In depth

Guardian Trust revisited

Joseph de Lacey* and Niamh Herrett†

Abstract

When a third party threatens a claim in relation to trust assets, and the time for distribution has arisen, the trustee is placed in a difficult position. To distribute notwithstanding the threatened claim could result in personal liability for the trustee under the *Guardian Trust* principle. To not distribute, whilst the threatened claim is outstanding, could lead to the paralysis of the trust for months, if not years. This article considers the availability of '*put up or shut up*' orders against the threatening party in such circumstances. What is the jurisdiction to make such an order, what are its requirements, and might a trustee be justified in utilising '*put up or shut up*' orders more often and more quickly?

"*Taking caution does not mean standing fast.*" Rhaenyra, *House of the Dragon*, HBO, series 1, episode 10.

Introduction

The duty to distribute trust property to, or for the benefit of, those entitled has been described as the trustee's "*ultimate*" duty.[1] Where trustees fail to distribute when the time for doing has come (i.e., at the end of the trust period, or within say a year of the death of the deceased in estates) then they may bear the costs of proceedings commenced by a beneficiary to compel a distribution.[2]

In most cases it should be reasonably obvious who the trustee can or should distribute the trust property to. Where there is some doubt, it must be overcome before distributing,[3] and a trustee is personally liable for payment to the wrong person for such a payment is no discharge of its obligations in respect of the assets distributed.

Doubts may arise where a person (i.e., a stranger to the trust or a beneficiary claiming in their personal capacity) asserts that the trust property in fact belongs to them or is held for them. This engages the *Guardian Trust* principle:[4]

> "*. . .[I]f a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded*".[5]

The principle places trustees in an awkward position. *Guardian Trust* is not a rule against distributions; it is a warning of *potential* liability. It is a strong incentive to delay distributing until the claim to the trust property in question is determined. It appears to take effect when the trustee receives notice of a claim, not receipt of a claim form (or originating summons etc.). A trustee may therefore at the time for distribution be under a positive

*Joseph de Lacey, Senior Associate, Farrer & Co, 66 Lincoln's Inn Fields, London, UK. Tel: +44 (0)20 3375 7009. Email: joseph.delacey@farrer.co.uk
†Niamh Herrett, Barrister, Serle Court Chambers, 6 New Square, Lincoln's Inn, London, UK. Tel: +44 (0)20 7400 7134. Email: nherrett@serlecourt.co.uk

1. *Lewin on Trusts* 20th Ed., paragraph 24-004.
2. *Moss v Integro Trust (BVI) Ltd (1997)* 1 O.F.L.R. 427 (BVI).
3. *Lewin on Trusts*, paragraph 24-004.
4. *Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand* [1942] A.C. 115(PC).
5. *Guardian Trust*, at 127.

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duty to distribute to person X (the named beneficiary), while being at risk of personal liability to person Y (who has intimated but not yet issued a claim). Therefore, the principle in reality empowers a party to prevent or delay distribution to the named beneficiaries without having to do much more than intimate a potential claim (and not necessarily a good one). It encourages caution in trustees, prejudices the named beneficiaries, and provides leverage to the threatening party. In some cases, this paralysis can last many years.

What is the proper role and approach of trustees in such cases? The usual wisdom is they must be neutral between those fighting over the trust property. That is clearly the right course (in usual cases) where a claim has been issued, as the trustee will want to protect its indemnity for costs. But the proper role and approach where no claim has been issued, and a significant period of time has passed since (i) the time for distribution, and (ii) the date the threatened claim was first intimated, is less clear. Should trustees simply wait until the warring parties have made peace?

This difficulty often comes up in practice, particularly in estates where the property should normally be distributed within a reasonably certain time (i.e., one year after the testator's death) and where a personal representative's inability (or, more accurately, refusal) to distribute is more acutely felt. In discretionary trusts, of course, the time for ultimate distribution may be many years away.

This difficulty is exacerbated by caveats. A caveat can be registered without any real interrogation as to merits. And once registered it prevents the personal representative from receiving a grant and administering the estate[6] and remains in effect until the commencement of a '*probate action*', unless "*. . . a registrar of the Principal Registry by order made on summons otherwise directs. . .*".[7]

Where such difficulties arise, and the trust or estate reaches a standstill, in the writers' view it is incumbent upon the trustee as fiduciary to take active steps to break the deadlock, allowing the trust to be distributed. In some cases that might include engagement and the encouragement of discussion between the warring beneficiaries. But in others, trustees may decide reasonably that they can neither bring the parties together, nor convince the threatening party to drop its potential claim. Sometimes, a point may be reached where trustees decide that without court intervention and guidance, the final distribution cannot be safely made.

In such circumstances, trustees may seek directions or declarations from the court to force the issue. So, where there is real doubt as to the identity of the beneficiaries (for example, due to questions of descent or legitimacy) then a declaration might be required (or indeed a *Benjamin* order). Where, however, the trustees are faced with an unissued claim to the trust property (such as a claim under proprietary estoppel), then the most suitable and effective direction may well be what is commonly referred to as a "*put up or shut up*" order. This is likely to be a cheaper and more efficient remedy than a declaration.

This article will therefore:

a. examine the rationale and scope of liability under the *Guardian Trust* principle;
b. explore the jurisdiction of the court to grant a "*put up or shut up*" order (which was recently considered in *Parsons v Reid);*[8] and
c. consider whether trustees might be justified in utilising this jurisdiction more often, and more quickly.

Guardian Trust

The facts of the case

The testator, Miss Smith, died on 9 July 1935. Probate was granted to her executors on 19 July 1935. The same

6. See rule 44 of the *Non Contentious Probate Rules 1987* (the "**NCPR 1987**"), and *Tolley's Administration of Estates*, at H2.3: "*A caveat is usually entered because the person doing so has doubts as to the validity of a will or codicil and wishes to make further enquiries in this respect, so requires the time to make those enquiries. If the enquiries establish a validity claim, with a caveat in force, they can sit back and wait for those who wish to prove the will or codicil in dispute to commence a probate action*". The writers respectfully disagree with the final sentence of this guidance.

