ESTERHUIZEN v ALLIED DUNBAR ASSURANCE PLC

[1998] 2 F.L.R. 668

LONGMORE J: In this case Mrs Brenda Esterhuizen and Miss Tina Esterhuizen sue Allied Dunbar in respect of the will-making services which Allied Dunbar rendered to Mr David Ellis Dibden. They claim as disappointed beneficiaries since the will of Mr Dibden was signed by only one witness. The case thus raises the question whether the law as laid down in Ross v Caunters [1980] Ch 299 and White v Jones [1995] 2 AC 207 applies to financial institutions as well as to solicitors.

Between the mid-thirties and 1973 Mrs Brenda Esterhuizen's father was a general practitioner in the Bitterne area of Southampton. Two of his patients were Mr Alex Jeffreys and Mr David Dibden. Mrs Esterhuizen got to know Mr Jeffreys and met Mr Dibden at his house.

In 1981 Mr Jeffreys became ill. While Mrs Esterhuizen was visiting him in hospital she met Mr Dibden on a number of occasions. She met him again at Mr Jeffreys' funeral. On that occasion Mr Dibden, now about 76, told her that Mr Jeffreys had been his only friend and that he, Mr Dibden, did not know what he was going to do. From that time Mrs Esterhuizen, who was then in her mid-forties and whose father had himself died in 1980, took Mr Dibden under her wing. She used to invite Mr Dibden over for Sunday lunch with her mother and her daughter who was 8 at the time of Mr Jeffreys' death. She also used to visit him on Tuesdays, clean his house, and stay overnight.

Mr Dibden had been born in 1904 and had lived at No 12 The Close, Thornhill, Southampton, for a considerable number of years. He was a shy man and did not have any substantial dealing with his neighbours. He was a widower and had acquired an adopted daughter, now Mrs Jane Roberts. His relationship with Mrs Roberts was, to put it at its lowest, somewhat strained. He did not attend her wedding and although she visited him in 1991 she did not see him between that time and his death in July 1994. On

21 November 1974 Mr Dibden had made a home-made unattested will leaving his property to Mrs Roberts, but in October 1984 he made another document of testamentary intention, revoking any previous arrangement, and leaving all his estate to Mrs Esterhuizen and her daughter Tina. That was not in proper form for a will since Mr Dibden's signature was not witnessed. Mrs Roberts, as I have said, paid Mr Dibden an isolated visit in 1991 and at about that time Mr Dibden signed a nomination form in her favour in relation to money deposited with National Deposit Friendly Society in a sum not exceeding 5000.

Some time in 1992 Mr Dibden asked Mrs Esterhuizen to get a will form from WH Smith, or perhaps the post office. He filled it in nominating Mrs and Miss Esterhuizen as the recipients of his property. He showed this to Brenda Esterhuizen who was unable to read it because she did not have her spectacles with her at the time. She did however see a capital B and a capital T on the document and thus concluded that Mr Dibden intended to leave them at any rate something.

In late 1993 Mr Dibden told Mrs Esterhuizen that he was worried about the validity of his will. She suggested that he should contact a solicitor but he thought that might be too expensive. She then suggested he should go to Lloyds Bank for assistance but he did not do so. He continued to be concerned about the position and Brenda Esterhuizen was aware of that concern.

Mrs Esterhuizen worked as a secretary and one of her employments had been with Allied Dunbar in 1995 and thereafter. In the course of that employment she had got to know, and indeed worked for, Mr Andrew Fitzpatrick at their Southampton office. Some time in 1991 Allied Dunbar had decided to set up a will-writing service and issued a public brochure. Andrew Fitzpatrick acted as Mrs and Miss Esterhuizen's adviser in relation to their own financial and pension arrangements. In particular once Tina started work in 1993 he advised her about her pension arrangements.

