In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 41

B E T W E E N:

(1) DEBRA ANN TUCKER

(2) LISA YOUNG

(3) VALERIE YOUNG

Plaintiffs

and

(1) DESIREE O'CONNOR

(2) MJM LIMITED

Defendants

RULING

Before: **Hon. Alexandra Wheatley, Registrar**

Appearances: **Ms Sara-Ann Tucker of Trott & Duncan Limited, for the Plaintiffs**

Mrs Jennifer Haworth of MJM Limited, for the Second Defendant

Date of Hearing: 24 October 2023
Date Draft Circulated: 8 May 2024
Date of Ruling: 10 May 2024

Strike Out Application; Reasonable Cause of Action; Duty of Care; Abuse of Process Principles of White v Jones; Extension of Duty of Care to Disappointed Beneficiaries

RULING of Registrar, Alexandra Wheatley

INTRODUCTION

1. This is a dispute between the children of Mr Gregory Michael Young (**the Testator**) who passed on 21 May 2021 at the age of seventy-five years. The Testator was predeceased by his wife, Mrs Jennifer Young, who is the mother of the Plaintiffs. The First Defendant is a half-sister to the Plaintiffs as she was born to the Testator by another woman during his marriage to Mrs Young.

2. There are allegations of discord between the siblings which the Plaintiffs say ultimately led to a will being drafted by the Second Defendant excluding the Plaintiffs from the Testator's estate and was executed on 30 March 2012 (**the Will**). On 18 February 2022, the Plaintiffs filed a Specially Endorsed Writ of Summons (**the Claim**) which, in summary, alleges as follows:

    i. The First Defendant used duress or undue influence over the Testator in order to be the sole beneficiary of his estate at the exclusion of the Plaintiffs;

    ii. Further and in the alternative, that the Second Defendant was professionally negligent in drafting the Will for the Testator which caused the Plaintiffs to suffer injury, loss and harm.

3. As it relates to the negligence claim against the Second Defendant, it is being alleged that the Will was not duly executed due to plethora of allegations set out at a) through p) of paragraph 12 of the Claim. Briefly, the allegations include, *inter alia*, that the First Defendant obtained advice from the Second Defendant as to how the Plaintiffs could be excluded from the Testator's estate which resulted in a conflict of interest; that instructions for the drafting of the Will were provided by the First Defendant and not the Testator; and that there was a failure to confirm the Testator's true wishes for his estate, along with

failing to ensure the Testator understood and had full knowledge of the terms of the Will.

4. The Second Defendant filed an application by way of Summons dated 4 May 2023 to strike out the Plaintiffs' claim against the Second Defendant (**the Strike Out Application**). The following relief is sought in the Strike Out Application:

    a. *The Plaintiffs' claims against the Second Defendant, as set out in the Specially Endorsed Writ of Summons dated 18 February 2022 be dismissed under Order 25 rule 1 because the Plaintiffs have not taken out a summons for directions within one month of pleadings in this action having closed;*

    b. *Further or alternatively, the Plaintiffs' claims against the Second Defendant be struck out under Order 18 rule 19(1)(a), and/or in the Court's inherent jurisdiction, in that they disclose no reasonable cause of action.*

    c. *Further or alternatively, the Plaintiffs' claims against the Second Defendant be struck out or stayed generally pending final determination of the Plaintiffs' claims against the First Defendant, pursuant to Order 18, rule 19(1)(d) and/or Order 1A, rules 1 and 4 and/or RSC Order 15, rule 5(1) and/or pursuant to the Court's inherent jurisdiction, on the basis that the Plaintiffs' claims against the Second Defendant amount to an 'abuse of process' of the Court, and serve no useful or convenient purpose*.

LEGAL TEST APPLIED IN STRIKE OUT PROCEEDINGS

5. Whilst the parties were not at odds regarding the law as it relates to strike out applications, the power to make an order striking out a pleading under the Rules of the Supreme Court 1985 (**RSC**), Order 18, Rule 19 is discretionary and provides as follows:

    "***18/19 Striking out pleading and indorsements***

    19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
    (a) it discloses no reasonable cause of action or defence, as the case may be; or
    (b) it is scandalous, frivolous or vexatious; or
    (c) it may prejudice, embarrass or delay the fair trial of the action; or
    (d) it is otherwise an abuse of the process of the court;

    and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

    (2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

6. The summary procedure under this provision will only be applied to cases which are plain and obvious where the case is clear beyond doubt, where the cause of action is on the face of it obviously unsustainable, or where the case is unarguable.