7. Rule 44(13) of the NCPR1987.

8. [2022] EWHC 755 (Ch); [2022] W.T.L.R. 1103.

day, the executors noted that some of the deceased's relations were considering challenging the will, but they considered that those relations would "*realize their folly*".[9] In October, it was noted that the solicitor acting for those relations had suggested that proceedings were proposed to upset the will. In light of this, they said: "*[i]n view of the possibility of proceedings we consider it would be unwise to make any payment to the legatees, because there is just the chance if the will was upset that they may not turn out to be the actual next-of-kin who are entitled and … we would possibly be under some liability*".[10] In December, solicitors for the relations wrote to the executors to note that they had been consulted with regard to issuing proceedings for the revocation of the grant due to lack of testamentary capacity. It was suggested that a definite decision regarding the issue of proceedings would be arrived at before the end of January 1936.

Despite this warning, and without notice to the relations or their solicitors, the executors paid out certain legacies in February 1936. A successful claim was then brought to revoke the grant. Proceedings were issued against the executors to recover the amount paid out to the legatees under the will.

The Privy Council held that there was no statute in force in the relevant jurisdiction (New Zealand) which governed the case, and that it therefore fell to be decided by well-established principles of equity. One of those principles was said to be that:

> "*[I]f a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded*".

It was further held that the information which had been conveyed to the executors in December 1935 was of such a nature that "*no reasonable man should have disregarded it*". The executors should, it was said, have at least applied to the court for directions and, if the facts and circumstances had been placed before it, the court would have refused to sanction any payment to the legatees for the time being.

In explaining its decision, the Privy Council noted that the question for the court was not whether the executors had acted honestly in disregarding the information they had received regarding the potential claim. It was not sufficient that they thought the potential claim unfounded:

> "*A trustee who has received information of a charge on the interest of his cestui que trust in favour of a third party is not entitled to disregard it merely because he honestly believes the charge to be invalid*".[11]

The question to be asked, according to the Privy Council, was whether the person acting in a fiduciary capacity had notice of the claim, and not whether they formed a favourable or unfavourable view as to its prospects. The Privy Council found that the executors had made the payments with notice of facts and circumstances which should have made it plain to any ordinary, reasonable and prudent man of business that the payments should not have been made.

The principles underlying Guardian Trust

It has been said that the source of the principle is not "*wholly obvious*".[12] *Lewin* suggests that the principle is independent of the principles under which a person wrongly distributing may be held liable as constructive trustee, whether on the grounds of dishonest assistance or knowing receipt. Instead, *Lewin* suggests that the principle appears to derive from the rule that a person holding property with notice that another person has a beneficial interest in it will be liable if they apply the property in a manner inconsistent with the interest, such that the principle is a branch of that against inconsistent dealing.

9. *Guardian Trust*, at 122.
10. *Guardian Trust*, at 123.
11. *Guardian Trust*, at 128.
12. *Lewin on Trusts, paragraph* 24-030.

In *Guardian Trust* however, as with any dispute where the claim to the trust property by the threatening party has not yet been proved, the trustee does not have notice that another person has a beneficial interest in the property. The trustee only has notice that a claim to an interest has been intimated, that the threatening party may have a beneficial interest in the trust property, and the trustee may or may not have information or advice about the claim's merits.

In the writers' view, the principles underlying *Guardian Trust* should be considered to be the following:

a. The liability of a trustee for incorrect distribution;[13]
b. The trustee's duty of single-minded loyalty to the beneficiaries.[14] This is not the same as loyalty to those named as beneficiaries in the trust deed—if the true beneficiary is the person who has given the trustee notice of their claim, then a distribution to any other person would be a breach of that duty of loyalty; and
c. The trustee's duty to account, which encapsulates the beneficiaries' rights to enforce the trust and make the trustees account to them and the court for their conduct. As above, where the true beneficiary of the trust is the person giving notice of their potential claim, then that person (and not the named beneficiaries) has the right to have the trustee account for their conduct.[15]

In other words, the *Guardian Trust* principle is based on the overarching rule that trustees are accountable and liable to those in respect of whom they *in fact* hold the trust property.

Difficulties arising from the application of the Guardian Trust *principle*

Liability under the principle only crystallises upon the threatening party successfully proving their claim: " . . . *he will be liable to A if he deals with the fund in disregard of that notice* ***should the claim subsequently prove to be well founded***" (emphasis added). Therefore, the principle anticipates the threatened claim being proven one way or the other. Difficulties arise, however, if the claim is not proven one way or the other (as is often the case, sometimes for many years). The trustees themselves cannot and should not in most cases judge whether a claim is well founded—except, perhaps, for claims which are spurious and with no arguable foundation whatsoever (see below).[16] It is not for trustees to act as arbiters between competing claims to the trust property—to do so would put the trustees' indemnity for costs at risk as they would be improperly favouring one potential beneficiary over the other, breaching the rule against partiality. A claim can only be proven to be well founded by the court.

Therefore, where a trustee is on notice of a claim to the trust property, but that claim remains unadjudicated by the court, what is the trustee to do?

In *Guardian Trust*, it was suggested that the executors should have applied for directions. But what directions? An indication is given by Lord Romer: ". . . *if the facts and circumstances had been placed before [the court], the court would certainly have refused to sanction any payment to the legatees for the time being*".[17]

The words "*time being*" are important. They are likely to have been included by Lord Romer to indicate that a delay to payment of the legacies could only be in place for a certain period, and that there must be a definite end point to the delay caused by the competing claims to the trust. What Lord Romer must have anticipated is that, following the refusal by the court to sanction the payment in his imagined scenario, something would have to take place so that the question of whether the claim was well founded and who the property should be distributed to could be resolved one way or the other. That would require: (i) a claim to have been issued by the threatening party and determined by the court; or

13. *Re Hulkes* (1886) 33 Ch. D. 552, at 557.
14. *Bristol and West Building Society v Mothew* [1998] Ch. 1, at 18 (Millet LJ).
15. *English Trust Law Principles*, Michael Ashdown, paragraph 1.25, in *International Trust Disputes 2nd Ed.*
16. See *Sinel Trust Ltd v Rothfield Investments Ltd* [2003] JCA 048 and *Re the Representation of BNP Paribas Jersey Trust Corporation Ltd* [2010] JRC 199.
17. *Guardian Trust*, at 128.