In the course of one of the meetings that took place at the Esterhuizen home in early February 1994 Mr Fitzpatrick mentioned that he had been trained to 'do wills' for a fee of 35. Mrs Esterhuizen then said that she had an elderly friend who wanted a will done and she gave him the name and

telephone number of Mr Dibden. She explained, as was the fact, that Mr Dibden lived alone, had no contact with his neighbours, and had no visitors. She said she thought he was not very well and, being the sort of man he was, she should speak to him first about the possibility of Mr Fitzpatrick coming to see him. She made clear to Mr Fitzpatrick that she wanted to know nothing about the will or its contents. That was because she suspected that she and her daughter might be included as beneficiaries although she did not tell Mr Fitzpatrick about her suspicions.

Mr Fitzpatrick had indeed had training in dealing with wills. He had been part of a pilot project in 1992 when he underwent two training sessions. He and others discussed the will of a gentleman called Mr Mickey Mouse, and were given various advisory documents to keep. The scheme was relaunched at the end of 1993 and the beginning of 1994, and Mr Fitzpatrick said in evidence that in all he had probably done ten wills or thereabouts for Allied Dunbar. Although he was strictly one of Allied Dunbar's agents rather than a direct employee he made no commission from the service.

Mrs Esterhuizen explained to Mr Fitzpatrick that Mr Dibden had very little idea of the value of money and would think that 35 was too great a sum to expend on a matter such as a will. She proposed that she and Tina should each pay 15 of Allied Dunbar's fee and that Mr Fitzpatrick should inform Mr Dibden that the cost was 5. Mr Fitzpatrick agreed to this and collected 30 from the two ladies before leaving, Tina herself contributing 15.

Mr Fitzpatrick then visited Mr Dibden in early February 1994 who had been forewarned by Mrs Esterhuizen that he would be hearing from Mr Fitzpatrick. Mr Dibden filled in a questionnaire giving instructions to Mr Fitzpatrick in the course of quite a long meeting that lie wanted to leave his estate - effectively his house - to Mrs Esterhuizen and Miss Esterhuizen .

Mr Fitzpatrick then arranged for the instructions to be sent to the relevant department in Allied Dunbar to enable the will to be drafted.

Before he left Mr Fitzpatrick folded up the WH Smith will and put it in a dustbin. The appropriate department in Allied Dunbar then drafted the will, and there is no complaint about the terms of the draft. In due course Mr

Fitzpatrick took the draft will, together with instructions as to execution, back to Mr Dibden.

It is impossible to date this second visit save by saying that it must have been later than mid-February 1994. Mr Fitzpatrick said in his evidence, as if it were a matter of complaint, that Mr Dibden had not arranged for one witness to be present as he, Mr Fitzpatrick, had requested. He, Mr Fitzpatrick, intended to be the other witness.

My finding is that Mr Fitzpatrick had not made any such request because it would be premature to make any such arrangement before Mr Dibden had approved the draft. In my view what happened was that Mr Fitzpatrick took Mr Dibden through the draft and also the instructions accompanying the draft.

Those instructions were materially in the following terms:

‘(4) You must have two independent witnesses who should be at least 18 years of age. Executors, guardians or beneficiaries under the will (and spouses of such people) must not be witnesses.

(5) You should confirm to your witnesses that you have read and understand the contents of your will. Your witnesses do not need to read your will or know its contents but they should know that they are witnessing your will.

(6) Date and sign your will in the presence of both witnesses in the space provided. They should see you sign.

(7) Your witnesses must then sign in your presence and in the presence of each other and write their name and address and occupation where indicated. It is advisable that all three of you stay in the same room until all the signing has been completed.’

And then at the bottom of the page, after instruction 10, which is not relevant, in capital letters one finds:

‘Remember your will is not valid unless it has been signed, dated, and witnessed in accordance with the above instructions.’