7. Former Chief Justice Hargun helpfully summarized the legal test in *Geoffrey Willcocks v Joseph Wakefield and Wakefield Quin Limited* [2023] at paragraph 12:

> *"…a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known*."

8. In the matter of *David Lee Tucker v Hamilton Properties Limited* [2017] SC (Bda) 110 Civ, Registrar Subair Williams (as she then was) set out the legal principles to be applied in strike out applications at paragraphs 11 to 14:

> "*11. The principles of law applicable to the strike-out of a claim were no source of contention between the parties. This area of law has been well recited in previous decisions of this Court. In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross-examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out.*
>
> *12. That is not to say that a strike-out order should stand as the remedy for a badly pleaded statement of claim which can be cured by an amendment (see Dow Hager Lawrence v Lord Norreys and Others HL 1980 [Vol XV] 210) On the other hand, the inference to be drawn from facts unsupported by the affidavit evidence may be either the evidence was not deemed sufficient or important enough to be put forward or it was known that the asserted facts were incapable of being proved.*
>
> *13.* In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick *[1999] EWCA Civ 1247 p.613 Auld LJ said, "It is trite law that the power to strike-out a claim under RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases…to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistent with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits…There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff*

can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation…
However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in McDonald's Corp v Steel [1995] 3 ALL ER 615 at 623, Neill LJ…said that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof." [Emphasis added]

…

14. The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly." [Emphasis added]

9. In *Lonrho PLC v Fayed and Others (No. 2)* [1992] 1WLR 1, Millett J, as he then was, set out the approach of the Court on an application to strike out under our equivalent rules of the Supreme Court, Order 18, Rule 19 (1)(a). At 5B he said:

> "*The approach of the court on an application to strike out a statement of claim under R.S.C., Ord. 18, r. 19(1)(a), on the ground that it discloses no reasonable cause of action, is to assume the truth of the allegations contained in the statement of claim; and evidence to the contrary is inadmissible. This is because the court is being invited to strike out the claim in limine on the ground that it is bound to fail even if all such allegations are proved. In such a case the court's function is limited to a scrutiny of the statement of claim. It tests the particulars which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the court's function to examine the evidence to see whether the plaintiff can prove his case, or to assess its prospects of success.*" [Emphasis added]

10. *Lonrho PLC* was not cited by the parties given there was no contention in this area, however, it is necessary to be precise in establishing what factors and/or evidence the Court must consider and what it must not consider such as, considering only the statement of claim on the basis that the claim will fail "*even if all such allegations are proved*". I have given counsel the opportunity to provide their respective positions regarding this case and it was confirmed by both counsel that they accepted this position and had nothing further to add.

PARTIES' POSITIONS

Strike out pursuant to Order 18 Rule 19(1)(a)/No reasonable cause of action

11. Mrs Haworth presented two distinctive rationales as to why there is no reasonable cause of action. Firstly, she submitted that the Plaintiffs' claim has been incorrectly commenced against MJM Limited (**MJM**) whereas the proper defendant is the partnership of Mello Jones & Martin as it was the partnership with whom the Testator had its retainer when it accepted instructions. The Plaintiffs were advised that it was confirmed that Mello Jones & Martin, the partnership, obtained an opinion from the Testator's physician, Dr Reddy, dated 13 March 2012, confirming his testamentary capacity prior to execution of the Will. It was emphasized that neither Mello Jones & Martin nor MJM had a retainer with the Plaintiffs and that the Testator did not instruct Mello Jones & Martin to include them in the Will. Further, it was submitted that the Testator gave no instructions to Mello Jones & Martin or MJM regarding the creation of a trust.

12. This argument is rejected by the Plaintiffs based on the evidence set out in the Plaintiffs' Affidavit sworn on 13 October 2023 at paragraph 6:

> "*6. Based on the information in 5 (a) Mr Griffith confirms that the Second Defendant sealed the disputed Will and executed the disputed* [will] *under its corporate name of MJM Limited. By doing so we are advised that the Second Defendant inter alia assumed liability for all work undertaken, prepared or completed by the partnership of Mello Jones & Martin who were initially retained by the Testator by contract dated 18 August 2011 exhibited at "**DG-1**". Further, we are advised that it is necessary to also draw reference to the fact that the Second Defendant executed the will one month after they took over the practice of the partnership which certainly does not make it clear that MJM Limited were not the legal entity which acted for the Testator*."

