cases of that nature, the law should not impose complementary duties: so that for breach of the one the specific legatee is enabled to recover the loss which he has suffered and for the breach of the other the personal representatives are enabled to recover, and recover only, the loss suffered by the other persons interested in the estate. I said this:

> "Justice will be done to each of the three interests concerned – the specific legatee, the estate and the solicitors – if solicitors who, in the course of carrying out the testator's testamentary instructions, have failed to take care to ensure that the relevant property forms part of the estate are liable to compensate the specific legatee for the loss which he has suffered as a result of the breach of duty owed to him; and are liable to compensate the estate for the loss (if any) suffered by the other persons interested in the estate for breach of the duty owed to the testator."

That, then, is an illustration of the concept which I have in mind when I refer to complementary duties. They have these features. First, the duties are legally distinct – in the sense that the duty which A owes to B is not the same as the duty which A owes to C. That follows from the need to determine the scope of each duty by reference to the kind of damage from which A must take care to save harmless B (or C, as the case may be). Second, the act or omission by A which gives rise to a breach of A's duty to

[13] [1999] Ch 326, 337F-G
[14] *Ibid*, 337F-338B

B gives rise, also, to a breach of A's duty to C. It may be noted that, in a case where the duty owed to B (or C, as the case may be) is contractual (as where A is a solicitor and B or C is the client) it is not necessary that the breach causes damage to the party to whom it is owed. Third, the scope of the duty which A owes to B and the scope of the duty which A owes to C are inter-related: that is to say, the kind of damage from which A must take care to save B harmless and the kind of damage from which A must take care to save C harmless are such that the extent of the damage suffered by B (in the event of breach) will vary inversely with the extent of the damage suffered by C (in the event of breach arising from the same act or omission). To put that third point more simply, the loss caused by the breach may fall wholly on B, or wholly on C, or partly on B and partly on C; and if the latter, the greater the part which falls on B, the less the part which falls on C (and *vice versa*). It is that last feature which leads to the description "complementary duties": each of the duties mutually completes the other.

The concept has an obvious application to certain classes of claim against solicitors who, having accepted instructions to prepare a will, fail to carry out those instructions with care and skill. The cases can, I think, be grouped under two main heads: the first are cases where the lack of care and skill causes no loss to the estate; the second are cases where the lack of care and skill does cause loss to the estate.

White v Jones [15] is a paradigm example of a case in the first class. *Ross v Caunters* [16] - where the lack of care lay in failing to advise the testator that the will should not be witnessed by the husband of the residuary beneficiary provides another example. It may be said that, in such cases, the duties to the beneficiary and to the testator and his estate are complementary duties. – in that the three features which I have described can be identified – but to characterise them as such is of no practical relevance, because, in each case, the breach of duty to the testator gives rise to no loss to the estate.

The second group of cases includes (i) cases in which the solicitor's failure to exercise proper care and skill in connection with the carrying into effect of the testator's

[15] [1995] 2 AC 207
[16] [1880] Ch 297

wishes has led to the estate being deprived of an asset which the testator intended should pass under his testamentary dispositions and (ii) cases where the solicitor's failure has led to the estate being reduced by the costs of litigation. Cases in the first class can be divided into those in which the lost asset was the subject of a specific gift – of which *Carr-Glynn v Frearsons*[17] is an example – and those in which the lost asset would have formed part of the residue.

Cases in which the lost asset was the subject of a specific gift are capable of raising a number of interesting issues. First, there are those cases where the estate is insolvent as to residue – in the sense that the debts and expenses, including inheritance tax, cannot be paid without recourse to assets which are themselves the subject of specific gifts. In such cases, as it seems to me, application of the concept of complementary duties leads to the conclusion that the disappointed specific legatee can only recover (at most) part of the value of the lost asset. It is necessary to ask, first, to what extent would the personal representatives have had recourse to the lost asset (if it had formed part of the estate) in order to meet the debts, expenses and inheritance tax. And, in seeking an answer to that question, it will be necessary to have in mind that, if the lost asset had formed part of the estate, the inheritance tax payable out of the estate would have been increased (or, indeed, incurred, if otherwise the value of the estate were below the tax threshold) by reference to the value of that asset. In such cases the amount which the disappointed specific legatee can recover in an action for breach of the *White v Jones* duty must be limited to the difference between the value of the asset and the amount which would have been distributed to the specific legatee in a due course of administration (if the lost asset had formed part of the estate) after payment of debts, expenses and inheritance tax..

