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Section 22 & recovery proceedings

Kathryn Purkis analyses the limitation periods applicable to claims brought by personal representatives

IN BRIEF

▶ On a proper view, s 22 of the Limitation Act 1980 cannot be used to argue that personal representatives have a special 12-year limitation period within which to sue for mistaken overpayments.

An executrix, Hanna, believes she is dealing with a very large estate, with complex assets. A deserving close family member and residual beneficiary, Peter, asks early on in the administration for a distribution of a sum that appears to the executrix to be a small proportion of his ultimate entitlement under the will. The distribution is readily made out of cash. After a while, however, it begins to become apparent to Hanna that all is not well with the testator's investments: they include a going concern which carries significant liabilities. Worse, there are some very large specific legacies, the payment of which will take priority over any entitlement to residue. Her heart begins to sink. She writes a warning letter to Peter indicating she may need to seek recovery from him, but he ignores it and she is so preoccupied with doing her best to realise the investments as profitably as possible that she only gets around to issuing proceedings for recovery against him around eight years from the original date of payment. Is she within time to sue Peter?

Pattern repetition

This fact pattern was mirrored in a recent unreported case in Central London County Court (*Webster & ors v K & L Gates & ors*) and one of the arguments raised was that, in these circumstances, the 12-year period provided in s 22 of the Limitation Act 1980 (LA 1980) should apply to the claim for recovery.

Section 22 & Diplock claims

Section 22 of LA 1980 provides: 'Subject to section 21(1) and (2) of this Act—

> (a) no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) shall be brought after the expiration of twelve years from the date on which the right to receive the share or interest accrued.'

This provision is principally concerned with claims by unpaid beneficiaries against personal representatives, as it is beneficiaries who have accrued rights to 'claim[s] to the personal estate'. Thus it is personal representatives who are most likely to be defendants to such claims.

The well-known case of *re Diplock* [1948] Ch 465 2 All ER 318, affirmed in *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, establishes that a direct claim by a beneficiary against a mistakenly paid third party or overpaid beneficiary also falls within this section (or on that case its predecessor, s 20 of the Limitation Act 1939 (LA 1939), which was in materially identical terms). It is worth considering the underlying basis for a *Diplock* claim. This is an equitable claim to vindicate the relative equities between estate beneficiaries (whether testate or intestate). This much is evident from the passage in the judgment of Lord Greene MR in *re Diplock* at p 503, which effectively describes the claim as equity's remedial response to unjustified receipt, arising because the conscience of the improper recipient has been engaged (whether he knows it or not).

The core reason given for the decision in *re Diplock* was, essentially, the choice to use in the consolidating statute of 1939 the widely cast words 'in respect of any claim to the personal estate'. Prior to 1939, actions by unpaid legatees against personal representatives were time-limited to 12 years by s 8 of the Real Property Limitation Act 1874, and described therein as 'action[s] to recover a legacy'. Before the property legislation of 1925, actions by next of kin against administrators to recover a personal entitlement due on intestacy (real estate devolving by operation of law in accordance with the then current rules of descent from its last purchaser) were also described by s 13 of the Law of Property Amendment Act 1860 as 'actions to recover' personal estate, which imposed a time-bar of 20 years.

However, where a person died intestate after the coming into force of the Administration of Estates Act 1925 (which incidentally also had the effect of aligning beneficial distributions of personalty and realty), s 46 of that Act in making the administrator of an intestate a trustee for the next of kin was thought probably instead to engage s 8 of the Trustee Act 1988 in unpaid next-of-kin claims. Section 8 applied a six-year period to 'any action or other proceeding against a trustee…', subject to the fraud exception and to claims where trust property was being recovered or had been converted. In short, the limitation period for claims by beneficiaries against personal representatives had varied over time, depending on what was being sued for, and when.

However, also until 1939, claims made by unpaid beneficiaries direct in equity against a third party who had been overpaid or wrongly paid, then called a *David v Frowd* claim (after *David v Frowd* (1833) 1 My & K 200, 2 LJ Ch 68, 39 ER 657, [1824-34] All ER Rep 714, but now a *Diplock* claim), had no statutory limitation period at all. The statute of James I applied in such cases, treating the action as analogous for limitation purposes to actions for money had and received.

It was in this context, therefore, that the Court of Appeal in *re Diplock* accepted the submission that the wide phraseology of s 20 of LA 1980 was adopted deliberately. Movement from the direct language of actions 'to recover', to the generalised terminology of actions 'in respect of personal estate' made the section apt to catch claims between beneficiaries or by beneficiaries against third parties, as well as claims against personal representatives for unpaid legacies or entitlements.

Section 22 applied to claims by personal representatives?

Why therefore, it might be asked, should this same wide construction not be applied to catch claims for restitution *by* personal representatives, in circumstances like those outlined above? On one view, these could be described as 'claim[s] to the personal estate of a deceased person'. Furthermore, the courts in *re Diplock* and in *Simpson* had recognised that the accrual date definition in the then s 20, bearing reference to the beneficiary's right to receive, did not sit easily with so-called *David v Frowd* (now *Diplock*) claims, because the commencement of the running of time would bear no relationship to the date of receipt of the erroneous payment, as would have formerly been the case. Given their conclusion that this 'awkwardness (if such it be) is insufficient to override the effect which we think must be given to the earlier part of the section' (*re Diplock* at 513), why pay heed to the equivalent point in the context under consideration? Rather, there would be an obvious advantage in applying a generous construction: one could then align the limitation period applicable to all claims involving estate asset recovery. The limitation period for claims brought by wronged beneficiaries against third party recipients would just be extended to apply to equivalent claims brought by others on their behalves, namely by personal representatives acting on behalf of the estate as a whole.