13. The second rationale for the Second Defendant to say there is no reasonable cause of action and that the claim is bound to fail is because no duty of care was owed by the Second Defendant to the Plaintiffs. Mrs Haworth asserted that clearly, any contractual duty was owed to the Testator only, and subject to the assumption that his instructions were not tainted by undue influence, or by a lack of capacity, the only identifiable intended beneficiary was the First Defendant.

14. The landmark House of Lords case of *White v Jones* [1995] 2 AC 207 is relied on by the Plaintiffs to support the position that disappointed beneficiaries who have suffered a loss can bring a claim against the attorney who prepared a will for a claim in tort of professional negligence where there was no contractual duty of care between the attorney and the beneficiaries.

15. *White v Jones* was a case where a solicitor accepted instructions to revise the terms of a will for his client. The solicitor failed to take steps to bring fruition to his client's revised testamentary intentions which resulted in the intended beneficiaries not being entitled to the testamentary provisions that they would have had the solicitor acted promptly. The House of Lords held that the solicitor was liable for the loss of the bequest for the following reasons: (i) since neither the testator nor his estate had a remedy against the solicitor, an injustice would occur because of a lacuna in the law which would result in there being no remedy for the loss that the solicitor's negligence caused unless the intended beneficiary could claim against him; and (ii) the principle of assumption of responsibility should be extended to a solicitor who accepted instructions to amend a will so that he was held to be in a special relationship with those intended to benefit under it, resulting in him owing a duty to the intended beneficiary to act promptly and with care in relation to the amendments he had been instructed to make.

16. It was submitted by Mrs Tucker that some scenarios where liability can arise between an attorney and a beneficiary following the case of *White v Jones* are as follows:

> "*a) The solicitor can only be as liable to the beneficiary as they would have been to the testator. This means that the solicitor only has to give effect to the testator's intentions and is not responsible for ensuring that those intentions are followed through.*
>
> *b) A solicitor can only be liable if it is proved that the will does not match the testator's intentions.*
>
> *c) a solicitor cannot be liable if the beneficiary would not have benefited from the Will e.g., if the testator intended to make the gift elsewhere.*
>
> *d) Solicitors cannot owe a duty to a disappointed beneficiary where the solicitor's duty to the testator (their client) conflicts with the duty owed to the disappointed beneficiary.*"

17. Mrs Tucker asserted that the above scenarios are not all-inclusive and as such the court ought to ventilate the evidence of the Plaintiffs to establish if any acts of negligence have occurred. She submitted that this can only be done by the parties' evidence being tested under cross examination at a substantive hearing of this matter.

18. Mrs Haworth for the Second Defendant rejects the proposition that this case is one which falls within the scope of *White v Jones.* In the UK Court of Appeal case of *Worby & Ors.* v *Rosser* [2000] P.N.L.R., a claim was made against the solicitors who drafted the testatrix's will on the basis that the testatrix had advised the plaintiff that he would receive her house upon her death. Upon her death it was discovered that there was no provision for the house in the will to be gifted to the plaintiff as it only provided the plaintiff with a share of the

residuary estate which included the house. The plaintiff alleged that the solicitors had acted negligently in failing to carry out the testatrix's instructions. The first instance Judge dismissed the claim and on appeal, the Court of Appeal dismissed the appeal on the basis that: "*on the facts the judge had been entitled to find that the plaintiff had failed to discharge the onus on him to prove, on convincing evidence on the balance of probabilities, that the testatrix instructed the defendants to include in the will a gift of the house to the plaintiff and that they failed to do so in circumstances which constituted negligence*".

