Benjamin, *Fitzhugh Gates* and *Cobden-Ramsay* orders: asking the court to (not) answer the tricky questions

On 1 September 1892, Philip David Benjamin was summoned back to London by his employer from Aix-la-Chapelle, where he had been holidaying with a friend. He boarded a train and promptly vanished, never (as far as this author is aware) to be heard from again. He was twenty-four years old. Inquiries were made and advertisements placed, but bore no fruit.

This was troubling enough, but it was soon to pose a particular legal problem. The following year, Mr Benjamin's father died, leaving his missing son a very substantial sum of money if he had survived him.

But had he?

The matter came before the court, and, in 1902, Joyce J (*In re Benjamin* [1902] 1 Ch. 723) made an order giving liberty to distribute under the will on the basis that the younger Benjamin had predeceased his father. The *Benjamin* order was born.

Part 64 of the Civil Procedure Rules makes provision for estate proceedings, and covers, under rule 64.2(a)(i), claims *"for the court to determine any question arising in* […] *the administration of the estate of a deceased person"*. Paragraph 1 of Practice Direction 64A provides a list of examples, but this is not exhaustive.

The power to make orders of this sort should be remembered by those acting for personal representatives when uncertainties arise. Despite the protection afforded to personal representatives acting in good faith, circumstances can arise where the appropriateness of a course of action is not clear. Doing nothing is likely not a long-term option, and so it may be necessary to throw the matter upon the court.

One example of a situation in which the High Court has seen fit to provide assistance is in the case of the deadlock which can arise where a will is subject to some form of challenge following the grant of probate in common form, but where the challenging party fails to pursue proceedings. The personal representatives may feel exposed in simply distributing on the basis of the will, and yet may not wish to expend resources in pursuing the grant of probate in solemn form 'just in case'.

This situation arose in *Fitzhugh Gates v Sherman* [2003] WTLR 973 and in *Cobden-Ramsay v Sutton* [2009] WTLR 1303. In the latter, noting the similarity to *Re Benjamin* and having regard to discussion in the Court of Appeal in *Fitzhugh Gates*, Deputy Master Behrens concluded that he had jurisdiction to make, and should make, an order permitting

distribution in accordance with a codicil unless proceedings to challenge it were issued within a defined period.

A *Fitzhugh Gates* order differs from a *Benjamin* order in that the former arises when the testamentary document itself is impugned, but the two are clearly closely related. The distinction may be academic: the practical point is that the High Court (operating under the Part 64 procedure) is highly likely to find that it has both jurisdiction and justification to come to the rescue of reasonable personal representatives by allowing them to proceed on a particular basis where a thorny issue is lurking in the undergrowth but refusing to emerge.

One of the attractive features of these orders is that, like *Beddoe* applications (seeking sanction for proceedings - *Re Beddoe* [1893] 1 Ch 547), they serve to protect trustees/personal representatives by providing the court's sanction, rather than purporting finally to determine underlying questions of fact. The need for a lengthy trial of the underlying issue is thus avoided in the immediate term, but without permanently shutting the half-hearted challenger out from seeking to raise the issue as against the beneficiaries later, if otherwise possible.

Fitzhugh Gates orders prototypically provide a last opportunity for the challenger, by giving liberty to proceed on a given basis unless proceedings are issued by a particular date. This was the form sought in *Cobden-Ramsey*. However, particularly where a *Benjamin* order is sought, the underlying facts may be various, and it should not be assumed that the court will in all circumstances consider itself restricted merely to giving its approval in the form *unless… then*. The appropriate order will likely depend on what is sought, what obstacle has arisen, and what attempts to manoeuvre around it have already been frustrated. In *In re Benjamin* itself, the court simply proposed to declare the assumed factual basis on which the distribution should proceed.

Benjamin and *Cobden-Ramsey* orders, and orders analogous to them, are not the be-all-and-end-all. However, where an issue is lurking in the background but will not fully raise its head, they can be a useful tool in the armoury of personal representatives, permitting them to get on with the job in hand.

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