RE PERANE AND CO LIMITED

OPINION

Introduction and background

1. Those instructing have asked me to provide an opinion to Perane Limited (**"Perane"**). I am asked to opine on executors' obligations in respect of assets of a deceased's estate that have been brought to their attention after the administration and distribution of the estate was thought to be completed.

2. The desire for this advice arises in the following circumstances:

2.1 Perane & Co Limited (**"Perane"**) has a technological means of ascertaining where shares are held in the name of a deceased person in respect of whom probate has been granted. Such shares are referred to below as (the **"Shares"**).

2.2 Perane also has the means to realise the Shares for the benefit of the deceased person's estate, in exchange for a fee.

2.3 Perane has contacted various executors, and may wish to contact other executors, to explain to them the existence of the Shares. Perane wishes to have some understanding of the executors' responsibilities in these circumstances, and have asked me to provide an opinion about those obligations.

3. I understand that Perane and those instructing may wish to disclose this opinion, or parts of it, to some or all executors of various estates, and perhaps other persons. I am content for this opinion to be disclosed in this way as a reflection of my genuine professional opinion. However, my duties are owed to Perane and those instructing, and I do not assume any responsibility or liability to any third party. Additionally, without providing a bespoke opinion in respect of the circumstances of each executor, my observations below are necessarily general, and should not be thought automatically to apply to every executor and estate's particular circumstances.

The legal duties of executors

4. After the grant of probate[1], executors owe the following relevant duties under s.25(a) Administration of Estates Act 1925:

"[to] collect and get in the real and personal estate of the deceased and administer it according to law"

5. The obligation to collect and get in the deceased's estate encompasses the getting in of debts owed to the estate, the calling in of other assets, and their conversion into money. In carrying out these acts the executor owes a duty to act with due diligence[2].

6. Once the assets are got in, "administering" the estate involves essentially paying debts, paying inheritance tax, and dealing with any claims under the Family and Dependents Act 1975[3].

7. Although an executor might feel that their functions administering the estate are over once all the assets that can be found and got in have been administered, this is not legally the case. An executor remains an executor for life (unless removed by the statutory procedure at s.50 Administration Act 1925) and continues to be the proper representative of the estate as circumstances require[4].

8. Once the assets of the estate are administered, the executor is obliged to distribute[5] the administered assets of the estate in accordance with the terms of the will (or as is otherwise required):

"Having administered the estate in the sense of getting in the assets and paying or providing for the payment of debts and inheritance tac and claims under the Inheritance (Provision for Family and Dependents) Act 1975, the executor or administrator has performed their functions as such. As trustee the representative [i.e. for present

[1] In fact, in the case of executors, technically following death, but that is irrelevant for present purposes
[2] ***Re Tankard [1942] Ch 69***
[3] See the summary at Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 22nd Edition of Willaims on Executors, 10th Edition of Mortimer on Probate – 61-05
[4] See e.g. ***Attenborough v Solomon [1913] AC 76*** at 83
[5] ***Re Marshall [1914] 1 CH 192***

purposes the executor] now becomes concerned with the problems of distribution of the administered estate among the persons entitled."[6]

9. As the above quotation explains, once assets of an estate have been administered, the executor stands possessed of the assets as trustee[7], and is subject to duties as such.

10. An executor is not generally required to distribute a deceased's estate for a period of one year (known as the "executor's year") from the death of the deceased[8]. After that time, the executor is under a duty to have got in, administered, and distributed the estate unless, broadly speaking, he can show a good reason not to have done so[9]. I anticipate that in all or nearly all cases, a good deal longer than a year will have passed since the deaths of those individuals whose estates are being administered by the executors contacted by Perane. If this is not the case, I would be grateful if those instructing could let me know.

The application of the above duties to the existence of the Shares

11. I consider it clear that executors would ordinarily be under a duty to get in, administer and distribute the Shares. I would make the following observations in particular in light of the duties owed by executors that are explained above:

11.1 It may very well be that the rest of the administration of the estate took place long ago and a given executor considers the matter long closed. However, it is very clear that an executor remains executor for life (unless removed by the statutory procedure) and I do not therefore consider that the passage of time could justify refusing to get in, administer and distribute the Shares.

11.2 The executor's obligation to get in an estate's assets requires the use of "due diligence". I am doubtful that an executor could be said to be using due diligence if Perane has drawn their attention to an asset, and indeed a means of realising it, and that notice was ignored or the opportunity refused.