19. Lord Justice Chadwick in *Worby* provided a helpful summary of the application of Lord Goff's analysis in the House of Lords case of *White* v *Jones* as it relates of a duty of care owed to an intended beneficiary by counsel in drafting a will. At page 149 C Chadwick LJ stated:

> "*The remedy fashioned in White v Jones was needed to fill a lacuna. The remedy is provided in circumstances in which you can be seen that there is a breach of duty by the solicitor to the testator in circumstances in which the person who have suffered loss from that breach will have no recourse unless they can sue in their own right. In a case like White v Jones the disappointed beneficiary suffers loss but the estate does not because nothing that the solicitor has done or failed to do causes any diminution of the estate. In cases like Carr-Glynn v Frearsons where the breach of duty lay in failing to advise the testator to take the necessary steps to sever a joint tenancy in property in which she was interested, so that her half share could devolve to the intended beneficiary - the estate does suffer loss because it is deprived of the half share. But to allow the estate to recover for that loss would have had the effect that the recovery accrued to the benefit of the residuary legatees (whom the testatrix never intended to benefit from that property); the specific legatee (who was intended to benefit) would have no remedy. In both cases the lacuna was identified and the court fashioned a remedy to fill it.*" [Emphasis added]

20. Gibson LJ went further at pages 150 C and 151 A to address scenarios which it would be appropriate to apply the principles in *White v Jones* and whether there is a lacuna which arises that should be filled:

> "*That judicial creativity has encouraged the testing of the limits of the principle of White v Jones. In Carr-Glynn v Frearsons [1998] 4 All ER 225 this court applied that principle to a case where the negligent solicitor failed to advise that the testator should have severed a joint tenancy so as to enable a specific gift by his will to take effect. The duties owed to the testator and to the specific legatee were complementary and it was not just to allow the beneficiary to sue. There would have been a gap which otherwise would have enabled the negligent solicitor to escape liability. There is a marked difference between the present case and cases like Ross v Caunters where the solicitor had failed to warn the testator about formal witnessing requirements for the will, White v Jones where there was a failure by the solicitor to draft a will promptly and Carr-Glynn where the solicitor had failed to advise on the necessary preliminary step for the gift by will to take effect. In each of those cases*

there was a failure by the solicitor to take action so as to enable the testators wishes to be fully effective and the intended beneficiary would have been left without a remedy unless the court allowed that beneficiary to sue. In the present case the alleged negligence is that the solicitors failed to take reasonable care to ensure that the testator had the capacity to make the 1989 will and was not unduly influenced by a beneficiary under it. That duty is said to have been owed not only to the testator but also to the beneficiaries under the 1983 will. No authority has been shown to us that goes so far as to establish such a duty owed to those beneficiaries and I do not believe that any such duty arises.

Of course, if one goes backwards from the fact that the plaintiffs have suffered a loss and that they have not been able to enforce the costs order made in their favor in the probate action (despite the fact that the cost order was made on an indemnity basis), one can see that but for the solicitor drawing up the 1989 will, the subject of the probate action, that loss would not have been incurred. That is an impermissible way of finding that there is a duty of care owed by a solicitor to such beneficiaries. Still less is it possible to see that there was an assumption of responsibility by the solicitors towards such beneficiaries.

For the reasons given by Chadwick LJ, I am not satisfied that there is, in reality, any gap in the law such as would require the court to fashion a remedy to enable the beneficiaries to recover in the present case." [Emphasis added]

21. It was argued by Ms Tucker that any legal principles applied in *Worby* do not assist this court as this case was determined after a full trial where evidence was tested. In this instance, as this is a Strike Out Application, there is no evidence being tested which Ms Tucker asserts must be done for any determination to be made. Furthermore, she submitted that the process of discovery must be carried out which reveals of contents of the file held by the Second Defendant for the court to ensure that the Testator's wishes were properly carried out.

22. Mrs Haworth also cited the Court of Appeal case of *Walker v Geo Medlicott & Son (A Firm)* [1999] 1 WLR 727. *Walker* is a case where a testatrix had informed the claimant as well as other persons that Walker would be the sole devisee of her house; however, in her will the house was not devised to the claimant, but rather it was included in the residuary of the estate of which the claimant was just one of the beneficiaries. The Court of Appeal dismissed the appeal on the basis the claimant had failed to discharge the onus on him to show that on the balance of probabilities the testatrix instructed the defendants to include a provision of her will for the plaintiff to be gifted the house. Therefore, a disappointed beneficiary who brings a claim in negligence against a lawyer-draftsman of a will faces an "*exacting*" onus of proof. Sir Christopher Slade J at 731 G stated:

"*…Secondly, in my judgment, it reinforces the view that the onus of proof falling on a disappointed beneficiary who brings a claim in negligence against the solicitor draftsman of an executed will is an exacting one*.

In In re Segelman, decd, *[1996] Ch. 1717, 184 Chadwick J. observed:*

"although the standard of proof required in a claim for rectification made under section 20 [one] of the act of 1982 is that the court should be satisfied on the balance of probability, the probability that a will which a testator has executed in circumstances of some formality reflects his intentions is usually of such weight that convincing evidence to the contrary is necessary."

