IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H12 of 2015

ROBERT BADENACH — First Appellant

MURDOCH CLARKE SOLICITORS (A FIRM) — Second Appellant

BETWEEN: - and -

ROGER WAYNE CALVERT — Respondent

**APPELLANTS' REPLY**

**PART I: Suitability for publication**

1. The appellants certify that this submission is in a form suitable for publication on the internet.

**PART II: Concise reply to the argument of the Respondent**

2. **Duty of care to the testator:** The appellants' case does not seek to justify a failure to ask questions or to give advice. The issue is whether the duty formulated by the Full Court was too specific. The conflation of duty and breach obscured the difficulties in recognising the duty and ultimately led the Full Court to the creation of an extended duty of care to the testator, mirrored in a coextensive duty to the respondent. The Respondent's various incarnations of the duty expose the difficulties arising from the conflation of duty and breach in this case.

3. **The contended duty question**: The respondent's submissions (RS) emphasise this as a case about a failure to make any inquiry and to give any advice[1]. Correspondingly, the respondent variously frames the duty, by reference to its content, to take reasonable care to:

   (a) give effect to the testamentary intention of the testator[2];

   (b) make inquiry and give, unspecified, advice[3];



[1] RS particularly at [25].

[2] RS [13], [20], [24], [30], [42] and [48].

[3] RS [11], [12], [14], [49] and [51].

**Filed on behalf of: Appellants**

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(c) give effect to the testamentary intention of the testator by making inquiries and by giving unspecified advice[4]; and

(d) give effect to the testamentary intention of the testator by giving advice to consider an *inter vivos* transaction to defeat any claim by the daughter[5].

4. The respondent's formulation of duty (a) erroneously assumes that the testator would only have chosen one of several options which were open. Duty (b) is incomplete. It is not simply a duty to inquire and then to give some unspecified advice. It must, as the respondent accepts[6] include a range of advice; some of it inimical to his economic interests.

10 5. Duty (c) is an amalgamation of (a) and (b). But it is unrealistic to constrict the role of the solicitor to giving advice only in the form of pallid options. A client will very frequently ask for advice about all options and how they might, but sometimes how they *should* be exercised. Moreover, there is often a very fine line between advice that the client 'should' take and advice that the client 'should consider' taking.

6. There is no question that the Appellants owed a duty of care to the testator; the issue is what did its content require?[7]

7. Duty (d) is the most specific example of the conflation error; it selectively focuses upon the chain of circumstances which the respondent contends caused him loss in the events as they did occur.

20 8. **U.S. Authorities:** It is unproductive to embark upon an excursion into the disparate United States jurisprudence, for three reasons. First, the position in California as exampled in *Heyer v Flaig*[8] and *Bucquet v Livingston*[9], depends on a balancing of six factors including the moral blame which is attached to the lawyer's conduct and a policy of preventing future harm[10]. Secondly, there is no uniformity of approach as between the States. New York[11], Texas[12] and Maryland[13] do not generally permit recovery by disappointed non-client beneficiaries[14].Thirdly, some States, specifically Ohio, limit the right of action to the direct consequences *"of the lawyer's professional*

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4 RS [24] and [48].

5 RS [58].

6 RS [48].

7 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [58-64], Gummow J.

8 70 Cal 2d 223 (1969).

9 57 Cal App 3d 914 (1976). A case involving no conflict between testator and beneficiaries and in that respect like *Hill*.

10 *Heyer v Flaig* at 228, *Bucquet v Livingston* at 921.

11 *Victor v Goldman* 344 NYS 2d 672 (1973), 351 NYS 2d 956 (1974) affirmed 351 NYS 2d 956 (1974), District of Columbia Court of Appeals.

12 *Barcelo v Elliott* 923 SW 2d 575 (1996).

13 *Noble v Bruce* 349 Md 730 (1998).

14 Generally, on the position in the United States see Prosser, Wade and Schwartz's *Torts, Cases and Materials* (13th ed) (2015) at 434-437, *The Law of Torts* by Dan Dobbs (2000) at 1396-1398; and Mortensen: *Solicitors' Will-Making Duties* (2002) 26 MULR 60.

*negligence (where) the testator's intent as expressed in the testamentary instrument is frustrated*"[15].

9. **Costs relevant to content of duty:** Before a duty of care is imposed, consideration must be given to what is required to reasonably discharge that duty as a component of the "*totality of the relationship between the parties*"[16]. Contrary to RS [44], cost is a very realistic consequence associated with the proper discharge of the duty: what is the client required and prepared to pay, to advantage the beneficiary?

10. **The coextensive duty of care to the Respondent**: The formulation of the coextensive duty at [47] begs the essential question: what advice was required to be given in the circumstances? It is unrealistic and unworkable to impose a duty of the kind formulated by the respondent in the hope that it will restrict the solicitor to giving advice only about options. The solicitor is likely to be called upon to give advice and express an opinion about the appropriate courses the testator should or should consider taking, including those to the economic detriment of the beneficiary to whom it is said the coextensive duty is owed.

11. The respondent's submissions are inconsistent. He accepts that it was open to the appellants to give advice inconsistent with his economic interests[17]. He then seeks to avoid the fundamental question of conflict of interest, and lack of coincidence of interests, by postponement to a later point in time: "*If the solicitor had not breached his duty*"[18].

12. The duty question is not capable of segmentation in this way: the conflict arises and is apparent from the outset. The solicitor may advise the testator not to create a joint tenancy over the properties. Alternatively, the solicitor may advise that a substantial bequest be made in favour of the daughter. Such advice clearly conflicts with the economic interests of the respondent as beneficiary. It is the lack of coincidence, caused by such conflicts, which is fatal to the respondent's formulation of the duty of care said to be owed to him, no matter which version is accepted.