Second, but still within the class of cases where the lost asset was the subject of a specific gift, there are those cases in which the estate is solvent as to residue; but would become insolvent if the asset had formed part of the estate and the inheritance tax payable in respect of the (increased) value of the estate fell to be borne by residue. Again, in such cases, the amount which the disappointed specific legatee can recover in an action for breach of the *White v Jones* duty must be limited to the difference

[17] [1999] Ch 326

between the value of the asset and the amount which would have been distributed to the specific legatee in a due course of administration, after providing for inheritance tax, if the lost asset had formed part of the estate.

A further question, in such cases, is whether the personal representatives have any claim against the solicitors. The answer, I think, is that they do not. If the lost asset had formed part of the estate, the personal representatives would have been liable for the inheritance tax payable in respect of the (increased) value of the estate. But, having regard to the concept of complementary duties, the personal representatives could not recover the value of the lost asset: they have no claim which, itself, can be regarded as an asset of the estate; and so no actual liability for inheritance tax referable to that lost asset.

Third, but still within this class of cases, there are those cases in which the estate is solvent as to residue; and would remain solvent even if the lost asset had formed part of the estate. Examples would include (i) cases in which the value of the lost asset would not have brought the estate within a charge to inheritance tax, (ii) cases in which there is ample residue, sufficient to bear the inheritance tax which would have been payable out of residue even if the lost asset had formed part of the estate and (iii) cases in which the effect of the will was to subject the specific gift to its own inheritance tax. In cases (i) and (ii) it seems to me that the disappointed specific legatee could expect to recover from the solicitors, in an action for breach of the *White v Jones* duty, the full value of the lost asset; and would not be under any liability to inheritance tax in respect of the damages which he did recover. In case (iii) I think that his recovery would be limited to the net amount that he would have received, in a due administration of the estate, after inheritance tax attributable to the lost asset had been provided for out of that asset. But, in the latter case, that is not a consequence peculiar to the concept of complementary duties: it is a result which follows from measuring, on conventional principles, what the disappointed specific legatee has actually lost

Cases in which the lost asset would have formed part of the residue present little difficulty. I doubt if those are truly to be regarded as giving rise to complementary duties. That is, I think, because there is no *White v Jones* duty owed to the residuary

legatees. There is no lacuna to be filled. Damages recoverable by the personal representatives are recovered for the benefit of the residuary beneficiaries, after payment of the creditors. There is no need to fashion a separate remedy.

I turn to the other class of case within the second group: cases where the solicitors' failure to exercise proper care and skill has led to estate being reduced by the costs of litigation. The first question is whether there is a *White v Jones* duty owed to beneficiaries. Absent a duty to beneficiaries, the concept of complementary duties does not arise. *Worby v Rosser*[18] provides an illustration. The claim was brought by three beneficiaries under a will made in 1983 against a solicitor who prepared a later will which, after contested proceedings, was refused probate. The three beneficiaries under the earlier will sought to recover from the solicitor the substantial costs which they had incurred in resisting probate of the later will. The claim failed because the solicitor owed no *White v Jones* duty to the beneficiaries under the earlier will. There was no lacuna to be filled. The remedy against the solicitor was the estate's remedy for loss to the estate. There was no need to fashion a separate remedy for the beneficiaries under the earlier will. In so far as their costs were properly incurred in obtaining probate of the earlier will, those costs would come out of the estate and be recoverable by the personal representatives for the benefit of the estate[19].

The position would have been different, as it seems to me, if the claimants had been intended beneficiaries under the later will. At least *prima facie*, they would have been persons to whom the solicitors owed a *White v Jones* duty. They would have been entitled to claim damages as disappointed beneficiaries. And, in assessing those damages, the costs of the litigation (including any costs which they recovered out of the estate) would have been left out of account. That was the position of the beneficiaries under the later will in *Corbett v Bond Pearce*[20].

The importance of determining the scope of the duty owed by solicitors is illustrated by the facts in *Corbett v Bond Pearce.* The solicitors had been instructed in connection with the preparation and execution of a will in September 1989; but had

[18] [1999] Lloyd's Rep PN 972
[19] *Ibid*, 978
[20][2001] 3 All ER 769

negligently failed to appreciate that the circumstances in which that will was executed rendered it invalid. The costs of unsuccessful proceedings to propound that will fell on the estate. The solicitors compensated the disappointed beneficiaries under the September will. An earlier will, executed in February 1989, was admitted to probate. The personal representative under that earlier will brought a claim for damages in respect of the diminution of the estate. It was held, in the Court of Appeal, that the damages recoverable by the personal representative were limited to the sum needed to avoid insolvency as to residue. The solicitors owed no duty to the testatrix, in connection with the preparation and execution of the September will, to ensure that the estate was distributed under the terms of the February will. As Sir Christopher Slade pointed out[21], money recovered for the benefit of the estate, beyond that required to avoid insolvency as to residue, would have gone into the pockets of persons whom the testatrix did not intend to benefit as her residuary legatees. Had the solicitors carried out their task in connection with the September will with proper skill and care, the February will would have been revoked and the residuary beneficiaries under that will would not (as such) have shared in the distribution of the estate.