I agree, and it has been common ground between counsel, that the same standard of proof should be applied in the present case. I see no reason why a claimant who is asking the court to find that a will does not properly record a testatrix's intention, not in order to rectify the will but to recover an equivalent benefit in the form of damages from the solicitor who prepared the will, should be in a better position as regards onus of proof than if he sought to recover his alleged testamentary benefit direct from the testatrix's estate." [Emphasis added]

23. It was submitted by Ms Tucker that *Walker* should not be considered as the Plaintiffs are not disappointed beneficiaries, but rather are intended beneficiaries. Ms Tucker also identified that this case was determined after a full hearing where evidence was tested.

24. Additionally, Mrs Haworth presented the case of *Gibbons v Nelsons* [2000] PNLR 734, 752-753 which supports the proposition that an attorney does not owe a duty of care to anybody that he does not know is an intended beneficiary or intended to benefit in any respect. Justice Blackburne addressed this legal principle as follows:

"*Scope of the Remedy*

There is, to my mind, a very real difficulty here. As I have mentioned White v Jones has established that a solicitor retained to prepare or execute a will (or both) may owe a duty of care to a disappointed beneficiary if as a result of the solicitor's negligence, the will is not drawn up or is drawn up in a way which fails to give effect to the testator's intentions, with the result that the beneficiary does not take the benefit which the testator intended. Yet, the cases in which liability has been established are all ones where the identity of the intended beneficiary, to whom the assumption of responsibility by the solicitor towards his client is held by law to extend, it was clearly known to the solicitor defendant...

Given the approach of the House of Lords in White v Jones, how can the solicitor be held to be in breach of duty to a person (the intended recipient of a particular benefit) of whom the solicitor is unaware?...While acknowledging that it may not be necessary for the solicitor to be aware of the precise identity of the intended beneficiary (he may, for example, be aware that the testator intends to make a gift to someone identified certainly as "my son" or to a defined class eg "my children and grandchildren") I am of the view that the law requires, at the very least, that the solicitor should know (1) one what the benefit is that the testator-client wishes to confer and (2) who the person or persons or class of persons are (in each case ascertainable if not actually named) on whom the client-testator wishes to confer

> *the benefit. I have seen nothing in any of the authorities which justifies an extension of the assumption of responsibility to cases where these two elements are not present.*" [Emphasis added]

25. Ms Tucker argued that the principles applied in *Gibbons* were irrelevant as (i) there has been no evidence presented that shows the Plaintiffs were not possible beneficiaries; (ii) there has been no evidence from the Second Defendant showing that the First Defendant was the only intended beneficiary; and (iii) there is no indication or evidence of what was shared between the Testator and the Second Defendant.

26. *Byrn v Farris* [2017] BCCA 454 is a case that was heard in the Court of Appeal of British Columbia and considered the common law laid out in *White v Jones* as well as subsequent cases thereto such as *Carr-Glynn*. Mrs Haworth submitted that *Byrn v Farris* supports the premise that a claimant seeking to establish an interest as an intestate successor cannot establish that he was an intended beneficiary to whom any duty of care might be owed at common law. Justice of Appeal Groberman at paragraph 29 stated:

> "*[29] In my view, Carr-Glynn does not assist the plaintiff. First, this is not a case involving testamentary instructions. The evidence contains no suggestion that the solicitor was ever instructed to draw a will giving Mrs. Byrn interest in the real property her only entitlement arises and her as an intestate successor.*" [Emphasis added]

27. Ms Tucker's position is that the Plaintiffs in this matter are intended beneficiaries (rather than disappointed beneficiaries) and that the Will does not meet the Testator's intentions. Therefore, *Byrn v Farris* also does not provide helpful guidance to the court. Ultimately, Ms Tucker submitted that the Claim has been properly pled, that it would be draconian to strike out the Claim and that there is reasonable cause of action where the Plaintiffs have suffered damages.

Abuse of process

28. The Second Defendant's position is that the claim is an abuse process because it serves no useful for convenient purpose. Mrs Haworth says this is because if the Plaintiffs' claim against the First Defendant is finally dismissed at trial it will follow that the Testator only intended the First Defendant to benefit under the Will in accordance with its terms. Conversely, Mrs Haworth says if the Plaintiffs' claim against the First Defendant is successful at trial, it will necessarily follow that the Testator died intestate, leaving the Plaintiffs in no worse a position than they would otherwise have been as intestate successors. Therefore, the only "loss" which would have been suffered is that of cost consequences of these proceedings.