Only when Mr Dibden had approved the draft did, in my judgment, Mr Fitzpatrick decide to see what he could do about getting the will witnessed. What he did was first to suggest that he, Mr Fitzpatrick, call on a couple of neighbours. Naturally enough Mr Dibden was not very keen on that since he did not want his neighbours to know his personal business. Mr Fitzpatrick then left the house and walked round The Close to see if he could find anyone by chance. Not surprisingly, since it was the middle of the day, everything was very quiet. Mr Fitzpatrick then suggested that they should drive to the local petrol station. Not surprisingly Mr Dibden then became somewhat irritated and said to Mr Fitzpatrick that he should just leave the will with him. Mr Fitzpatrick left saying he would contact Mr Dibden in about a week’s time to see if he had managed to get the will witnessed himself

Mr Fitzpatrick was as good as his word. Finding a gap in his diary he telephoned Mr Dibden about a week later and said he would come round again. He did so - this is now the third visit - and reiterated the need for two witnesses. According to Mr Fitzpatrick Mr Dibden appeared reluctant to take up his suggestions for witnessing the will and told him that he should leave the will with him and he would arrange for the will to be witnessed.

I do not accept that matters were left as certainly as that. My finding is that Mr Fitzpatrick soon realised that this third visit was going to be abortive and he decided to leave matters with Mr Dibden to sort out as best he could. It is most unlikely that Mr Dibden would have said anything as definite as ‘Leave the will with me and I will arrange for it to be witnessed’, he was just not that sort of man. Moreover, if he had done, Mr

Fitzpatrick would have wanted to put that on the record by writing to confirm that was the position but Mr Fitzpatrick never did so.

After Mr Gordon's expert statement of opinion in relation to the practice of solicitors was served Mr Fitzpatrick made a supplemental statement stating that his offer to ask neighbours to witness Mr Dibden's signature, his attempt to find witnesses by walking around The Close, and his suggestion of driving Mr Dibden to the local garage, all took place at the time of the third visit rather than the second visit. I reject this change of evidence on the part of Mr Fitzpatrick. His first statement was made considerably closer to the time of the relevant events and is in my view more likely to be correct.

What Mr Fitzpatrick did do after his third visit was to telephone Mrs Esterhuizen and inform her that he had been unable to get Mr Dibden to sign the will in the presence of two witnesses. He suggested that Mrs Esterhuizen might care to arrange this herself during one of the Sunday lunches to which she often invited him, or during a Tuesday when she came to clean his house. Mr Fitzpatrick said Mrs Esterhuizen agreed to do this. Mrs Esterhuizen denied that she agreed while agreeing that Mr Fitzpatrick did make the suggestion. I prefer Mrs Esterhuizen's account.

Meanwhile Mrs Esterhuizen was rather worried about a faulty plug which she thought Mr Dibden had 'bodged' while attempting to mend it. He met her concern by asking her to find some electricians. This she did by using the Yellow Pages, and they came round on 24 May 1994 when it appears that Mr Dibden did sign the draft will and had indeed procured one of the electricians to witness his signature.

29 May 1994 was a Tuesday and as usual Mrs Esterhuizen came round to clean the house and stay the night. During the evening Mr Dibden told her that the electricians had been and fixed the faulty plugs and that he had got one of them to witness his will. Mr Dibden then showed Mrs Esterhuizen the will and she, having her spectacles on this occasion, saw what the will said, viz, that everything was to be left to her and her daughter. She was absolutely amazed and said no one had ever done anything so nice to her in her life. He said that he did not want Mrs Esterhuizen and Tina to have to worry about money again.

Mrs Esterhuizen then saw that though the will had been signed and there was a signature under the rubric 'Witness 1', there was no signature under the rubric 'Witness 2'. She said she thought the will needed to have two signatures. Mr Dibden then said 'Oh' in a tone of some surprise, and also said that the other electrician had left before the first had signed. He then put the will back into its envelope and into his bureau. She naturally felt inhibited from pressing the matter in any way.

Shortly after this Mr Dibden became seriously ill. He had in fact been deteriorating for some time. By Christmas 1993 he had lost much weight. Mrs Esterhuizen and her daughter took him on an outing to Boscombe in March 1994. He had been unwell during that visit.