13. The respondent underestimates the role of the solicitor at [53]. It is entirely likely that a solicitor will be called upon to do more than suggest options; that is, to give advice not only as to what might be in the best interests of the testator, but, depending on circumstances, what *is* in the best interests of the testator, having regard to his moral obligation pursuant to the TFM Act, and by the new duty, the solicitor may also need to have dealings with the beneficiary[19]

14. **Public policy**: The proposed duties to testator and non-client beneficiary are incoherent with the familial/moral policy considerations underpinning the TFM legislation. The moral obligations of the just and wise testator are so fundamental that

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[15] *Schreiner v Scoville* 410 N.W. 2d 679 (987) at683.

[16] *King v Philcox* [2015] HCA 19, (2015) 89 ALJR 582 at [80] per Nettle J.

[17] RS [48].

[18] RS [51].

[19] Appellants' submissions at (47-48).

they cannot be contracted out of[20]. But the solicitor is now under a new duty both to advise the testator of the importance of his moral/familial obligations, recognised by the law and also to advise his client that he should consider and, depending on the circumstances, in fact should adopt a course to avoid those same familial/moral obligations.

15. The revenue and other legislation referred to by the respondent are not underpinned in policy considerations based on fundamental moral obligations and family relationships.

16. **Inconsistency and incoherence**: The economic interests of the respondent are inseparable from the formulation of the duty of care for which he contends. It is not a question of acting for the respondent; the issue is whether in discharging the putative duty of care, a solicitor can freely give advice to his or her client which may impact on the beneficiary to whom such duty is owed. The duty recognised in *Hill v Van Erp* was capable of being discharged only in the interests of both the testator and the beneficiary: the duty in this case was capable of being discharged in ways which did not benefit or advance the economic interests of the respondent.

17. **Causation**: The appellants did not contract with the respondent to provide him with the opportunity of gain or loss avoidance. For this reason the contract cases are of little assistance[21].

18. In some cases it is readily apparent that the lost opportunity is itself of value; for example, where a solicitor negligently fails to commence an action for damages for personal injury, within time[22].

19. In this case, the respondent's claim of lost opportunity must be categorised as a form of loss in itself; otherwise he had no claim. The respondent was required to prove, on the balance of probability, in order to discharge his causation onus conformably with sections 13 and 14 of the *Civil Liability Act* 2002 , loss of the opportunity of an outcome better than he in fact achieved.

20. The respondent draws attention to a passage from *McGregor on Damages*, which identifies, as a second element, proof on the balance of probabilities that *"the claimant has lost the particular chance"*[23].

21. In this case the evaluation of the chance of a better outcome depended upon a hypothetical assessment of decision-making by the testator. That chance may never have eventuated. The range of hypothetical outcomes at least included:

    (a) do nothing, and let a judge make a determination in the event that the daughter prosecuted a TFM Act claim;

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[20] *Liebermann v Morris* (1944) 69 CLR 69.

[21] *Tabet v Gett* (2010) 240 CLR 537 at [47], Gummow ACJ and [124], Kiefel J.

[22] *Kitchen v Royal Air Force Association* (1958) 1 WLR 563, (1958) 2 All. E.R. 241; and *Johnson v Perez* (1988) 166 CLR 351.

[23] RS [93]. This is a reference to the 18th edition. The corresponding passage in the 19th edition (2014) is at [10-045], page 374.

(b) make complete amends with the daughter, by bequeathing to her the whole, or substantially the whole, of the estate;

(c) make a substantial bequest to the daughter, in cash or of real estate, in the hope of forestalling a TFM Act claim;

(d) make a more modest bequest in the hope of forestalling a TFM Act claim; or

(e) take steps to defeat a claim, which may have been partially or wholly effective, depending on the value of assets retained.

22. What the respondent failed to prove, by inference, is that the testator would have taken **some** step to his (the respondent's) advantage; i.e. he failed to prove a better outcome hypothesis as more probable than the competing worse outcome which he suffered[24]. At a minimum he was obliged to prove on the balance of probability a *"substantial prospect"* of a better outcome[25]. He did not. His loss of chance claim was entirely speculative for the reasons stated by Blow CJ[26] and Estcourt J[27].

23. Had the respondent proved on the balance of probabilities that the testator would have taken some positive step to his advantage, then it is accepted that the valuation of the lost opportunity is a matter of *"informed estimation"*[28].

24. Finally on this point, evidence by the respondent as to what he would have done, if asked about the creation of joint tenancies, would not have been admissible[29]. Accordingly, the point made by the Respondent about the conduct of the cross-examination, is of no assistance[30].

Date: 18 January 2016

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[24] Sellars v Adelaide Petroleum NL (1994) 179 CLR 332 at 368, Brennan J.

[25] Sellars v Adelaide Petroleum NL at 368 per Brennan J. Further, Tabet v Gett (2010) 240 CLR 537 at [124] , Kiefel J.

[26] Reasons [32-33].

[27] Reasons [129] and [131].

[28] Sellars v Adelaide Petroleum NL (1994) 179 CLR 332 at 368 per Brennan J. The Malec v J C Hutton Pty Ltd (1990) 169 CLR 638 assessment would then have included an evaluation of the chance of settling with the daughter, and for how much, or changing the titles to joint tenancies.

[29] *Civil Liability Act* 2002, section 13(3)(b).

[30] RS [101.5].