29. Accordingly, Mrs Haworth submits that when taking into consideration the overriding objective, cost implications, and other key case management matters, it becomes clear that the claims against the Second Defendant serve no useful or convenient purpose and therefore ought to be struck out.

30. In response to this position, Ms Tucker says that the Second Defendant is merely attempting to dismiss their acts of negligence by deferring to the outcome of the trial against the First Defendant. She asserted that the Second Defendant is effectively saying, "It does not matter if we were negligent, you have remedy elsewhere".

31. Ms Tucker submitted the Plaintiffs are in the current position as a result of the Second Defendant's negligence. Ms Tucker further asserted that compensation would be calculated for beneficiaries who have suffered a loss will apply to the facts of the case and therefore require the hearing of evidence. She asserted that if the Second Defendant accepted they were negligent, which they have not, there would be no need to adjudicate. The adjudication has and will incur significant costs to the Plaintiffs. It was also submitted by Ms Tucker that the outcome could be that the claim against the First Defendant fails but is successful against the Second Defendant. Moreover, it could find that both are liable which would result and the Second Defendant being required to pay damages and costs. As such, Ms Tucker submitted that the Strike Out Application should be dismissed so the court can fully ventilate all evidence at the trial.

APPLICATION OF THE LEGAL PRINCIPLES

Strike out pursuant to Order 18 Rule 19(1)(a)/No reasonable cause of action

32. For a claim in negligence (tort) to be made against a person or entity, the starting point is that there must be shown that the defendant owed a duty of care to the claimant. In most circumstances, this duty will arise out of contract. However, where there is no contractual duty, the principle of *White v Jones* may be used to fill this gap by extending the duty of care to a drafting attorney. What *White v Jones* does not do, however, is provide a blanket principle that all intended beneficiaries are owed a duty of care by an attorney drafting a will for a testator/testatrix. Lord Goff at 269 in *White v Jones* stated:

> "*Unlimited claims*
>
> *I come finally to the objection that, if liability is recognised in a case such as the present, it will be impossible to place any sensible limits to cases in which recovery is allowed. Before your Lordships, as before the Court of Appeal, Mr. Matheson conjured up the spectre of solicitors being liable to an indeterminate class, including persons unborn at the date of the testator's death. I must confess*

that my reaction to this kind of argument was very similar to that of Cooke J. in Gartside v. Sheffield, Young & Ellis [1983] N.Z.L.R. 37, 44, when he said that he was not "persuaded that we should decide a fairly straightforward case against the dictates of justice because of foreseeable troubles in more difficult cases." We are concerned here with a liability which is imposed by law to do practical justice in a particular type of case. There must be boundaries to the availability of a remedy in such cases; but these will have to be worked out in the future, as practical problems come before the courts. In the present case Sir Donald Nicholls V.-C. observed that, in cases of this kind, liability is not to an indeterminate class, but to the particular beneficiary or beneficiaries whom the client intended to benefit through the particular will. I respectfully agree, and I also agree with him that the ordinary case is one in which the intended beneficiaries are a small number of identified people. If by any chance a more complicated case should arise to test the precise boundaries of the principle in cases of this kind, that problem can await solution when such a case comes forward for decision." [Emphasis added]

33. Additionally, I accept that the legal principles set out in *Worby* are directly applicable to this case. It matters not that this is an interlocutory application where no evidence is being tested. The key premise set by *Worby* is that allegations against an attorney that he or she was negligent for failing to ensure a testator had the capacity to make the will and that there was no undue influence exerted on the testator by a beneficiary under the will, does not give rise to circumstances that are apt for the duty of care to be extended between attorney and an intended beneficiary.