On 10 June 1994 he was admitted to Southampton General Hospital and cancer of the bowel was diagnosed. He disliked hospital and Mrs Esterhuizen had to arrange for a transfer to a nursing home. She could not herself afford the fees and consulted a solicitor, Mr Hayes, who advised she should get an enduring power of attorney so that Mr Dibden's own funds could be used for the purpose. Mr Dibden was agreeable to this course and Mr Hayes came to the nursing home and Mr Dibden signed a power of attorney in his presence. Mrs Esterhuizen visited every day and also tried to find a cheaper alternative since Mr Dibden was concerned at the cost.

On 12 July 1994 Mr Dibden said to Mrs Esterhuizen that he was worried about his will. He told Mrs Esterhuizen that it was in the chest of drawers in his bedroom, and that he would like Mrs Esterhuizen to arrange for her solicitor to come and see him about it.

After work on that day Mrs Esterhuizen collected the will and put it through Mr Hayes' letter box, together with a note, asking him to visit Mr Dibden at the nursing home. The next afternoon Mr Hayes telephoned Mrs Esterhuizen saying that he and his secretary had gone to the nursing home but had been unable to communicate with Mr Dibden whom he felt was in no position to give any proper instructions. In fact morphine had already been prescribed. Apart from two subsequent days morphine was thereafter

administered and Mr Dibden died on 19 July 1994 with Mrs Esterhuizen at his bedside. In the absence of any valid will all Mr Dibden's estate went to his adopted daughter.

I heard oral and written evidence of fact from Mrs Esterhuizen, Miss Tina Esterhuizen, Mr Hayes their solicitor, Mrs Hayter who lived four doors away from Mr Dibden in The Close, and Mr Fitzpatrick. There was not much substantial conflict between them, and the above account is based on their evidence. There was some difference between the recollections of Mrs Esterhuizen and Mr Fitzpatrick. Where it matters I have preferred the evidence of Mrs Esterhuizen to that of Mr Fitzpatrick because Mr Fitzpatrick agreed his memory of events was not particularly good and indeed he had less cause to remember them than Mrs Esterhuizen. He admitted confusion in his mind between the events of his second and third meetings with Mr Dibden. He also admitted that after Mr Dibden's death he had suggested to Mrs Esterhuizen that a second witness signature be added to the will. Mrs Esterhuizen naturally rejected that suggestion but Mr

Fitzpatrick did not come clean about this incident until his oral cross-examination in the face of the court.

Mrs Esterhuizen gave her evidence in a model way which I found entirely convincing. She is a modest lady who performed considerable services to Mr Dibden in his declining years and could not conceivably be described as a bounty hunter. She was fully aware of her delicate position and that is why I am sure that she never agreed to Mr Fitzpatrick's proposal that she should try to arrange execution of the will.

I also heard expert evidence as to the practice of solicitors from Mr Charles Gordon of Foster Savage and Gordon, a firm in Farnborough. He is one of the authors of the Probate Practitioners Manual published by the Law Society, and was heavily involved in the Law Society practice of the issuing of the remuneration certificates in cases where clients complain about a solicitor's charges. He had thus considered numerous files in wills and probate matters.

Although both his expertise and substance of his evidence were roundly attacked by Mr Croxford QC for Allied Dunbar I find his experience to be

entirely appropriate for the purpose of assisting me as to solicitors' practice in this area. I also find the substance of his evidence to be correct, partly because it was inherently convincing and partly because no evidence was called to challenge it. The essence of his evidence was that a prudent solicitor regards it as his duty to take reasonable steps to assist his client in and about the execution of his will, rather than merely to inform the client how it is to be signed and attested. This means that once the client has approved the draft of a will a prudent solicitor will either invite the client to his office so that the will can be executed there or visit him with a member of his staff to execute the will at the client's house.

