The scope of a solicitor's duty of care to intended beneficiaries redefined

Tim Hackett reports on *Badenach v Calvert* [2016] HCA 18.

Introduction

The High Court of Australia[1] ('High Court') has allowed an appeal on the extent and scope of the duty of care of a solicitor in the context of a will dispute. The High Court clarified that *Hill v Van Erp*[2] is not authority for the proposition that a solicitor instructed to prepare a will always owes a duty of care to an intended beneficiary.

First instance decision

The first appellant, a solicitor, prepared a will that devised the entirety of the testator's estate to the respondent ('beneficiary'). After the testator died, it emerged that the appellant's firm (the second appellant) had prepared two wills in 1984, one of which included a bequest to an estranged daughter. She sued for maintenance out of the estate and was awarded a significant portion of the estate plus legal costs. The beneficiary then sued the appellant and the appellant's firm in negligence.

At first instance, the beneficiary's action failed.[3] Blow CJ held that while the solicitor owed a duty of care to the testator and breached that duty, causation was not established. His Honour found that the solicitor and his firm owed a duty of care to the testator to enquire as to the existence of any family members who could make a claim under the *Testator's Family Maintenance Act 1912* (Tas) ('TFM Act'). His Honour held that if the solicitor had made the enquiries, then the testator would have disclosed the existence of the daughter and the solicitor would have advised the testator of the risk of a successful claim under the TFM Act.

However, his Honour concluded that it was unnecessary to make a finding as to whether the solicitor owed a duty of care to the beneficiary as pleaded, because no causation could be established on the facts. His Honour was not satisfied, on the balance of probabilities, that the testator would have accepted the solicitor's advice (in the event the duty had been properly discharged) and would have taken action to prevent a successful maintenance claim by the daughter.

Full Court

The Full Court of the Supreme Court of Tasmania ('Full Court') allowed the beneficiary's appeal[4], holding that the trial judge confined the scope of the solicitor's duty of care unnecessarily[5] and that the duty of care extended to advising the testator about possible maintenance claims.[6] In their Honours' view, the solicitor's duty to the testator extended not only to a duty to enquire whether he had any children, and to advise on a potential claim under the TFM Act and the impact on his estate, but also to advise on the possible steps he could take to avoid that occurring. This was so, even if the testator did not make any enquiry about the relevant steps.

The Full Court held that the duty of care owed by the solicitor to the intended beneficiary could not be less than that owed to the testator under the terms of the retainer or in tort. As such, the Full Court held the duty the solicitor owed to the testator was co-extensive with that owed to the beneficiary. The Full Court also held that the loss suffered by the beneficiary, as a result of the solicitor's negligence, was the loss of opportunity[7] that the testator may have taken steps to protect the beneficiary's position.

High Court

Before the High Court, the appellants argued that the Full Court erred in extending the scope of the solicitor's duty of care. The High Court unanimously allowed the appeal, with French CJ, Kiefel and Keane JJ delivering a joint judgment and Gageler and Gordon JJ each delivering separate concurring judgments.

In relation to the scope of the solicitor's duty of care to the testator, French CJ, Kiefel and Keane JJ held that on receiving the original instructions the solicitor would have observed that no provision had been made for any family member. Therefore 'prudence' would have dictated an enquiry about the testator's family.[8] That would have led to information regarding the daughter. Accordingly, in the circumstances of this retainer, the solicitor was obliged:

- to advise the testator that it was possible that a claim might be brought by the daughter against the testator's estate under the TFM Act;[9]
- to inform the testator that, in the absence of further enquiries, the solicitor could not advise on whether the daughter would qualify for provision out of the client's estate under the TFM Act;[10]
- to advise the testator that it could not be known whether the daughter would in fact make a claim;[11]
- to identify the options available to the testator to deal with a possible TFM Act claim by the daughter (with the High Court noting that the testator could have made further enquiries to assess the risk of a successful TFM claim);[12] and
- to ensure that the testator considered the claims that might be made on the estate before giving instructions on his testamentary dispositions.[13]

However, French CJ, Kiefel and Keane JJ held[14] that the scope of the solicitor's duty of care to the testator could not have extended to providing voluntary advice about how to defeat any possible TFM claim against the testator's estate by, for example, *inter vivos* transactions with property interests as alleged by the beneficiary. This was because the testator's initial instructions were limited to the drafting and execution of his will to solely benefit the beneficiary.