34. I am reminded of the foundational particulars of the Claim set out in paragraphs 8, 10, 12 and 13 which are as follows:

> "*8.…It is the claim that at this time the First Defendant used undue influence over the Testator in an effort to circumvent his true intention to have all of his children benefit from his estate in equal shares to the detriment of the Plaintiffs."*
>
> *10. Accordingly, the Plaintiffs contend that at all material times the Testator wished to set up a trust for his estate from which all of his daughters would benefit and it is averred that the First Defendant did exercise either duress or undue influence over him to the detriment of the Plaintiffs.*
> *…*
> *12. It is alleged that Second Defendant acted in breach of its professional duties in its construction of the purported Will and in doing so created a document which had not been duly executed in that they:…*
>
> *13. Further, and as a result of the above it is asserted that the Testator could not have approved the Will with knowledge of its contents.*"

35. I see no reason why the principle in *Worby* that undue influence is not a circumstance where the drafting-attorneys (the Second Defendant) owe a duty of care to the beneficiaries (the Plaintiffs) should not be followed.

36. The Plaintiffs' assertion that this Court should shift the burden of proof away from them and place it on the Second Defendant must be addressed. The onus is not on the Second Defendants to demonstrate (i) that the Plaintiffs were not possible beneficiaries; (ii) that the First Defendant was the only intended beneficiary; and (iii) of what was shared between the Testator and the Second Defendant. In accordance with *Walker* the Will is evidence of the Testator's intentions, and it is for the Plaintiffs to prove otherwise.

37. As it relates to the principle in *Byrn v Farris* that an intestate successor cannot be considered an intended beneficiary, this is unequivocally applicable in this matter. The Plaintiffs only ever would have been intestate successors as there was no previous will.

38. Considering the allegations made as well as the relief sought in the Claim, and applying the legal principles set out in paragraphs 32 to 37 above, I find that there is no lacuna to fill which would require the duty of care to be extended to the Second Defendant. Ergo, there is no reasonable cause of action.

Abuse of process

39. I agree with Mrs Haworth's assessment as to the possible outcome of this case set out at paragraph 28 above. Ms Tucker's assertion that the Second Defendant is attempting to brush aside its alleged negligent acts by relying on the outcome of the claim against the First Defendant is misplaced.

40. The Plaintiffs' Claim is based on the assertion that the Testator intended to put his estate in a trust with all four of his children (the Plaintiffs and the First Defendant) in equal shares. Albeit repetitive, if the court were to find that the First Defendant exerted undue influence over the Testator regarding the intentions set out in the Will, the result will be that the Will is void and the beneficiaries of the estate would be determined by the Succession Act 1974. Accordingly, the four children would obtain equal shares of the Testator's estate. In this scenario the Plaintiffs would not have suffered any loss. The only potential claim is that of the costs of the proceedings which are recoverable from the estate.

41. Chadwick LG in *Worby* found that the costs incurred by beneficiaries in probate proceedings were not circumstances which the court should allow such a gap to be filled; at page 149:

> "*In the present case there is no lacuna to be filled. If the solicitors breach of duty under his retainer has given rise to the need for expensive probate proceedings resulting in unrecovered costs, then, prima facie, those costs fall to be borne by the estate for the reasons which I would have already sought to explain. If the estate bears the cost thereby and suffers loss then if there is to be a remedy against the*

solicitor, it should be the estates remedy for the loss to the estate. There is no need to fashion an independent remedy for a cost, if properly incurred in obtaining probate of the true will, can be provided for out of the estate. If there has been a breach of the duty by the solicitor, the estate can recover from the solicitor the additional cost (including the cost to which the beneficiary is entitled out of the estate). The practical difficulties which would be likely to arise as solicitors were held to owe duties directly to beneficiaries under earlier wills provide powerful support for the view that it would not be appropriate to provide a remedy and circumstances in which it is not needed." [Emphasis added]

42. The alternative scenario is that the Plaintiffs' Claim is unsuccessful which would culminate in them not being beneficiaries of the Testator's estate and thereby would not have suffered any loss. Even if it were found that a duty of care was owed to the Plaintiffs by the Second Defendant, the possible outcomes of the Claim would remain the same; i.e. the Plaintiffs did not incur any loss. Consequently, I find that the Plaintiffs' claim against the Second Defendant is an abuse of process in that it does not serve any useful or convenient purpose.

Dismissal under Order 25, Rule 1

43. There is no need for me to address this third alternative argument given my findings above.

CONCLUSION

44. In view of my findings that there is no reasonable cause of action and that the Claim does not serve any useful or convenient purpose, I will allow the Strike Out Application.

45. As to costs, I see no reason why costs should not follow the event and as such award costs to the Second Defendant on a standard basis, to be taxed if not agreed.

DATED: 10 May 2024

ALEXANDRA WHEATLEY

REGISTRAR OF THE SUPREME COURT