(ii) a declaration by the court (perhaps on the trustee's application) as to the beneficial interests in the trust property; or (iii) the resolution of the claim by agreement; or (iv) the dropping of the claim.

In practice, however, sometimes none of the above take place. Instead, the notice of claim lingers over the trustee, preventing a distribution for fear of liability. This has the effect of paralysing the trust.

This predicament raises a number of questions. For the purposes of this article, we will concentrate on the following:

a. Does the *Guardian Trust* principle apply to all claims to the trust estate, or should spurious claims without arguable foundation fall outside its scope?
b. If the trustee is unwilling to distribute pending the threatened claim's resolution (either by the parties' agreement or by the court), what should they do?
c. If the trustee decides to seek assistance from the court, what application should be brought? And how is the position complicated by caveats?

Does the principle apply to all claims to the trust estate?

Guardian Trust is not a bar to distributions. It does not force a trustee to delay a distribution until the threatened claim is resolved. Instead, it is a warning that personal liability will attach to the trustee if they distribute and the threatened claim, of which they have notice, is proven to be well founded. So, in each case, a trustee must consider if the risk of liability is such that the distribution should be delayed. A judgment call is required involving an analysis of the threatened claim.

In this regard, it is instructive to note the comments in *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)*, in which it was stated that "*... claims are not the same thing as facts*".[18] This statement was made in the context of a claim for knowing receipt, but it is just as relevant to a case which concerns the *Guardian Trust* principle. It should be borne in mind particularly in clear cut cases where the threatened claim has no evidential foundation whatsoever. In other words, the writers suggest that the *Guardian Trust* principle should not apply, and should not dissuade distributions, where a claim is entirely fanciful or impossible.

The principle was considered and similarly qualified in *Sinel Trust Ltd v Rothfield Investments Ltd*[19] and in *Re the Representation of BNP Paribas Jersey Trust Corporation Ltd*.[20] In *Sinel*, the court was eager to establish a dividing line between claims to which the principle applies, and claims to which it does not. It was said that:

> "*Lord Romer was one of the greatest equity judges of the twentieth century. It is clear that what he meant by "notice of a claim" was notice of a claim which is, prima facie, a reasonably arguable claim. Lord Romer was not referring to specious claims with no arguable foundation.*"[21]

In *BNP Paribas*, it was said that the Court of Appeal in *Sinel* had:

> "*... disapproved one of the contentions made by one of the parties in the Royal Court to the effect that if the test were as set out by Lord Romer, any rumoured claim, however outlandish, would paralyse the administration of the trust and the enjoyment of the trust assets by the beneficiaries. It was made plain that specious claims with no arguable foundation were not what Lord Romer had in mind.*"[22]

"*No arguable foundation*" is not a term of art. It is a phrase sometimes used by the courts (of both England

18. [1969] 2 Ch. 276, at 293.
19. [2003] JCA 048.
20. [2010] JRC 199.
21. *Sinel*, at [29].
22. *BNP Paribas*, at [21].

and Wales and Jersey) as shorthand for a claim or argument that is baseless and without any merit.[23] The problem, however, is that it will not always be clear to trustees whether a claim has no arguable foundation. They may not be in possession of all the relevant facts, contentions and documents, and they will likely know (or should know) that what can appear a bad claim at the outset, can quickly (or slowly) become a good one (and vice versa). The threat of personal liability, even if remote, can stymie the bravest of trustees.

Therefore, in practice, the principle is likely to apply to almost all claims which are asserted against the trust property, and is likely to dissuade distribution in all but the most clear cut cases (or where an indemnity is given which can reasonably be relied on).

Stepping back, what we are dealing with here is not a legal test or rule (is there a good claim, if so, do not distribute as doing so is a breach of trust), but a question of prudence and risk (is there a potential claim, and if so should we distribute or are we at risk?) That is because a trustee who distributes to X while on notice of a claim by Y to the trust will only be liable to Y if Y's claim proves to be well founded. *Sinel* suggests that liability only bites where a claim has an "*arguable foundation*". However, it is unclear from *Sinel* whether liability will attach where a trustee determines honestly that a claim has no arguable foundation, distributes the trust property, only to then find that the claim is proven by the court. First, the very fact the threatened claim succeeds indicates that, contrary to the trustee's determination, it was not a claim without arguable foundation. Further, and with respect, it appears to ignore what was said in *Guardian Trust*:

> "*A trustee who has received information of a charge on the interest of his cestui que trust in favour of a third party is not entitled to disregard it* ***merely because he honestly believes the charge to be invalid***" (emphasis added).[24]

It is hard to reconcile this clear statement of principle with the attempted qualification in *Sinel*.

So, we are back to square one—trustees cannot protect themselves from potential liability by coming to the honest view that the claim is a bad one. All they can do is assess the likely risk and consider if they are comfortable distributing without the threatened claim being determined, or without a blessing. An indemnity from the named beneficiaries may provide some comfort, but may not be willingly offered or provide actual security in the longer term.

If the trustee is unable to discount the threatened claim and unwilling to distribute pending its resolution (either by the parties' agreement or by the court), what should they do?

First, it is almost never appropriate for a trustee to do nothing. Trusteeship requires active and constant consideration of the steps that might be taken to further the purposes of the trust and the interests of the beneficiaries. While it is correct that a trustee should (in most cases) remain neutral between warring beneficiaries, neutrality does not require, nor should it result in, passivity.