Discussion

In the end, this question was not resolved judicially in the recent case. However, it is likely that the argument is over-ambitious.

- First, the language of s 22 is too far away from governing claims by personal representatives. The accrual date provision in s 22 must delimit the claims governed by that section to those causes of action which are actually vested in persons who were intended to benefit or who actually benefited under a will or intestacy. A restitutionary claim for the recovery of a mistaken payment by an executrix is a cause of action vested in her; the beneficiaries or legatees may have standing to bring the claim, but they would have to do so in her name: see *re Diplock* at p 480.
- Second, and separately, it is not possible to argue that a personal representative herself could ever bring a *Diplock* claim for the estate as a whole. As is well explained in *re Diplock* itself, and in *Lewin on Trusts* (19th edition 42-014ff), this is a secondary remedy, for which it is a prerequisite that the claimant has first exhausted his remedies against the personal representatives. Their bringing such a claim to avoid their own liability would therefore be inimical. Furthermore, the authority supports the existence of an equity arising in those wrongly prejudiced in the administration of an estate (see further below), which simply does not arise in those who make errors in administration. Section 22 could therefore not even be argued to apply by analogy, in order to get around the concerns of construction.

In simple terms, where an executor or trustee sues on a contract or for a tortious remedy the same law, including limitation law, applies to him or her as it would to a non-office-holder. There is no reason therefore why restitutionary claims should be any different. The proper characterisation of a claim by executors for recovery of money paid by them from an estate under a mistake as to fact is for money had and received. These are different in character from *Diplock* claims. In *re Diplock*, Lord Greene notes at p 481 that the essential focus in a restitutionary claim is on the mere fact of the payment. Even though his analysis invokes the implied contract theory of restitution, which is now consigned to the history books, it is still true that a restitutionary claim is understood to focus on a transfer of benefit, and whether one of the recognised categories of unjust factors applies to it such that it should be reversed. But generalised potential unconscionability of the sort invoked in rationalising *Diplock* claims, and the call to conscience that is often made to support the making of an order for an account against a personal representative, has no role in constituting a cause of action for unjust enrichment.

Unjust enrichment claims & s 5 of LA 1980

It has always been settled law that the applicable limitation period to restitutionary claims is six years under s 5 of the 1980 Act, though the courts are fairly diffident about saying so. In *Kleinwort Benson Ltd v Sandwell BC*, reported with the conjoined case of *Westdeutsche Landesbank Girozentrale v Islington LBC* at [1994] 4 All ER 890, Hobhouse J reasoned that (seemingly on balance) he would follow the 'weak' 'expression of an opinion' in *re Diplock* at p 514 that the phrase in s 2(1)(a) of the 1939 Act, now s 5 of the 1980 Act, 'actions founded on simple contract' 'must be taken to cover actions for money had and received … [t]he assumption must, we think, be made though the words used cannot be regarded as felicitous', the alternative being no time-bar at all. Recently, the Supreme Court noted in *Aspect Contracts (Asbestos) Limited v Higgins Construction plc* [2015] UKSC 38 4 All ER 482 at para [25] that that point decided in *Sandwell* was 'not questioned' by the House of Lords in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 when it had to decide whether the extended period provided by s 32 of the Act applied to restitutionary claims to recover payments made based on mistake. The same lukewarm acceptance is evidenced in other cases, including *Davies v Sharples* [2006] EWHC, WTLR 839 at [50].

The reasoning in *Sandwell* is unfortunately somewhat abbreviated. As explained by counsel in that case, Mark West, in 2011 *Civil Justice Quarterly* 367, Hobhouse J had in fact been shown a 'considerable volume of authority' which, in short, established and confirmed that common law counts for money had and received were actions upon the case, and were expressly accorded a six-year period (as were actions of account) by the express terms of s 3 of the Limitation Act 1623. When the old forms of action were abolished by the Common Law Procedure Acts and the Judicature Act 1873, it was further settled in *Gibbs v Guild* (1882) LR 9 QBD 59, [1881-85] All ER Rep Ext 1655 that s 3 continued to apply in the case of claims corresponding in nature to actions of account and on the case; per Brett LJ at [67]: 'I am of opinion that the Judicature Act, 1873, did not alter or touch the Statute of Limitations at all, and that that statute still applies to the circumstances which constituted the actions named in it'. Thus until 1939, there was no question about it: restitutionary claims had an express statutory limitation period, with which a new consolidating Act was very unlikely to have dispensed. This point is not drawn out much in the judgment in *Sandwell*, which focuses more on resolving apparent ambiguity in the phrase 'actions founded on simple contract' by reference to extraneous sources, such as the Law Revision Committee report of 1936 preceding LA 1939, which noted that a 'simple contract' would include a 'quasi-contract' (this in accordance with the then prevailing 'implied contract' theory of restitution).

Conclusion

For all these reasons, in answer to the hypothetical question which opened this article, Hanna would be out of luck. Peter will be able to enjoy the windfall which the law allows him. NLJ

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