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[6] Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 22nd Edition of Willaims on Executors, 10th Edition of Mortimer on Probate – 61-05

[7] ***Attenborough v Solomon [1913] AC 76***

[8] S.44 Administration of Estates Act 1925

[9] ***Grayburn v Clarkson (1868) LR 3 Ch. App. 605; Buxton v Buxton (1835) 40 ER 307; Re Bathurst (Deceased) [2018] EWHC 21***

11.3 There may be some situations in which an executor contends that they were aware of the existence of the Shares, and had satisfied their duty to get in the Shares, but had taken an active decision to retain the Shares rather than convert them into money (for example because the will had provided for a legacy to be given in the form of the Shares). Even if there are some arguments that executors have already adequately got in and administered the Shares, however, (and I anticipate convincing arguments would be rare), a separate duty is owed to distribute the Shares. I anticipate it would only be if the deceased's death was very recent (within the last year or perhaps a little longer) that there could be the beginnings of an argument that executors had not breached their duty to distribute the administered Shares.

Consequences for executors who breach their duties to get in, administer, and distribute an estate's asset

12. Ultimately, the consequences for an executor who breaches their duty to get in, administer and distribute the Shares will depend on the particular factual circumstances, but they may well be serious for the executors personally. Where an executor has been informed of the existence of the Shares and does nothing about them, it seems to me at least possible that they would face the following claims and outcomes:

12.1 An executor may be personally financially liable in what is called, "*devastavit*". "*Devastavit*" is a cause of action that can be brought against an executor personally to hold them liable for the loss of assets to an estate. Whilst generally an executor can only be held liable for loss of assets that are already in their hands, they can also be liable for assets that are not in their hands as a result of their own, "*wilful default*", which means that the executor has fallen below the standards reasonably expected of a reasonably competent executor[10]. Thus, for example, there have been cases in which personal representatives (i.e. in modern terms including executors) have been found personally liable for failing for several years to pursue debts that had fallen due to the deceased.[11] It appears to me that a failure or refusal to realise the Shares, once aware of their existence, may well also give rise to personal liability on the part of the executors

[10] ***Iliffe v Trafford [2002] W.T.L.R. 507*** per Hart J at [9]

[11] ***Lowson* v. *Copeland* (2 Bro. C. C. 156)** and ***Powell v. Evans (5 Ves. 839)***. Whilst these authorities are very old, they were sited with approval by a chain of authorities leading to the important authority of ***Armitage v Nurse [1998] Ch. 241***

to compensate the estate. If the executor was unsuccessful in such a claim brought by a beneficiary of the will, the executor would also likely have to pay legal costs.

13. Similarly, an executor may be personally financially liable in *devastavit* and/or breach of fiduciary duty for breaching the obligations executors have to preserve assets, deal properly with them, and apply them in the due course of the administration for the benefit of the beneficiaries (and perhaps others)[12]. Again, if the court were to find a breach of this duty, an executor would face personal liability to compensate the estate, and probably liability for legal costs too.

14. If an executor's conduct was found to stop short of *devastavit* or breach of fiduciary duty, there are a number of claims that could be brought against executors (depending on the facts) at common law or under the Trustee Act 1925 (for example claims seeking to compel an executor to act in a particular way, or to remove an executor from their role). Although speaking in very general terms, I anticipate that there is very significant scope for such claims to be well-founded, which would lead to the executor being compelled to realise the Shares, or being replaced by another executor (who presumably would be more amenable to doing so). In claims of this kind one would normally expect an executor to be indemnified for its legal costs from the estate. However, in circumstances where an executor had simply refused or failed to make an effort to realise assets that were drawn to their attention (i.e. the Shares) there would be an appreciable risk that an executor would be judged to have acted so unreasonably as not to be permitted to recover their costs, and very possibly be liable for the legal costs of the claimant beneficiary.

Conclusion

15. In my opinion an executor who simply refuses to take any steps to realise the Shares for the estate is in very many cases likely to be in breach of one or more of the duties owed to the beneficiaries of a will that are described above. It would in my view be a very unusual situation in which an executor could ignore the existence of a realisable asset brought to its attention without being at serious risk of breaching a duty.

[12] ***Commissioner of Stamp Duties (Queensland) v Livingston [1965] AC 694*** at 707

16. If an executor were to be found to be in breach of their duty to the beneficiaries described above, they would in my view face litigation in which they would face a substantial risk of being unsuccessful. This may well result in personal liability for the executor and/or adverse costs orders.

17. In my opinion it would be unwise for any executor to ignore the existence of readily realisable assets brought to their attention and, except in exceptional circumstances, I would be most unlikely to advise an executor who was a client of mine to do so.

18. I hope that these observations are of assistance. Those instructing should not hesitate to contact me if I can assist further.

Stephen Hackett

3 Hare Court

19 January 2024