Second, noting that the ideal outcome is usually one where the warring beneficiaries come to an agreement, giving them time to come to that agreement will often be the safest and most prudent approach.

However, sometimes the warring beneficiaries do not come to terms. Our practice deals primarily with human beings, often in the context of a bitter family breakdown, and the threatening party may be reluctant to issue so as to force the threatened claim's determination, while the named beneficiary may refuse to negotiate. In such cases, there is no reasonable option open to the trustee but to seek the court's intervention, whether by an application for a declaration or

23. *Grove Park Development Ltd v The Mauritius Revenue Authority & another (Mauritius)* [2017] UKPC 4; *Libyan Investment Authority & Ors v King & Ors* [2020] EWHC 440 (Ch); *R v Sheryar Khan Nawaz* [2020] EWCA Crim 893.

24. *Guardian Trust*, at 128.

directions. The question may then arise as to how long the trustee should wait for: (i) the warring parties to come to terms; (ii) the threatening party to issue their claim; or (iii) the threatening party to confirm they will not bring their claim.

In practice, this paralysis can last years. In the writers' view, the general rule that trustees must remain neutral as between warring beneficiaries requires that the trustees allow the parties time to engage in pre-action correspondence before taking any court action, in which the exchange of relevant information (such as required by the Pre-Action Protocols) may take place. However, where that correspondence has concluded, or where it is reasonably and honestly considered by the trustee that the correspondence may continue for some time without any resolution, then there should be no reason to delay an application to the court simply out of caution or fear of costs. The purpose of the inherent jurisdiction of the court over trusts has been said to exist "*to enable practical effect to be given to a trust*".[25] Where a trust has ceased to function, then a court application should be issued as a matter of course.

One option for the trustee is to force the issue themself by issuing declaratory proceedings, or in the case of a contested will proving the will in solemn form. However, such an option will be time-consuming, expensive, and where the threatened claim is weak (albeit disclosing an arguable foundation) could give the beneficiaries cause to complain as against the trustee. In the writers' view, the proper application will often be for a "*put up or shut up*" order.

"Put up or shut up" orders

A "*put up or shut up*" order is an order where the court puts the threatening party on terms that they must issue a claim within a given period or else the trustees will be authorised to distribute without regard to their threatened claim. It is not a debarring order.[26] The threatening party maintains their claim in relation to trust assets and if successful can recover money from the named beneficiaries who have been wrongly paid. What they lose (or rather do not gain) is a claim against the trustee for wrongly distributing the estate. In other words, the trustee is exonerated and they will not fall personally liable under the *Guardian Trust* principle.

But what is the jurisdiction for making such an order, and what are the requirements a trustee must successfully establish in order to obtain one?

The jurisdiction

The jurisdiction to make a "*put up or shut up*" order was considered (obiter) by Carnwith LJ in *Sherman v Fitzhugh Gates (A Firm)*.[27] An executrix obtained probate of the deceased's estate in 1994. The Defendant, Claudia Sherman, raised two objections at an early stage. First, she contended that a 50% beneficial interest in a property in the estate in fact belonged to her (owing to the property being held by the deceased and his sister, prior to the latter's death, as tenants in common and not joint tenants). Second, Claudia contended that the deceased's will was invalid for lack of testamentary capacity or from undue influence. In 1998, after drawn-out pre-action correspondence, Fitzhugh Gates ("**FHG**") issued proceedings on behalf of the executrix against Claudia seeking an inquiry as to whether she was entitled to any, and if so what, interest in the estate. The Master determined the severance issue but declined to determine the capacity issue on the basis that, as a matter of law, the validity of the will required a probate action. It was in part due to the latter—namely the misconceived form of proceedings—that a wasted costs order was subsequently made against FHG.[28]

That wasted costs order was overturned in the Court of Appeal, and Lord Carnwath commented on the proper form of proceedings an executor should take in such circumstances.[29] He had considerable sympathy

25. *Re MF Global UK Ltd* [2013] EWHC 1655 (Ch); [2013] 1 W.L.R. 3874, at [32].
26. *Coben-Ramsay v Sutton* [2009] W.T.L.R. 1303, at [13].
27. [2003] EWCA Civ 886; [2003] P.N.L.R. 39.
28. The wasted costs order was made by way of appeal of the original costs order made by the Master; *Sherman*, at [5].
29. *Sherman*, at [52–61].

with the difficult position the executrix found herself in, and considered that "*[t]he textbooks do not appear to offer an easy solution*". Simply proceeding on the basis of the will would have been "*risky*" in light of the *Guardian Trust* principle. Equally there were difficulties with the executrix starting a probate action. He held that: (i) there is no obligation on an executor to do so; (ii) it is difficult to fathom why it is the executor who should be expected to incur the costs of a fully-fledged probate action; and (iii) this was especially the case where, had the executor brought such proceedings, the beneficiaries might have had reason to complain.

In light of this, Lord Carnwath suggested that "*put up or shut up*" orders could be the solution:

> "[57] ... *The powers of the court to control abuse and delay have been strengthened by the new Civil Procedure Rules. However, even before those changes, the court's powers of direction under the old RSC Order 85 (administration actions) were very wide. I see no reason why they could not have been used to impose a time—limit on a potential challenge to the probate — in effect a direction to "put up or shut up" — following which the executor would be free to distribute under the will.*"

The writers agree and suggest that "*put up or shut up*" orders can and should provide, if not an easy solution, the best solution available in the circumstances.