The one person I did not hear from of course was Mr Dibden. My findings about him are necessarily coloured by the views of the other witnesses. He was already elderly when Mrs Esterhuizen got to know him in about December 1980. 1 do not consider he was exactly a recluse, in the sense that he enjoyed being with Mrs Esterhuizen and Miss Tina Esterhuizen but he was reclusive, in the sense that he went out little, he had virtually no intercourse with his neighbours, and never invited anyone into his house. Communication with him was not easy, though once it began it might be difficult to bring it to end. He was not well educated and although he probably understood once it had been explained to him that two witnesses were needed for his signature to the will he did not have the intellectual equipment or the frame of mind to arrange it for himself. When he said to Mr Fitzpatrick at the end of the second or third visit, 'Leave it with me' he did not mean he would arrange for witnesses himself, and I do not believe that Mr Fitzpatrick understood it that way either because, as I have said, if he had he would have written a letter confirming that position.

In the light of those findings or, perhaps I should more correctly say, his anticipation of those or similar findings, Mr Inglis Jones QC for Mrs and Miss Esterhuizen submitted:

(1) that Allied Dunbar owed a duty in contract to Mr Dibden and in tort to Mrs and Miss Esterhuizen to take reasonable care to carry out Mr Dibden's instructions;

(2) that the scope of the duty was the same as the scope of a solicitor's duty;

(3) that a prudent solicitor would take reasonable steps to assist a client in the practicalities of signing and attesting his will;

(4) that insufficient steps had been taken in this case;

(5) that Mr Dibden had at all material times a settled intention to leave his property to Mrs and Miss Esterhuizen and that the failure to take reasonable steps to assist Mr Dibden to get his will properly signed and attested meant that Mrs and Miss Esterhuizen were never left the property contrary to Mr Dibden's intentions;

(6) that if there was no tortious duty there was a contractual duty to the same effect because Mrs and Miss Esterhuizen contributed part of the price of Allied Dunbar's services;

(7) that accordingly Mrs and Miss Esterhuizen were entitled to damages against Allied Dunbar in what was the agreed sum of 93,831.32.

Mr Croxford for Allied Dunbar accepted that Allied Dunbar owed a duty to their client, Mr Dibden, to procure a properly drafted will, made in accordance with his wishes, and to give him correct instructions as to the requirements of signature and attestation. That, he submitted, had been done. He further submitted:

(1) that Allied Dunbar owed no duty in tort whatever to Mrs and Miss Esterhuizen as prospective beneficiaries;

(2) that if any duty was owed it was no greater than that owed to Mr Dibden as the testator;

(3) that a prudent solicitor had no greater duty to a testator or a prospective beneficiary than as set out above, viz. to take care to procure a properly drafted will and give correct instructions as to signature and attestation;

(4) that that duty had been performed;

(5) that the plaintiffs' loss was caused not by any negligence on Mr Fitzpatrick's part but by Mr Dibden's own failure for his own reasons to have his will attested;

(6) that alternatively the plaintiffs' loss was caused or contributed to by Mrs Esterhuizen's own conduct in failing herself to take steps to have the will properly attested;

(7) that there was no contract between Allied Dunbar and the plaintiffs.

(1) Duty to beneficiary

Mr Croxford submitted that, although the law now imposed a duty on a solicitor to take reasonable care of the interests of a beneficiary of whom he was aware, that was a duty peculiar to solicitors. He emphasised that White v Jones [1995] 2 AC 207, had gone to the limits of the law by the barest of majorities and should not be extended to non-solicitors. He pointed out that both Lord Goff of Chieveley, at 260, and Lord Browne-Wilkinson, at 276 had placed great reliance on the special position of solicitors. The passages are worth reading.

First Lord Goff of Chieveley at 260D:

'(3) There is a sense in which the solicitors' profession cannot complain if such a liability may be imposed upon their members. If one of them has been negligent in such a way as to defeat his client's testamentary intentions, he must regard himself as very lucky indeed if the effect of the law is that he is not liable to pay damages in the ordinary way. It can involve no injustice to render him subject to such a liability, even if the

damages are payable not to his client's estate for distribution to the disappointed beneficiary (which might have been the preferred solution) but direct to the disappointed beneficiary.