There was, as it seems to me, potential for double liability on the facts in *Corbett v Bond Pearce* which could have been avoided (and, I think, was avoided in the events which happened) by treating the *White v Jones* duty owed to the disappointed beneficiaries under the September will and the contractual duty owed to the testatrix (represented by the personal representative under the February will) as complementary duties. The disappointed beneficiaries under the later will were entitled to receive by way of damages an amount equal to what they would have received if the later will had been valid and the estate had been solvent as to residue. So they were entitled to have the wasted costs incurred by the estate in the unsuccessful probate proceedings (including their own costs in so far as those were payable out of the estate under the order made in those proceedings) left out of account in computing those damages. But they were not entitled to have the whole of the wasted costs incurred by the estate added to their legacies. In so far as those wasted costs led to insolvency as to residue, they were properly payable to the personal representative.

[21] *Ibid*, [34] ,782*f*

Thus far I have illustrated the concept of complementary duties in the context of the duties owed by solicitors in connection with their client's testamentary wishes. But I would not like to leave you with the view that there is no other context in which the concept may have relevance. Duties owed by solicitors and accountants to trustee, and to beneficiaries under a trust, may exhibit the three features to which I have referred earlier; and so give rise to circumstances in which it is necessary to invoke the concept in order to avoid the risk of double liability or double recovery. And so, perhaps, may the duties which shareholders owe to each other and to the company under a shareholders' agreement.

Let me illustrate that latter possibility by reference to the facts in *Giles v Rhind*[22]. The parties were directors of, and shareholders, in a company, Surrey Hill Foods Ltd. In connection with refinancing arrangements, involving a third party venture capitalist, they entered into a shareholders' agreement, to which the company was also party, that each would keep secret and confidential, and not use disclose or divulge to persons outside the company, any confidential information relating to the company. Subsequently, the parties fell out, the defendant left the company's employment and, in breach of the shareholders' agreement, disclosed confidential information to a competitor in which he had an interest. As a result, the company lost a lucrative contract to the competitor and was forced to discontinue trading. It went into administrative receivership. Although the receiver brought an action against the defendant for breach of the confidentiality agreement, that action was discontinued for lack of funds. The claimant sought to recover his loss (including loss in respect of the diminution in the value of his shares, which has become worthless) in an action against the defendant. He was met with the defence that his loss was merely reflective of the company's loss; so that, on the principles explained in *Johnson v Gore Wood*[23], he had no cause of action. The Court of Appeal were persuaded that the reasoning underlying the judgments of the House of Lords in *Johnson v Gore Wood* did not require the no reflective loss rule to be applied in a case where the defendant's own conduct had led directly to the circumstances in which the company had been unable (through lack of funds) to pursue its own claim.

[22] [2002] EWCA Civ 1428; [2003] Ch 618
[23] *Johnson v Gore Wood & Co* [2002] 2 AC 1

An alternative approach, on facts similar to those in *Giles v Rhind*, might be to recognise that the duties which each shareholder owed to the company and the duties which he owed to his fellow shareholder were complementary. Given that those duties arose under a single shareholders' agreement, it might have been possible to reach that conclusion as a matter of construction. It could hardly have been intended by the parties that, in the event of breach of the shareholders' agreement leading to the cessation of trading and liquidation, the only claim for damages would be a claim by the company; leading, perhaps, to a distribution of those damages in the liquidation amongst all the shareholders (including the shareholder in breach). A more attractive analysis might be that, in the event of liquidation, the duty owed to the company was limited to a duty to make good its loss to an extent sufficient to enable it to pay its creditors; leaving the innocent shareholder free to pursue the shareholder in breach for the loss of the value of his individual shareholding. That approach would provide an explanation for the inclusion of reciprocal obligations as between the shareholders in the shareholders' agreement; a feature which would otherwise seem to have little purpose given the no-reflective loss rule. It would avoid double liability and double recovery. It would also avoid the need to find an exception to the rule in *Johnson v Gore Wood* in cases where the application of that rule would serve no useful purpose and would have the potential to cause obvious injustice.

That would be bold step indeed. So I will leave it there. The sub-title to this lecture – "A solution to problems of double liability and double recovery?" – ends with a question mark. It does so because I have sought in this lecture to stimulate thought rather than to prescribe solutions. It seems to me that as a solution to problems of double liability and double recovery, the concept of complementary duties should provide scope for the ingenuity of the Chancery Bar for some time to come.