The jurisdiction for "*put up or shut up*" orders is firmly rooted in the court's inherent power to control abuse and delay—a power crystallised in CPR 3.1(m). In *Sherman*, Claudia Sherman's pre-action conduct was "*vexatious*".[30] In particular: (i) the pre-action correspondence between the parties lasted for four years; (ii) there was no continuity or consistency with Claudia's legal representation or the conduct of her case; (iii) there was no explanation for why Claudia failed to keep FHG informed of her changes in legal representation or intentions; (iv) Claudia repeatedly threatened to issue proceedings, including in August 1994, February 1995 and May 1996, but did not; (v) no explanation was given by Claudia to FHG for why, having threatened proceedings so often, she did nothing; and (vi) Claudia had no reason to delay starting proceedings.[31]

This analysis strengthens the writers' view, which is that the factors relevant to an application for a "*put up or shut up*" order do not concern whether the threatening party potentially has a good claim. Instead, the relevant factors are how the threatening party has conducted their claim and, crucially, how much time has passed since they first raised it.

Sherman was applied in *Cobden-Ramsay v Sutton.*[32] The executor obtained an order permitting him to distribute the estate unless the Defendant issued proceedings within 28 days (for the revocation of the grant). Master Behren found there was a "*practice*" of making, what he termed, *Fitzhugh Gates v Sherman* orders.[33] Further, the court did not need to find an explicit or statutory basis to make such an order.[34] This was "*pre-eminently a case in which [a 'put up or shut up' order] should be made*".[35] The writers place emphasises on the following findings and facts: (i) this was a "*simple estate*", the net value being £280,000; (ii) the administration and distribution of the estate was ready to be completed; (iii) the process was "*held up because the defendant ha[d] made, and continue[d] to make*" allegations regarding testamentary capacity; (iv) all relevant material to the issue of capacity had been made available by the claimant to the defendant; and (v) the defendant still refused to issue.[36] In the writers' view, as with *Sherman*, the pre-action conduct was vexatious. The court had the power to intervene and control the abuse and delay of the threatening party, and so it did.

30. *Sherman*, at [32].
31. *Sherman*, at [8] and [31].
32. [2009] W.T.L.R. 1303 (QB). In *Cobden*, the '*put up or shut up*' order was sought as the executor did not want to take the risk under section 27 of the Administration of Estates Act 1925. That section provides a defence for personal representatives who wrongly distribute an estate where they act in good faith. As the executor was on notice of the threatened claim, it would be argued any subsequent distribution would not have been in good faith.
33. *Cobden*, at [7].
34. *Cobden*, at [12].
35. *Cobden*, at [15].
36. *Cobden*, at [2–4].

"*Put up or shut up*" orders have been made in offshore jurisdictions; see *Representation of BNP Paribas Jersey Trust Corp Ltd* [2010] JRC 199. In that case, there is no discussion of the jurisdiction to make such an order, nor any reliance on the English case law referenced above, instead:

> "*. . . **the court has no doubt whatsoever that it is wholly unacceptable for the present uncertain state of affairs to continue**. It is quite wrong that the trustee of what appears to be a perfectly valid Jersey trust should be hamstrung in the performance of its trustee duties by an unparticularised and vague complaint which has neither been substantiated by detail provided to the trustee nor taken forward by any hostile litigation. It is not fair to the trustee that it should be placed in this position. Neither is it fair to the other beneficiaries of the trust, who are precluded thereby from receiving any benefit out of the trust for as long as the trustee does not know whether it holds assets on the trusts of the settlement or on trust for the would be claimant*" (emphasis added).[37]

By stressing the unfairness of the situation to the trustees and the beneficiaries, *BNP Paribas* found a further basis for the court's jurisdiction to make "*put up or shut up*" orders: in addition to the court's inherent jurisdiction to control abuse and delay, the court also has an inherent jurisdiction "*to enable practical effect to be given to a trust.*"[38] In order to enable practical effect to be given to a trust, the deadlock caused by a threatening party who refuses to issue must be resolved.

Sherman was again applied in *Re Thomas (Deceased)*.[39] There it was held that the prospect of the defendant's claim (to bring proceedings for revocation of the grant of probate) could and would be addressed by a direction that, unless he commenced a claim within 28 days, the executor was at liberty to distribute the estate according to the will. The threatening party had: (i) from time to time from January 2020 intimated an intention to bring proceedings to invalidate the will; (ii) provided no substantial basis for his case that the deceased lacked testamentary capacity; and (iii) alleged other reasons for invalidity which were "*unspecified*".[40] The executor commenced Part 8 proceedings in July 2020 (around six months after the threatened claim had first been raised) to seek a "*put up or shut up*" order and a decision as to the construction of the will.

Parsons v Reid [2022] EWHC 755 (Ch)

The case of *Parsons* is the most recent authority on "*put up or shut up*" orders, but disturbs the above analysis of the jurisdiction and requirements for such an order.

The deceased died in March 2018. He left the main asset of his estate, a farm, on full discretionary trust for his two children and grandchildren. He had made a letter of wishes requesting that certain payments be made to his son, Stephen, with the residuary estate to be divided 60% to Stephen, and 40% to his daughter, Judith. In December 2019 Judith raised concerns about the level of payments made by the executors to Stephen. However, upon receiving a prompt reply from the executors, Judith responded saying that "*has cleared up my queries*".[41] In January 2020, by deed of appointment, the executors appointed £600,965 to Stephen, and the remainder of the residuary estate as to 60% Stephen and 40% Judith. Judith had information relating to the breakdown of that £600,965 from March 2020 onwards.

Upon the sale of the farm, the executors made interim distributions to Stephen and Judith: in April/May 2020, £1.35 million to Stephen and £700,000 to Judith, and in September 2020, £252,000 to Stephen and £140,000 to Judith. Subsequently, in September 2020, Judith's solicitors wrote to the executors complaining of the nature and level of payments claimed by Stephen and the executors. In December 2020, Judith's solicitors sent a letter of claim. Thereafter, "*matters . . . effectively*

37. *BNP Paribas*, at [23].
38. *Re MF Global UK Ltd*, at [32].
39. [2021] EWHC 937 (Ch); [2021] W.T.L.R. 1091.
40. *Thomas*, at [17].
41. *Parsons*, at [9].

stalled".[42] Judith neither withdrew her challenge (to the payments already made and payments yet to be made) nor issued a claim. In August 2021, the executors sought directions (under Part 8) from the court. Their primary position was to obtain permission to distribute forthwith without allowing Judith further time to bring her challenge. Alternatively, they sought a "*put up or shut up*" order.