(4) That such a conclusion is required as a matter of justice is reinforced by consideration of the role played by solicitors in society. The point was well made by Cooke J in Gartside v Sheffield Young & Ellis [1983] NZLR 37, 43, when he observed that:

"To deny an effective remedy in a plain case would seem to imply a refusal to acknowledge the solicitor's professional role in the community. In practice the public relies on solicitors (or statutory officers with similar functions) to prepare effective wills".'

And then in the speech of Lord Browne-Wilkinson, at 276A:.

'Moreover there are more general factors which indicate that it is fair just and reasonable to impose liability on the solicitor. Save in the case of those rash testators who make their own wills, the proper transmission of property from one generation to the next is dependent upon the due discharge by solicitors of their duties. Although in any particular case it may not be possible to demonstrate that the intended beneficiary relied upon the solicitor, society as a whole does rely on solicitors to carry out their will making functions carefully. To my mind it would be unacceptable if, because of some technical rules of law, the wishes and expectations of testators and beneficiaries generally could be defeated by the negligent actions of solicitors without there being any redress. It is only just that the intended beneficiary should be able to recover the benefits which he would otherwise have received.'

I do not however accept that White v Jones is confined to solicitors. The essence of the decision was that the solicitor's assumption of responsibility to the testator carried with it an assumption of responsibility to prospective beneficiaries of whom he was aware. The solicitor had assumed responsibility in their case because it was part of a solicitor's business to assume that sort of responsibility. If however a non-solicitor assumes the same sort of responsibility I see no reason why such person should be exempt from the general principle there laid down.

Lord Goff only made the solicitors' position the fourth reason for his conclusion which would, in my view, have been the same if the defendant in that case had not been a solicitor but had assumed the appropriate responsibility. Lord Nolan, at 294, made no point on the special position of solicitors at all, referring merely to a professional man or an artisan. It seems to me that in this case Allied Dunbar did assumne responsibility in the same way that the solicitor in White v Jones had assumed responsibility, and I therefore reject Mr Croxford's first argument.

(2) The scope of the duty

Once it is held that the duty exists it would be strange to hold that the duty is less than that of a solicitor whatever that might be unless some clear indication of that is given at the time to the testator, or perhaps to the beneficiary. Solicitors have been drafting wills for centuries. Only recently have other professionals come on the scene. From the consumer's point of view it would be a trap for the unwary if the law imposed a significantly lower duty on non-solicitors.

Allied Dunbar's literature endeavours to give the impression that they are as good as a solicitor, and, although there is no suggestion that either Mr Dibden or Miss Esterhuizen saw that literature, Allied Dunbar should not wish to be judged by any lesser standard.

(3) Scope of a solicitor's duty

It is a curiosity of English law that the requirements of signature and attestation are, if not complex, comparatively strict. Allied Dunbar got it entirely right in their instructions left with the will, which I have already quoted. Is it enough for a solicitor or a professional will provider to leave it at that? There was some suggestion in argument that this might depend on how competent or intelligent the testator was perceived to be but I cannot believe that is correct, save insofar as the actual performance of the duty may vary according to a defendant's perception of his client.

The fact is that the process of signature and attestation is not completely straightforward and disaster may ensue if it is not correctly done. Any testator is entitled to expect reasonable assistance without having to ask expressly for it. It is in my judgment not enough just to leave written instructions with the testator. In ordinary circumstances just to leave written instructions and to do no more will not only be contrary to good practice but also in my view negligent.

Mr Fitzpatrick himself recognised this and did take some steps to help with attestation. He looked round in The Close and suggested that he and Mr Dibden should go to the local garage. The question is 'Was that enough?'

(4) Did Mr Fitzpatrick fulfil his duty?

I must regrettably find that Mr Fitzpatrick was negligent in this respect. As Mr Gordon said it is common form for a solicitor to invite a client who has approved his draft will to come into the solicitor's office to sign his will and have it attested. If the client is unwilling or unable to come to the office then a solicitor should ask the client if he would like the solicitor to attend him at home to get the will executed. If the client says 'No' that is the end of the matter. If the client says 'Yes' it is easy to take a member of staff who together with the solicitor can witness the testator's signature.