French CJ, Kiefel and Keane JJ also noted that the solicitor, without more information, had no reason to consider that a TFM claim was likely to be made or that the testator wanted to take steps to defeat any possible claim. The beneficiary's case was not put on the basis that the testator, on hearing that a TFM claim by the daughter was a mere possibility, would have instructed the solicitor that he wished to take all lawful steps to defeat such a claim. It was not known whether a TFM claim would be successful and, if so, the extent of the provision that might be made for the daughter from the testator's estate.[15]

In relation to causation, French CJ, Kiefel and Keane JJ noted that because the allegations related to a failure to advise, the focus was not on what occurred but on what should have occurred if the solicitor had acted with requisite professional skill and care.[16] Their Honours held that causation could not be established even on the duty of care as alleged because it could not be concluded, on the balance of probabilities, what course of action the testator would then have taken if so advised. In addition to the choices available to the testator, there would have been other matters put to the testator for his consideration including the risks concerning the irreversible nature of the *inter vivos* transactions and the associated cost and delay.[17] Accordingly, French CJ, Kiefel and Keane JJ held that the beneficiary had not discharged the 'but for' test of causation required by s 13(1)(a) of the *Civil Liability Act 2002* (Tas).[18]

As to the question of whether a duty was owed to the beneficiary, French CJ, Kiefel and Keane JJ considered that any duty owed to the testator could not be one which extended to the beneficiary by analogy with *Hill v Van Erp*[19]. Their Honours held that the solicitor's duty to the beneficiary, as recognised by the Full Court, did not arise because the interests of the testator were not the same as the interests of the beneficiary and the advice and warnings which the solicitor would need to give about such transactions would reflect that the interests of the testator and beneficiary were not coincident.[20]

French CJ, Kiefel and Keane JJ held that the duty for which the beneficiary contended was not the same as the more limited duty recognised in *Hill v Van Erp* to give effect to a testamentary intention.[21] Their Honours noted, by way of example, that at any point prior to completion of the creation of interests, the testator could change his mind despite any promise having been made to the beneficiary. Accordingly, this was not a circumstance which could arise where a solicitor was merely carrying into effect a testator's intentions as stated in his or her final will.[22]

Gageler J held that the central flaw in the reasoning of the Full Court was in treating the scope of the duty of care owed by the solicitor to the beneficiary as co-extensive with the scope of the duty owed to the testator.[23] His Honour emphasised that the duty owed to a testator was 'more narrowly sourced and more narrowly confined'[24] to performing the specific action of preparing the will on the basis of the testator's instructions to confer an intended benefit to particular beneficiaries, rather than a broader duty to take reasonable care for future contingent interests of a range of possible beneficiaries.[25]

His Honour considered that in the present case, the solicitor's duty was to carry out the testator's instructions, namely to ensure that the beneficiary was given a legally effective testamentary gift of the client's estate.[26] While that duty may have extended to enquiring about the daughter and her possible claims, it did not extend to advice to avoid possible claims, and even if it were an omission, that advice was not within the scope of the duty owed to the beneficiary.[27]

Gordon J held that the appellants did not owe a duty of care to the beneficiary because at the time it could not be said that the interests of the testator were the 'same, consistent or coincident'[28] as those of the beneficiary: the will had not been drawn, it was not clear what the testator would have done had he enquired about other family members, and the testator might have made a different decision.[29] However, even if a duty was owed to the beneficiary and had been breached, the beneficiary failed to adduce any evidence to establish what the client would have done but for that breach, and only managed to show that it was more probable than not that he would have received the entirety, or more of the estate than he did, as beneficiary.[30]

Conclusion

The High Court's decision makes it clear that the scope of the duty of care owed by a solicitor to a testator will depend on the circumstances of the case, in particular, the precise instructions received and the solicitor's actual or implied knowledge about the circumstances of the testator. Further, the High Court confirmed that a solicitor instructed to prepare a will will not always be found to owe a duty of care to an intended beneficiary.

Endnotes

1. French CJ, Kiefel, Gageler, Keane and Gordon JJ.
2. (1997) 188 CLR 159.
3. *Calvert v Badenach* [2014] TASSC 61 per Blow CJ.
4. *Calvert v Badenach* [2015] TASFC 8.
5. At [19].
6. At [21], [59], [70].
7. *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355–6.
8. At [27].
9. At [27].
10. At [28].
11. At [28].
12. At [29].
13. At [30].
14. At [31] – [33].
15. At [31] – [33].
16. At [26].
17. At [34].
18. At [36] and [41].
19. (1997) 188 CLR 159.
20. *Badenach* at [47].
21. At [45].
22. At [47].
23. At [56].
24. At [58].
25. At [57] – [59], and also at [62] – [63].
26. At [64].
27. At [66] – [68].
28. At [74].
29. At [83] – [91].
30. At [92].