Master Clark declined to grant the relief sought. Instead, he directed that the matter be sent to trial with full disclosure and witness evidence.

His reasoning was two-fold. First, Master Clark considered that, as a pre-requisite to making a "*put up or shut up*" order, the court must "*consider whether the claim was insubstantial, remote or speculative*", which necessarily involves "*considering its merits and therefore all the available material relevant to those merits*".[43] Second, and relatedly, "*the court would require to be satisfied that it was fully informed before making the order sought, because it would extinguish the trustees' liability.*"[44] Full disclosure had not been given at this stage, and for that reason the '*put up or shut up*' order was dismissed.

The ramifications of *Parsons* are significant. If followed, trustees making an application for a "*put up or shut up*" order will be required to (i) give full disclosure at the hearing of the application and (ii) establish that the threatened claim is "*insubstantial, remote or speculative*". This is a high and cumbersome threshold. In the writers' view it must be wrong for the following reasons.

First, the jurisdiction to make a *Fitzhugh Gates v Sherman* order is the court's inherent power to control abuse and delay and/or ensure a trust has practical effect. The focus, therefore, is on *how* the party has threatened their claim, not the strength of it. A detailed inquiry into the substantive merits of the threatened claim is unnecessary and places a cost burden on the trust, simply because someone has threatened a claim (but not, crucially, issued it).

Second, there is no need nor requirement for full disclosure. The question for the court is: what should the trustees do when faced with a threatening party who refuses to issue? Not, how might the court evaluate the unissued claim? Further, if full disclosure were required, one would question the benefits of a trustee applying for a "*put up or shut up*" order over pursuing positive substantive proceedings (such as a declaration, proving the will in solemn form, or a blessing application), thus rendering the jurisdiction pointless. The effect of Master Clark's decision transforms the application hearing for a "*put up or shut up*" order into a hearing which is tantamount to substantive proceedings—but this is precisely what the trustee is trying to avoid, and there is no principled reason why it should always be the trustees, and the trust, which is put to that administrative and cost burden.

In *Cobden*, the Court did give weight to the executor's disclosure of all relevant documents to the defendant.[45] However, in the writers' view, the significance of disclosure goes to whether the threatening party is in a position to bring their threatened claim, and if they were, why didn't they? In other words, if the executor has refused to give the threatening party documents which would shed light on its claim, then that informs the threatening party's decision (or inability) to bring a claim. As in *Sherman*, the question might be whether the potential claimant's actions could be considered "*vexatious*".[46]

Third, extinguishing the trustee's liability does not have a "*draconian effect*" as against the threatening party. A "*put up or shut up*" order, unlike the primary relief sought by the executors in *Parsons*, provides the threatening party with a reasonable window to issue their claim (and, even though that window may be weeks or months, it can only sensibly be made when a

42. *Parsons*, at [16].
43. *Parsons*, at [39].
44. *Parsons*, at [40].
45. *Cobden*, at [3].
46. *Sherman*, at [31].

significant period has elapsed since the threatened claim was first intimated).[47] Further, if the threatening party fails to issue within that window, they will merely lose their claim against the trustee for wrongful distribution. "*Put up or shut up*" orders are not debarring orders, as above. Besides, in practice the "*put up or shut up*" order is granted because of the threatening party's vexatious conduct of their claim, not because of its merits. It is difficult to understand the extent of Master Clark's sympathy with the threatening party.

Fourth, with respect to "*[f]ull disclosure [being] the price to be paid by the claimants for the exoneration they seek*",[48] it must not be lost sight of that the exoneration of the trustee is not the end goal of a "*put up or shut up*" order. Exonerating the trustee is merely the means to the end of giving practical effect to the trust.

In the circumstances: (i) Judith had raised concerns about payments to Stephen as early as December 2019; (ii) shortly after this she indicated her compliance; (iii) Judith was aware of the level and nature of Stephen's payments by March 2020 but only first wrote formally to the executors in September 2020; and (iv) after sending a letter of claim in December 2020 Judith allowed matters to stall, neither settling with Stephen, issuing her claim, nor conceding. No explanation was provided for why Judith had not issued proceedings. The trust was paralysed. The executors waited a full seven months before applying to the court for directions and were ready to distribute. In those circumstances, and absent full disclosure, a '*put up or shut up*' order should have been made.

The future for "put up or shut up" orders

In the premises, the court's jurisdiction to make such an order derives from the court's inherent power to control abuse and delay and/or give practical effect to trusts.

The cases where "*put up or shut up*" orders have been found to be appropriate (namely *Sherman*, *Cobden* and *Thomas*) invariably involve a threatening party who has not issued in circumstances where they have no reason not to. For example, sufficient pre-action correspondence and disclosure has occurred, whilst at the same time failing to give rise to any reasonable prospect of settlement. It is the delay and vexatious conduct of the threatening party which is—or should be—the bedrock of the jurisdiction, not the merits of the threatened claim. If a trustee finds themselves in a similar situation, they too should consider a "*put up or shut up*" order.