Mr Fitzpatrick did not do this. One can perhaps understand that on his second visit he had not appreciated the need for proper assistance as to attestation, but it is surprising that he offered no practical help of the kind described above on his third visit. He ought by then to have appreciated

the aspects of Mr Dibden's personality which I have attempted to describe. It is difficult, and it would be wrong, to blame Mr Fitzpatrick personally for this lapse. The only evidence I have on the training Mr Fitzpatrick received was that of Mr Fitzpatrick himself. He was asked whether there had been any discussion in the course of his training about difficulties that might arise with regard to the execution of wills and he said he could not recall. I strongly suspect that the, to my mind, essential follow-up procedure was never the subject of any detailed instruction at all during his training.

(5) Causation

In my view Mr Dibden did have a settled intention to leave his property to the Esterhuizens, probably from 1984 onwards, but certainly from the time when he assigned to his adopted daughter his deposit in the National Deposit Friendly Society in 1991. She visited her father in that year and his decision to assign that deposit dates from the time of that visit. He must then have intended to leave the remainder of his estate to Mrs and Miss Esterhuizen. Thereafter, he actually showed the 1992 home-made WH Smith will to Mrs Esterhuizen, although she could only discern the capital letters B and T, and also the will drafted by Allied Dunbar in 1994.

I am persuaded that the reason why Mr Dibden did not arrange for the signing and witnessing of his will was not that he had changed his mind nor that he wanted further time to think about what he was doing, it was merely that he found it too difficult to arrange for execution by himself. The only reason why he asked Mr Fitzpatrick to leave the will with him, or said that he would see to it, was that he disliked the idea of going out to the garage or bothering complete strangers, which is entirely understandable.

Mr Croxford relied on dicta in White v Jones about the lack of need for a cause of action in inter vivos transactions where the mistake or lack of form is discovered while the settler is still alive (see 262F and 276D per

Lord Goff and Lord Browne-Wilkinson respectively) but I do not get much assistance from those passages on what is essentially a question of fact.

(6) Contributory negligence and novus actus on the part of Mrs Esterhuizen

No doubt the conduct of the intended beneficiary can in law amount to a total or partial defence to her claim. I have indicated that I do not accept that Mr Fitzpatrick's evidence that Mrs Esterhuizen agreed herself to have Mr Dibden's signature witnessed when he went round for Sunday lunch or on Tuesday when she went to do his cleaning. As a potential beneficiary she felt far too inhibited to agree to any such thing and she was quite able to make the position clear to Mr Fitzpatrick. She naturally felt inhibited about taking any such action herself and her inhibition was entirely proper. Any plea of contributory negligence, let alone novus actus interveniens, must therefore fail on the facts.

(7) Contract

This can only matter if there was no duty in tort, in other words, if Allied Dunbar succeeds on issue (1). Allied Dunbar did not themselves assert a contract, whether to limit their duty in tort or otherwise. In my view, despite the fact that Mrs Esterhuizen and Tina Esterhuizen each paid 15 they did not do so with the intention of making a contract, nor did Mr Fitzpatrick proceed intending to contract with them. His intention was to contract with Mr Dibden. The claim in contract therefore fails.

I expressed some unease about the prospect of enforcing a contract by which one party agreed to use reasonable care to procure a benefit for another by drafting a will for a third party which left his property to the party providing the consideration. Neither counsel was concerned about that and I need say no more about it.

In conclusion I therefore decide the case in the plaintiffs' favour and will enter judgment for the agreed sum of 93,831.32 together with interest at a rate and from a date on which I will hear counsel.

Judgment entered for the plaintiffs with costs.

Solicitors: Michael Hayes & Co for the plaintiffs

Allied Dunbar Legal Department

CHRISTOPHER WAGSTAFFE

Barrister

 Home