The timing of applications for this order is important. If too soon, the requirements for a "*put up or shut up*" order may not be made out. For example, the threatening party's conduct, in not yet issuing the claim, may be entirely reasonable if they are still engaging in productive pre-action correspondence to better understand the merits of their claim and/or explore settlement. Likewise, at this early stage the trust may not be properly characterised as paralysed. The writers' view is that the trustee should wait until (i) the correspondence has come to an unfruitful conclusion, or (ii) where it is reasonably and honestly considered by the trustee that the correspondence may continue for some time without any resolution. Crucially, in both cases, the time for distribution should have arisen or passed. *Cobden* is an example of (i): the threatening party first intimated their claim in April 2007, their enquiries/correspondence ceased by February 2008, and thereafter the threatening party had "*taken no further steps*".[49] *Sherman* is an example of (ii): where the executrix tolerated four years of correspondence before issuing their application.[50] In the writers' view, the executrix in *Sherman* should not only have considered making an application for a "*put up or shut up*" order, but they should have done so far earlier. In any event, once either (i) or (ii) above has

47. For example, where there has been extensive pre-action correspondence, such that the parties know each other's position, and the key documents have been disclosed, it is reasonable to expect a party to be able to issue proceedings within 28 days—as in *Cobden*.
48. *Parsons*, at [40].
49. *Cobden*, at [4].
50. *Sherman*, at [8].

occurred, and the time for distribution has arisen or passed, the trustee should not hesitate to make an application for a "*put up or shut up*" order.

A trustee making such an application should be mindful of three issues.

a. First, as considered above, there is the problem of *Parsons*. If a trustee is required to give full disclosure and establish the threatened claim is "*insubstantial, remote or speculative*", this may rightly deter trustees from making such an application. *Sherman* was a Court of Appeal case, but the comments on "*put up or shut up*" orders were obiter dictum rendering it persuasive, rather than binding. The relevant paragraphs in *Sherman* were, however, explicitly quoted and applied in *Cobden*.[51] Likewise, *Sherman* was applied in *Thomas*. Neither of these cases determined whether the threatened claims were "*insubstantial, remote or speculative*", nor, in the writers' view, did either require that full disclosure was given.[52] Therefore, *Parsons* (a High Court case) is inconsistent with two other High Court cases (*Cobden* and *Thomas*) and obiter dictum in the Court of Appeal (*Sherman*). In any event, *Parsons* should not be followed for the reasons given above. However, trustees should be mindful of this obstacle.
b. Second, trustees need to remain neutral between warring parties. An application for a "*put up or shut up*" order should not be construed as trustees taking sides. Where a reasonable period has passed, the trustee must take steps to allow for the trust to be administered—it is part of their core duty to act in the best interests of the trust as a whole. An application is not therefore favouring one party over the other, it is simply forcing the resolution of the issue that is causing the deadlock, as acknowledged in both *Sherman* and *Cobden*.[53]
c. Third, although lack of merits is not a distinct requirement for obtaining a "*put up or shut up*" order, merits are still relevant to the trustee's determination of whether such an order is appropriate. As considered above, when faced with a threatening party who does not issue, the trustee has the option to issue positive substantive proceedings—such as a declaration or proving the will in solemn form. The writers consider that when the threatened claim appears weak, but does have an arguable foundation (or does not invoke the "red face" test), the best course, where the warring beneficiaries have not come to terms, is to seek directions for a '*put up or shut up*' order. Indeed, in such circumstances the trustee might be subject to criticism from the named beneficiaries if they issued substantive proceedings. However, what about where the threatened claim is a strong one, albeit the threatening party is refusing to issue? This situation is different, and the trustee may legitimately and properly issue substantive proceedings.

So, when should a trustee take this course instead of seeking directions for a '*put up or shut up*' order? The writers consider that this dividing line should be investigated further and would benefit from high authority. In particular, if a trustee pursues substantive proceedings where the threatened claim is good, but only seeks a direction for a '*put up or shut up*' order where the threatened claim is bad, does this conflict with the trustee's duty to remain neutral between warring parties?

And what of where a threatening party has a good claim, but no funds (and no reasonable chance of gaining litigation funding) to pursue it? That factor would, in the writers' view, be a relevant factor and might convince a trustee to instead seek a declaration.

Caveats

Where the threatened claim concerns the validity of a will, the threatening party may make use of the caveat

51. *Cobden*, at [9].
52. Full disclosure was relevant in *Cobden* to the extent that the threatening party had no reason not to delay issuing proceedings. If full disclosure was given in *Thomas* with respect to the capacity issue, this was not indicated in the judgment.
53. *Sherman* at [55]. *Cobden* at [14].

procedure in rule 44 of the Non-Contentious Probate Rules 1987 ("**NCPR 1987**"). By entering a caveat, no grant can be sealed with respect to the would-be personal representatives. The would-be personal representatives may subsequently cause a "warning" to be issued in respect of the caveat.[54] However, the threatening party (having an interest contrary to that of the person warning) may then make an "appearance".[55] Once an appearance has been entered, a caveat may only be disposed of by (i) order of a district judge on summons, or (ii) order of a district registrar on summons by consent. Otherwise, the caveat remains in force until the commencement of a probate claim.[56]

In the hands of a threatening party who repeatedly threatens but never issues claims relating to the validity of the will, the caveat procedure leads to that old enemy of the trust—paralysis. It prevents the executors from obtaining a grant of probate. As above, the writers' view is that "*put up or shut up*" orders can, and should, be used to resolve this.

The availability of such orders in the context of the caveat procedure was considered, and re-affirmed, in *Elizabeth Lisa Shattock v Suzanne Elisabeth Scott-Maxwell*.[57] In that case the deceased died in 2016, with a caveat being entered by the respondent shortly after. The caveator cast doubt over the last will of the deceased on the basis of capacity and/or undue influence. The caveator did not issue a probate claim—insisting that it was the executrix who should issue the probate claim and prove the will. The applicant made a summons for directions to a district judge, in accordance with the procedure set out in the NCPR 1987.

Gibson DJ considered that "*[t]he usual practice of this court is to make an order against the respondent, discharging the caveat unless a probate claim is filed in the Chancery Division by a certain date*"—so a "*put up or shut up*" order.[58] And this is what the applicant sought. The respondent made the submission that, as a matter of law, it is always for the person who wishes to prove the will that has to issue probate proceedings. This was rejected by Gibson DJ. The plain meaning of rule 44(13) NCPR 1987 was held to bestow a discretion on the district judge to make directions of the kind sought.[59] In exercising that discretion, the district judge must consider "*what is fair in [the] particular case*".[60]

On the facts of that case, Gibson DJ determined that it was in fact fair for the executrix to bring the probate claim. This seems to be in part on the basis of her questionable conduct of the litigation.[61] More significantly, Gibson DJ considered that the available information indicated that the Chancery Division would most likely determine that the burden of proof in any probate proceedings would rest on the executrix of the will.[62] In light of that, it was held that the "*fair course*" was for the executrix to lodge the probate action rather than to force the respondent to do so.

It follows that "*put up or shut up*" orders can and should be resorted to in order to resolve paralysis caused by the caveat procedure. Such orders are in fact "*usual practice*". The default position appears to be that the caveator should issue the probate proceedings, unless fairness indicates otherwise. A factor worth bearing in mind when considering fairness is the burden of proof. A trustee should consider the nature and strength of the allegations made by the caveator, and who the burden of proof would likely fall upon.

The writers note the Draft Probate Rules which contain a reformed caveat procedure.[63] In the proposed revised procedure, a caveat is termed an objection, a warning is termed a response, and there is no provision

54. Rule 44(5) NCPR 1987.
55. Rule 44(1) NCPR 1987. The archaic language of the NCPR 1987 is unhelpful in practice, and perhaps illustrates most neatly why an update is required.
56. Rule 44(13) NCPR 1987.
57. Unreported, 17 January 2018.
58. *Shattock* at [6].
59. *Shattock*, at [12–13].
60. *Shattock*, at [14].
61. *Shattock*, at [17]. There is a reference to the applicant swearing an affidavit which was "*clearly inaccurate*".
62. *Shattock*, at [19].
63. Draft Probate Rules 2013, final draft June 2013, at Part 11.

to make an appearance. In order to make an objection, an objector must set out the particulars of the objection (rule 55(1)). Further, an objection would have effect for a period of twelve months unless withdrawn by the objector (rule 58), extended or terminated by the court on an application by the objector or a person who has filed a response (rule 59), or upon application for a grant by a party successful in any probate proceedings (rule 61). Unlike the caveat procedure, there is no provision which enables the caveat to operate indefinitely upon the entering of an appearance (NCPR 1987 rule 44(13)). Interestingly, the draft form of the Draft Probate Rules, as considered in *Williams, Mortimer & Sunnucks*, provided that once a response had been filed the objection would cease with effect three months after—unless an application is made, or a probate claim is commenced by the objector.[64] The latter is, in effect, a mandatory "*put up or shut up*" order. In any event, this provision did not make it to the final Draft Probate Rules, and nor was the new objection procedure contained in the final Draft Probate Rules enacted by the Non-Contentious Probate (Amendment) Rules 2020. In the premises, unless and until the caveat procedure is amended, recourse should be made to the summons procedure under the NCPR 1987 rules to seek a "*put up or shut up*" order.

Conclusion

A claim is not the same as a fact. And trustees operate in the real world, not in an academic vacuum. While private lifetime trusts may be the preserve of the wealthy, trusts in estates are common to all, and a beneficiary of an estate may be in dire need of their bequest. In circumstances where the trust is paralysed by a threatening party who repeatedly threatens (but refuses to issue) a claim to the trust assets, the trustee cannot simply wait—they must take action. Nor can or should they assume that a claim is meritorious, or might be meritorious following a substantive claim. They can and should generally be neutral, but they should not "*stand fast*". They are there to administer the trust or estate, not wait for someone else to tell them what to do.

The conclusion of the above analysis is, in the writers' view, that in the circumstances described above, the trustee should first allow a reasonable time for the warring parties to attempt to set out their positions in sufficient detail, exchange information, and settle the threatened claim. However, where that correspondence has come to an unfruitful conclusion, or where it is reasonably and honestly considered by the trustee that the correspondence may continue for some time without any resolution, the trustee should not hesitate to make an application for a "*put up or shut up*" order where the time for distribution has arisen. A trustee cannot comply with its fiduciary duties by doing nothing, nor will it comply with its duty to protect the trust assets by spending them on substantive proceedings when the burden of cost should properly fall on the threatening party.

The jurisdiction to make such an order arises from the court's inherent jurisdiction to control abuse and delay and/or give practical effect to trusts. It does not bring into play issues of disclosure and merits, but should focus on conduct, time, and practicalities. The decision in *Parsons* should therefore not be followed in future cases. A trustee seeking a '*put up or shut up*' order should not need to provide full disclosure to the court at the relevant hearing, and need not establish that the threatened claim is "*insubstantial, remote or speculative*". The touchstone is the threatening party's *conduct* of their claim (whether good, bad or otherwise) and the effect that conduct has had on the trust.

The writers also propose that '*put up or shut up*' orders can and should be sought where a caveat has led to gridlock, and the caveator shows no sign of issuing. The case law suggests that the default position is that, upon entering a caveat, it is for the caveator (the

64. *Williams, Mortimer & Sunnucks—Executors, Administrators and Probate* 21st Ed., at paragraph 25-02. There appears to have been a Rule 57(4) in the draft form of the Draft Probate Rules which did not make it through to the final form.

threatening party) to issue probate proceedings. The writers agree.

The trustee's ultimate duty is to distribute the property. Whilst they should rightly be weary and mindful of the risk of personal liability under the *Guardian Trust* principle, and indeed remain accountable and liable to those of whom they in fact hold the trust property, they should not do nothing. They cannot allow the trust to be paralysed. In such a predicament the trustee's hands are not tied, and they may, and should, seek directions for a "*put up or shut up*" order.

***Joseph de Lacey**, Senior Associate, Farrer & Co, 66 Lincoln's Inn Fields, London, UK. Email: joseph.delacey@farrer.co.uk*

***Niamh Herrett**, Barrister, Serle Court Chambers, 6 New Square, Lincoln's Inn, London, UK. Email: nherrett@serlecourt.co.uk*